Non-State Justice Institutions and the Law

Decision-Making at the Interface of Tradition, Religion and the State

Matthias Kötter,
Tilmann J. Röder,
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Governance and Limited Statehood

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Governance and Limited Statehood
Series Standing Order ISBN 978–0–230–23597–7 (hardback) and ISBN 978–0–230–23598–4 (paperback)
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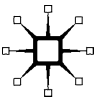

Softcover reprint of the hardcover 1st edition 2015 978-1-137-40327-8

First published 2015 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

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ISBN 978-1-349-48694-6 ISBN 978-1-137-40328-5 (eBook)
DOI 10.1057/9781137403285

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

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Preface and Acknowledgements

Non-state justice institutions are a phenomenon of modern statehood. Informal norms and mechanisms for their assertion have existed all along since the institutional setting of the modern state became the ruling structure in many societies of the world, however, with varying degrees of autonomy. In the North, with its strong tradition of consolidated statehood, the majority of such non-state justice systems were gradually marginalized, but still today the churches may regulate their own affairs and have their own jurisdiction. In many countries with colonial history, formal state judiciaries were only developed for the first time under colonial rule, whereas traditional forms of regulation and dispute resolution persisted. They were both formally recognized and used for indirect rule, or they remained a social fact against all state-building initiatives ever since.

Recently, non-state justice institutions have been enjoying a great deal of attention. Considered as a means for decentralized ordering whose legitimacy and effectiveness may even exceed the state judiciaries' ability to resolve conflicts, they have become an important aspect in the political and academic debates on law and development and, in numerous cases, of constitution-making and judicial reform. With regard to the protection of cultural and political rights of indigenous peoples and other ethnic or religious minorities, official recognition of non-state laws and justice institutions is considered a core aspect of self-government. In September 2012, the United Nations General Assembly in its Declaration of the High Level Meeting on the Rule of Law at the National and International Levels has acknowledged that "informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone [...] should enjoy full and equal access to these justice mechanisms". Also, since 2012, the World Justice Project's Rule of Law Index names informal justice as one out of nine key indicators to measure the rule of law. Within a short period of time a body of scholarly literature has emerged, which analyses how and under which conditions non-state justice institutions work.

To be considered a key indicator to measure the rule of law, non-state justice institutions have to fulfil rule-of-law functions. From a functionalist point of view, "rule of law" does not necessarily require state law

made by state institutions, especially by parliamentary legislation or adjudicated by state courts. The focus is rather on such state and non-state justice institutions that contribute to the fact that social ordering and conflict-resolution occur by way of the law (i.e. authority is being exercised on the basis of generally known and predictable laws) and the rationality of legal rule replaces the arbitrariness of personal rule. As far as non-state institutions provide legal solutions for social problems, they can improve access to justice and will not provide only "poor justice for the poor" as is often presumed. However, to keep up the connectivity of non-state justice institutions with the law and legal discourse a functionalist approach will not suffice. The law is a normative concept, and thus it will be required to determine a normative minimum standard to be upheld in legal structures beyond the state to be able to speak of legal systems or justice institutions. This is the biggest challenge among many difficult questions concerning non-state justice institutions; but one has to always remember that many state law systems also raise questions of rights and legitimacy and of a normative minimum standard.

The widespread assumption that non-state justice institutions tend to violate human rights – particularly those of women, children and other less powerful groups – has been supported by empirical research in many countries. Therefore, the aim to protect human rights forms the starting point of many approaches towards dealing with non-state justice systems. However, the case studies and analyses presented in this book indicate that focusing on this objective alone would not be sufficient to meet the complexity of any of the situations at stake. Adequate concepts have to consider, firstly, the problem of access to justice where the state is weak and thus formal state institutions do not apply; and secondly, the claims of indigenous communities to be entitled to regulate their own affairs and settle their disputes according to their customs and traditions. To reach an adequate solution for this triangular conflict of aims is a difficult task in each individual case. They may be reconciled either by an institutional setting that inter-couples various legal and judicial branches and can integrate traditional justice institutions into the official stages of appeal, or by discursive procedures that allow determining the demands of mutual appreciation of different legal systems. To reach mutual appreciation on all sides of a pluralist situation is the crucial point. Conflicts will not be resolved by imperative regulation where implementation is ineligible or autonomous self-regulation is to be respected.

In this volume, the focus is on decision-making by non-state justice institutions at the interface of traditional, religious and official state

laws. In a number of countries, legislation was passed only recently to ensure that such institutions deliver their judgements with respect to the rule of law and to a prescribed minimum of human rights protection. The introductory chapter depicts the current debates on non-state justice institutions and the law, and discusses them in relation to legal pluralism discourse and their implications for the rule of law (Brian Z. Tamanaha). The five chapters in the first part of the volume present case studies that represent changing degrees of interconnectivity and interaction between the non-state system and the state judiciary. They cover a broad spectrum from the case of Pakhtun *jirgas* in Pakistan (Tilmann J. Röder and Naveed A. Shinwari) to various degrees of interconnectivity within various statutory and constitutional frameworks, in the case of chief courts in South Sudan (Katharina Diehl, Ruben Madol Arol and Simone Malz), to social courts and Sharia courts in Ethiopia (Girmachew Alemu), to traditional courts in Bolivia (Lorena Ossio Bustillos), to the very elaborate system of incorporation of traditional leaders' courts in South Africa (Christa Rautenbach). These case studies elaborate on the question of embedding non-state justice systems into the official legal system and bring up some difficult theoretical problems of the provision of legality and justice including the construction of culturally fair and inclusive but also well-functioning justice systems. The three chapters in the second part of the volume build upon the case studies, but approach the topic conceptually from different perspectives. The five cases represent various forms of formal recognition and incorporation of non-state justice institutions into the formal state governance structures, but they also signify the context preconditions that co-determine how to best reconcile the justice systems (Matthias Kötter). Focusing on the plurality of norm enforcement regimes, the need for conflict of laws and regulations becomes apparent (Gunnar Folke Schuppert). The international regime on human rights provides no claim for complete harmonization, but gives room for some pluralism (Rüdiger Wolfrum).

The chapters were composed in cooperation with judges, traditional authorities and other experts from the examined legal systems. The authors participated in a conference in Berlin in May 2011 that was hosted by the WZB Social Science Center, Berlin and the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. The study of non-state justice institutions and their relation to the legal institutions of statehood constitutes the research focus of both of these institutes. As a member of the collaborative research centre

SFB700 on Governance in Areas of Limited Statehood, the WZB examines the factual and normative conditions of legitimate and effective rule of law and focuses on the effects of normative pluralism and functional aspects of jurisdiction. The Max Planck Institute has conducted several projects in Afghanistan, Pakistan, Somalia and South Sudan to support constitution-making processes and contribute to rebuilding and stabilizing new legal orders by training judges and other law professionals. Its off-spin, the Max Planck Foundation for International Peace and the Rule of Law, is currently supporting the development of a new framework for non-state justice institutions in Afghanistan.

This book shows that non-state justice institutions and their coupling with official state law are not only a legal issue, but also an issue of governance and political structure. The chapters reflect the problems and methods of coping with them from a mainly juridical perspective. As far as deficits in the validity and enforceability of the law are described, the studies, on which the contributions are based, were not designed to meet the methodological demands of empirical social research. By stressing the relevance of the issues for legal policy, we hope to activate further empirical research. It will have to be closely tied to conceptual considerations on governance and the rule of law.

Many people have contributed to this book. The editors and authors are very grateful to Yibza Aynekullu, Rachel Bell, Lisa Brahms, Victoria Oettershagen, Jenny Dorn, Hatem Elliesie, Aaron Thomas Jones, Ciaran Meyer, Selina Peter, Abdul Razaq, Rebecca Schultz, Theodor Shulman, Nasir Ul-Mulk, Christian Willmes, Madoda Zibi, Petra Zimmermann-Steinhart and others who cannot be mentioned here, for their research assistance, proof-reading and coordination. Without the generous financial support from the German Federal Foreign Office, which was managed by the IFA Institute for Foreign and Cultural Relations, the conference in 2011 would not have taken place and this book would not have been written; they deserve our special thanks. Last but not least, we are grateful to an anonymous reviewer for valuable comments on the first drafts of the chapters of this book and to Thomas Risse, the series editor.

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1
Introduction: A Bifurcated Theory of Law in Hybrid Societies

Brian Z. Tamanaha

1. The recent turn to non-state justice institutions

In recent years, development organizations have finally begun paying greater attention to non-state or informal justice systems. This shift should have occurred long ago. Countries with non-state justice systems in their midst have grappled with their implications for many years, and legal anthropologists and sociologists have been studying and writing about these systems for decades. But development organizations have mostly ignored them, focusing their activities instead on state legal systems. Now, non-state justice systems are taking on primary importance for development agencies and policy-makers.

1.1. Urgent geo-political events

Two main factors have contributed to this enhanced attention. The first factor relates to global geo-political events. The US-led invasions into Iraq and Afghanistan altered or destroyed existing institutions of legal and social ordering. The military forces could not depart these countries until stable institutions that would prevent a slide into social chaos were in place. It became imperative to find or create institutions that would maintain order and resolve disputes, but this proved to be highly problematic.

General Stanley A. McChrystal, the commander of coalition forces in Afghanistan, gave a speech in 2009 recognizing that an essential element of defeating the Taliban insurgency is providing people with access to a fair system of dispute resolution (Dempsey and Coburn 2010). However, the Afghan state legal system was weak, dysfunctional, plagued by corruption, stained by a history of despotic rule, distrusted by the

people and had very little presence in rural areas where most people live (Barfield et al. 2006). It was quickly realized that building the state legal system to meet the needs of the populace was an immensely difficult project that would take decades to complete.

The obvious alternative was to turn to existing non-state institutions. The United States Institute of Peace (USIP) issued a publication in 2010 advocating this approach:

> [T]he majority of civil and criminal disputes in Afghanistan are resolved locally through traditional means, including tribal and community councils that have operated in local communities for centuries. These councils (often called shuras or jirgas) generally consist of community elders and other respected individuals sitting together to reach equitable resolutions of disputes and to reconcile the disputants, their families and the community as a whole.
>
> (Dempsey and Coburn 2010: 2)

Traditional justice mechanisms are familiar to the population and are less costly and more accessible than state courts. Decisions made by local *shuras* and *jirgas* are generally consensual, and reach a final resolution much faster than state courts. The focus is on making the parties whole through equitable outcomes rather than adversarial courtroom proceedings that have winners and losers. Traditional justice resolutions are also more likely to obtain compliance and enforcement because respected elders have authority within the community and disregarding their decisions can disrupt social harmony. Support for non-state justice systems, for these reasons, became an essential element of US policy in Afghanistan (Dempsey and Coburn 2010).

1.2. The failure of law and development efforts

The second factor driving the recent turn to non-state justice institutions is the general recognition that little improvement has resulted from over a billion dollars spent on developing state legal institutions in the past two decades by law and development organizations (Tamanaha 2011b).

Law and development work is carried out by major international and national institutions, public and private, prominently including the World Bank, the Ford Foundation, the Carnegie Endowment for International Peace, the American Bar Association, the United

Nations Development Program (UNDP), the US Agency for International Development (USAID), the Inter-American Development Bank, the European Bank for Reconstruction and Development, the UK's Department for International Development, the Asian Development Bank, the Japan International Cooperation Agency and many more.

By most accounts, the actual improvements in law realized from these efforts have been meagre. Thomas Carothers, director of the rule-of-law project for the Carnegie Foundation, offers this assessment:

> The effects of this burgeoning rule-of-law aid are generally positive, though usually modest. After more than ten years and hundreds of millions of dollars of aid, many judicial systems in Latin America still function poorly. Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction. The numerous rule-of-law programs carried out in Cambodia after the 1993 elections failed to create values or structures strong enough to prevent last year's coup. Aid providers have helped rewrite laws around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement. [...] Efforts to strengthen basic legal institutions have proven slow and difficult. Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact.
>
> (Carothers 2006: 11–12)

Matters are worse than this passage lets on, unfortunately, because he omits the most disheartening failures (a catalogue of the widespread and persistent failures can be found in Stephen Golub 2006). In excess of a 100 million dollars has been spent in Africa on law and development, with results that have been characterized as "pretty depressing" (Piron 2006: 289).

A long-time participant confided in Carothers that "we know how to do a lot of things, but deep down we don't really know what we are doing" (Carothers 2006: 15). "The lessons learned to date have for the most part not been impressive and often do not actually seem to be learned." (Carothers 2006: 27)

This dismal assessment is widely shared. A review of three recent notable books on law and development observed that "[a]lthough the contributions to these volumes reflect decades of both practical

experience with and scholarly reflection upon legal reforms in developing countries, at the end of the day they are remarkably inconclusive. None of the authors represented in these volumes seem strongly optimistic about whether legal reforms are likely to promote development (at least early in the development trajectory)" (Davis and Trebilcock 2008: 897).

The most an optimist can say is that it is premature to draw overly pessimistic conclusions. It "will take many years or even decades before it becomes clear whether and to what extent sustained impact transpires" (Golub 2006: 125).

In the face of this lack of progress, it is no wonder that development organizations have begun to take a serious look at non-state justice institutions. An influential background paper for the 2006 World Development Report was produced by the World Bank Legal Department, urging that development practitioners engage with customary or informal legal systems. The authors concluded that the almost total neglect of these systems by the international development community makes little sense given their dominant role:

> In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone." *Customary* tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana [...]. In many of these countries, systems of justice seem to operate almost completely independently of the official state system.
>
> (Chirayath et al. 2005: 3)

There are separate sets of negative reasons for people to turn away from state legal systems, and positive reasons for their affirmative preference of customary systems. State legal systems frequently are seen as corrupt, dysfunctional, biased, too expensive, too distant, too delayed, or too unfamiliar and unaccountable. Whatever the combination of reasons, state legal systems often lack legitimacy in the eyes of the populace. In contrast, people may prefer non-state institutions because they are more accessible, more accountable, better understood and resolve disputes more effectively to the satisfaction of

the people involved. Hence, informal systems are often seen as more legitimate.

Recent case studies of Indonesia, Liberia, South Sudan, among other places, reveal that the majority of the population, at least in rural areas, express a preference for non-state justice systems (World Bank 2008; Isser et al. 2009; Leonardi et al. 2010; Isser 2011).

1.3. The problems with non-state justice institutions

But non-state justice systems raise serious questions and problems. Were it not for these issues they would have received greater attention from development organizations long ago.

(1) *Detrimental to state-building project* – One problem is that it has long been a prevailing assumption that every state must possess a well-developed legal system, necessary for economic development, to help maintain social order, to control government corruption and to create the rule of law. The state has a monopoly over law; and in the modern view, is perceived as a unified system backed by coercive enforcement.

Enhancing the role of customary or informal institutions is seen as potentially in tension with the state-building project: they might be rivals to the state for power and popularity, and they disrupt the uniformity of the legal system. Even when the state officially incorporates or recognizes these informal institutions, as many states have done, they might still be perceived as alternatives to the state rather than aspects of it.

A report on informal systems in Afghanistan noted the ambivalence of legal professionals about these systems. On the one hand they can help reduce the strain on the state legal system by handling cases. The report observes, however, that many in the legal profession are concerned that recognition of customary systems might reduce the status and prestige of the formal system and its agents. Successive Afghan governments have opposed formal recognition of customary law institutions in part because the state wanted to exert its exclusive right to make and execute laws (Barfield 2006).

(2) *Violations of constitutional and human rights* – A second major problem is that customary systems may be inconsistent with the national constitution and violate human rights or women's rights. These problems were also noted in the Afghan report:

> Some traditional practices violate Afghan and international law, including honor-killings, forced and underage marriage, and payment of blood money in lieu of punishment. Women rarely, if ever,

> participate directly in informal mechanisms, and their basic rights under Afghan law are often ignored.
>
> (Barfield 2006: 3)

A World Bank paper highlighted the problems that women and children face under many customary regimes:

> [I]n much of sub-Sahara Africa, traditional systems are patriarchal in nature and often systematically deny women's rights to assets or opportunities. Women are unable to own, control, or inherit land, and are only able to access land through a man (generally either their father or husband). This dependency, and systematic denial of control over land, exposes women to violence and exploitation, both from the males they are dependent on or from male relatives when they are widowed. Widows, divorcees and orphans are often forced into isolation and destitution. In many regions, land security is linked to food security, with people heavily dependent on their own food production, making the lack of access to land even more devastating for many women.
>
> (Chirayath 2005: 4)

Furthermore, customary law in some locations punishes witchcraft, conducts trials by ordeal (Isser et al. 2009) and in some instances imposes harsh punishments (Connolly 2005: 246–47). Thus, it is understandable that human rights and women's rights advocates frequently oppose recognition of customary law.

(3) *Controlled by local elites* – A third common objection to customary systems is that they are captured by local elites or favoured groups who use the law to maintain their own advantage. As the World Bank paper noted, "many forms of traditional law are seen to discriminate against marginalized groups and perpetuate entrenched discriminatory power structures within the local community" (Chirayath 2005: 4). In addition, local power brokers can sometimes ignore with impunity the findings of informal justice systems because they typically lack the capacity to forcibly enforce rulings. The USIP paper on Afghanistan remarked that "[c]ustomary law has little impact on powerful militia commanders who can afford to ignore community sentiments and act as they wish" (Barfield 2006: 17).

(4) *Inability to resolve disputes between communities* – Another problem with informal justice systems is that they are less effective in resolving disputes between members of different communities (religious, ethnic, territorial, or outsiders) (Forging the Middle Ground 2008: 51–4).

This may be because communities follow different norms, or because decision-makers are seen as biased in favour of their own community, or decision-makers are not respected or trusted by both communities. Securing compliance with a decision can also be problematic, because the primary enforcement mechanism is social pressure from the community, which has less influence on outsiders. "In the absence of strong common bonds, disputants have less incentive to accept an unfavourable outcome or to consider a ruling as binding." (Barfield 2006: 17)

(5) *Inconsistent with norms of legality* – A final common objection against customary systems is that they function in a manner inconsistent with the rule of law. Customary laws are often unwritten; sometimes there are no laws; or competing or inconsistent norms and principles are available, and decisions are not based on the strict application of legal norms. A report on Indonesia offered this summary of informal systems:

> Disputes are often resolved on the basis of local conceptions of justice or fairness or indeed what the local leadership subjectively thinks is an appropriate outcome, without any reference to state, religious, or traditional law. The party able to muster most authority is likely to determine the venue, the process and thus the likely outcome. Thus, while there are many "paths to justice", informal dispute resolution is on the whole not a comprehensive and coherent system, but a set of processes run by a range of influential individuals. They dictate the structures, processes and norms to be applied [...].
>
> Thus, in most circumstances, non-state justice is in fact a delegalized environment. This can facilitate flexible mediate solutions, but in the absence of a mandated structure or agreed norms, much discretion lies in the hands of the non-state justice actors.
>
> (Forging the Middle Ground 2008: 27)

For most informal systems, the overarching goal of decision-makers is to come to an outcome that obtains a consensus among the parties involved, often under pressure from the community. Beyond the substance of the particular dispute, the identities of the parties and their respective power relations sometimes matter to the outcome. Hearings are not always fair and impartial in the Western sense, often do not meet due process requirements, and do not follow such procedures as the presumption of innocence (Connolly 2005).

1.4. The benefits and drawbacks

The positive and negative characteristics of non-state justice systems were specified in the Afghanistan report (Dempsey and Coburn 2010):

Benefits of traditional justice:

- culturally familiar
- relatively corruption free
- quick resolution
- inexpensive
- locally accessible and resourced
- enforceable (in intact communities)
- trusted
- focuses on restorative justice rather than retribution – preserving harmony within the community.

Drawbacks of traditional justice:

- human rights concerns and other violations of the law
- lack of female participation
- sometimes not recorded and cannot be referenced later
- sometimes punishments inconsistent with criminal law
- unable to hold commanders and other powerful individuals accountable
- sometimes captured by illegitimate local strongmen
- challenges of inter-ethnic or cross-communal disputes.

From a development standpoint, it is not enough to tally up the strengths and weaknesses of informal justice systems; they must be compared against the alterative. Accordingly, the authors list weaknesses of state legal systems:

Drawbacks of state justice:

- inaccessible
- unfamiliar/not in line with Afghan traditions
- widespread corruption
- untrained/no respected judges or lawyers
- time consuming and expensive
- unenforceable where state lacks credibility/resources
- justice professionals lack security and resources
- humans rights concerns and lack of due process
- focus on punishment more than reconciliation.

Despite the negative qualities of non-state systems, development organizations have concluded that on balance they are worthy of support because in many locations they are more functional than state legal systems.

1.5. A more positive view of non-state justice

The impression given by these recent studies is that development organizations find themselves with two poor options in a generally dysfunctional situation. They would prefer to dismantle or avoid non-state justice systems, but reluctantly turn to them for lack of a better alternative. By drawing out the connections between law and society, I will try to present a more positive view of these informal systems, making five points:

(1) Non-state justice systems have certain features that make them superior to the state legal system in local circumstances.
(2) Their decision-making orientation, while characterized as opposite to state legal systems, differs only by degree. Both types of decision-making are subject to social influences and considerations.
(3) Although it is widely thought that non-state justice systems are inconsistent with the rule of law, when viewed from a functional perspective, they advance rule-of-law values.
(4) Several major concerns about non-state justice systems are rooted in objections to the society and culture that give rise to these systems. Thus, criticizing these systems takes aim at the wrong target.
(5) Finally, although the tendency is to view these hybrid legal situations as defective, I show that these arrangements are adaptations to a problematic mismatch between law and society – they are solutions rather than flaws.

Two preliminary clarifications must be made at the outset. Firstly, the problems identified above are serious and nothing I say attempts to diminish this. My argument is that we cannot understand the nature of these problems and how best to deal with them if we do not examine their social sources. Secondly, there is a multitude of hybrid legal contexts, each one unique. I have already mentioned studies based on Afghanistan, Indonesia and Liberia, which differ among themselves in a variety of ways. My observations are based on generalizations that do not necessarily match or apply to any particular situation.

2. How hybrid legal situations came about

The main original source of hybrid legal situations was European colonization of the non-European world. Transplanted legal regimes imposed by colonizers on subject lands primarily addressed the affairs of colonial government (taxes, maintaining colonial rule), economic matters (property rights, labour laws, resource extraction, commercial intercourse), and relations among expatriate settlers or mixed cases between settlers and indigenous people.

Colonizing powers brought with them legal norms and institutional structures and processes that reflected moral values, property and contract regimes, commercial practices and government structures of the colonizing country. Common law colonizers implanted the common law system reflecting Anglo-American norms. Civil law colonizers implanted civil codes. Legal matters typically were carried out in the colonizer's native language. Naturally, indigenous people in colonized countries perceived these legal systems as strange and contrary to their sense of right.

Colonizing powers often initially created systems of indirect rule that relied on indigenous leaders and institutions; beyond securing their own interests, colonizers largely left indigenous populations alone. Over time, as colonial rule was extended, state legal systems selectively incorporated customary or religious law and recognized or created customary or village tribunals to handle local matters; usually this was limited to family law, property, customary and religious problems, and violence between members of the community. Colonization thus produced legal pluralism, grafting or erecting a variegated mix of legal systems: transplanted state legal systems focused on matters of government and commerce, alongside modified indigenous laws and institutions, with mutual interpenetration and hybrid combinations of both.

The legacy of these historical arrangements continues today. Legal arrangements like this also exist in places where colonization was not a factor, when indigenous rulers developed state legal institutions in an effort to modernize, but did not extend the reach of state power into rural areas, or over distinct ethnic or religious groups within the territory that maintained a degree of autonomy from central government.

At the turn of the 20th century, the greatest driver of legal development around the world has been the spread of global capitalism. This is producing a growing transnational network of commercial law and regulation, environmental law, criminal law and more, as well as legal changes within countries that construct internal legal regimes to meet the demands of economic enterprises.

A common pattern today divides along urban–rural lines. The state legal system operates mainly in the cities with an emphasis on matters of government and the economy. Within urban areas, however, the state legal system often has a limited presence in large settler communities that have sprung up around sprawling megacities. Many of these people have come to the cities looking for work and a better life, or fleeing unrest or drought or famine in the countryside. In some of these urban areas versions of non-state systems exist to deal with social ordering problems, although they may look more like vigilantes or criminal gangs than like informal justice systems.

In rural areas, the state legal system is frequently weak or entirely non-existent, and non-state justice systems handle the bulk of problems. A multitude of arrangements exists, as I said, with no two exactly alike. They might be called customary, or village, or traditional, or religious, or informal courts, or councils; the decision-makers can be chiefs or headmen, tribal elders, or leaders of the community. Women are seldom included. Some of these institutions are officially recognized by and incorporated within the state legal system, and enjoy symbolic and financial support from the state, while others operate independently of the state. Some are decades-old standing institutions, while others are informal bodies that meet when the need arises. Some places have codified customary law. In other places, state courts or informal tribunals apply unwritten customary law. Many strive to reach a consensual resolution that satisfies all the parties involved and repairs the breach in the community, although some make rule-based decisions. They frequently bear the label "customary", or "traditional", or "religious" courts, or tribunals, but these labels can be misleading. These are contemporary institutions that deal with everyday problems.

3. A bifurcated law and society

The situation can aptly be described as a bifurcated society with corresponding forms of law. To elaborate this bifurcation, I will use the imagery of a core and two rings.

3.1. Core

The core is based in large urban centres where commercial enterprises and the government are located. State legal systems are most effective at this core. Legal institutions and norms are heavily influenced by external models, initially through colonization and more recently through the natural spread of law by imitation and extension.

Global capitalism is calling forth its own supportive legal regimes in countries that participate in it. Governmental infrastructures everywhere are increasingly constructed in legal terms. Transnational regulatory and commercial regimes have begun to crystallize. These common elements are forming in state legal systems across the globe.

At the peak of the core are wealthy, educated people with access to power. The most successful of these people have much in common with people from the core of other societies. They are part of a global network of elites coalescing in connection with global capitalism and the interaction of state and transnational governmental and commercial institutions. There are two groups of elites: economic and governmental. Often the two are from the same circles and have tight connections and alliances.

The legal apparatus and the legal profession – entry into which requires education and opportunities – are dominated by elites.

3.2. First ring – the urban ring

The first ring is the ring of poor and less educated in slums or squatter communities in megacities around the world. This is the urban ring. The core and the ring are not spatial references; sometimes the poor live in the centre of large urban areas, while the wealthy live in enclaves. The ring is meant to symbolize people who live at the margins of those with power and privilege.

The state legal system has a presence in the first ring, but its coercive power is limited and its primary orientation is different. In the core, state law emphasizes property rights and commercial transactions. In the urban ring, state law emphasizes its disciplinary aspects: the exertion of force to maintain order. Residents of the urban ring often lack official property rights (many do not have official title to the land they live on), and contractual rights have little meaning for those who work in the informal economy.

The people in the urban ring are exposed to a televised cultural mix of images from global society as well as local images. People who have come to the cities in recent waves of internal migration bring with them value systems from former rural communities, but former tight binds no longer hold. New communities are constructed out of a commingling of different groups that live in proximity in urban rings.

3.3. Second ring – the rural ring

The second ring is the rural ring consisting of the people who have remained in their communities, living much as they have for

generations. These people should not be thought of as living in an isolated condition preserved unchanged from times gone by. They have many connections with the contemporary world, including relatives who travel back and forth from the first ring supplying goods and resources. Cultural and political events come into their lives through cell phones, the internet, radio and television. But their lives remain rooted to the community. Land provides the basis of the society as well as the source of their food.

People in the rural ring have limited participation in the money economy, and limited interaction with the government. They frequently speak a local vernacular or dialect that might be different from the one spoken in the core or urban areas. They are less educated and less mobile.

This second ring is where the mismatch between state law and lived social norms is the greatest. The state legal system is often weak; legal officials are few and have limited resources. The norms and operation of the state legal system are unfamiliar to the people. The legal system is distant, expensive and unaccountable.

3.4. The bifurcation of law and society

A bifurcation results: the state legal system matches the norms followed in the core, especially in connection with economic and governmental activities, particularly with respect to the elite, and roughly matches the lives of people in the first (urban) ring, though not in all respects. In contrast, the state legal system substantially mismatches the way of life of the second (rural) ring. A law that generally comports with the urban core thus extends to a different form of social organization at the rural ring, with which it clashes. The standard notion that state law is uniform and holds a monopoly of legal authority over the entire territory does not recognize these internal differences.

This situation is not unique to developing countries. An example is found in the work of Eugen Ehrlich, who noted a century ago that the Austrian Civil Code did not match the norms actually followed in Bukovina. It is not unusual for people at the periphery to live according to a set of norms and institutions different from those followed at the centre. And when multiple distinct communities coexist, it can be manifested as a complex melange rather than an urban–rural bifurcation.

Many societies do not have such divides. Germany and the United States, for example, differ region by region, and have urban and rural differences, but a broad commonality spans these differences.

When a fundamental divide is present, special challenges are created.

4. The apparent misfit with the rule of law

A standard view of the rule of law is presented in a 2004 report of the United Nations Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies":

> The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.
>
> (UN Security Council 2004: 4)

Many non-state systems of justice fail to meet these standards. Their norms and processes often are not transparent; are not publically promulgated; are not independently adjudicated; and are not legally certain, among other discrepancies.

And these failures cannot be rectified. The orientation of non-state justice systems fundamentally diverges from the orientation of legal systems, upon which the rule of law is constructed. Or to put it another way, the rule of law is built upon and presupposes a specific kind of legal order.

4.1. Legal justice versus substantive justice

This can be comprehended through the contrast between legal justice and substantive justice. Roberto Unger describes these as alternative ways of ordering human relations:

> One way is to establish rules to govern general categories of acts and persons, and then to decide particular disputes among persons on the basis of the established rules. This is legal justice. The other way is to determine goals and then, quite independently of rules, to decide particular cases by a judgment of what decision is mostly likely to contribute to the predetermined goals, a judgment of instrumental rationality. This is substantive justice.
>
> (Unger 1975: 89)

Legal justice systems, also known as formal legal systems, are based on the application of rules. Substantive justice systems are oriented toward achieving outcomes that are perceived as right.

The rule-of-law definition set forth by the United Nations is derived from a system of formal legality. Non-state justice systems, in contrast, are typically substantive justice systems. The decision-makers aim to achieve a consensus or reconciliation of the parties by coming to an outcome that people find acceptable or right.

When compared to the rule of law, substantive justice systems might appear defective, but this fails to appreciate that they have their own kind of legitimacy. By producing outcomes that people perceive as right, they achieve justice in a direct and immediate sense. People in developing countries who live in rural communities often prefer substantive justice systems that achieve a resolution. This makes sense because they continue to live together throughout their lives, so disputes must not fester unresolved.

The study of Liberia revealed this preference. Locals were unhappy with the state legal system because it was expensive, corrupt, lacked transparency and impartiality, and was seen as favouring the rich and powerful. But a telling finding of the study was that Liberians would prefer the non-state informal system even if the formal system worked well. The Report explains:

> This is because the core principles of justice that underlie Liberia's formal system, which is based on individual rights, adversarialism, and punitive sanctions, differ considerably from those valued by most Liberians. One of the consistent complaints levied by Liberians against the formal court system is that it is overly narrow in how it defines the problems it resolves and thus fails to get at the root issues that underlie the dispute. This concern rests on a culturally grounded and deeply held assumption that incorrect or injurious behavior is usually rooted in damaged and acrimonious social relations. In order to be seen as adequate, justice must work to repair those relations, which are the ultimate and more fundamental causal determinant, rather than merely treat the behavioral expressions that are viewed as its symptoms [...]. Many Liberians noted that far from resolving the underlying dispute, formal adjudication serves to exacerbate adversarial relations.
>
> (Isser et al 2009: 3)

A Liberian remarked that "[a]ctually, the customary law is the one that I prefer [...]. Our traditional laws help us to handle our dispute very

easily and after the settlement of these disputes, the disputants go with smiles in their faces [...]. [In] fact, the statutory law brings separation among our people." (Isser et al. 2009: 4)

Substantive justice systems cannot be modified to meet rule-of-law requirements because the latter focus on rule application, whereas the former are oriented toward achieving outcomes (justice, consensus, reconciliation).

The implications of this difference in orientation have been revealed by stymied efforts to codify customary law. Codification creates an artificial rigidity that freezes norms and transforms their operation, reducing their flexible application (Bennett 2009: 19–21). There can be competing versions of rules, and rules are often vague in a way that defies codification. The main difference is that rules are not as strictly determinative as they are in legal justice systems. As Comaroff and Roberts (1981: 13–14) observe,

> [I]ndigenous rules are not seen a priori as "laws" that have the capacity to determine the outcome of disputes in a straightforward fashion. It is recognized, rather, that the rules may themselves be the object of negotiation and may sometimes be a resource to be managed advantageously.

When customary rules are placed in formal legal systems, distortion results, as anthropologist Martin Chanock (1985: 62) explains: "The essence of customary systems may be said to have lain in their processes, but these were displaced, and the flexible principles which had guided them were now fed into a rule-honing and – using machine operating in new political circumstances."

4.2. A difference of degree

It would be a mistake to think of legal justice and substantive justice as complete opposites with nothing in common. Both involve rules and processes, and both are infused with social values.

In substantive justice systems, a part of what makes the decision acceptable is the process of presenting one's side, being heard and being taken seriously. The parties must believe the applicable norms were given proper consideration in the proceedings and final outcome. Substantive justice is thus thoroughly norm-infused, even if legal rules are not determinative.

Legal justice, on the other hand, is itself not exclusively or strictly rule-determined. Legal rules have an open texture that can make it necessary

to implicitly or explicitly consider social purposes and consequences when interpreting and applying the rule. This openness is most evident when a rule or its application is ambiguous or when several rules potentially conflict, but it can also arise when a rule appears to be clear and straightforward.

To invoke a well-known illustration, think of the rule: "no vehicles in the park". This seems simple and straightforward. Everyone would agree that an automobile is prohibited. But does the rule prohibit from the park a motorized wheelchair, or baby carriage, or bicycle? These are all "vehicles". A simple rule, it turns out, is not so straightforward when outcomes dictated by the rule appear questionable. The decision-maker must then make judgements not contained in the stated rule itself. In this manner, rules and ends interact in legal justice systems as well.

Thus, both legal justice and substantive justice systems have some amount of flexibility. Both systems consider rules. Both systems consider outcomes. Both systems produce a sense of justice. They are different, though as points on a continuum, rather than antithetical.

What explains their connection is that people in all societies live according to rules and to a sense of right. Whatever legal system they devise will involve some combination or balance of the two. Legal justice systems emphasize the rule element, while substantive justice systems emphasize the element of right.

The crucial point of this discussion is that the failure of substantive justice systems to meet rule-of-law standards does not mean they are primitive or defective. They are forms of justice that operate with a design well-suited to resolving disputes in communities with shared values where people live in proximity for much of their lives.

4.3. Can satisfy important rule-of-law functions

Although non-state justice systems do not meet the requirements of the rule of law, they can satisfy several rule-of-law functions by supplying some of the benefits that make the rule of law valuable.

The rule of law, in the most basic sense, requires that government officials and the populace are bound by and abide by the law. At a minimum, this assumes that legal rules exist and that government officials and citizens know what the rules require. It operates at two levels: (1) imposing legal limitations on and coordinating the behaviour of government officials; and (2) imposing legal limitations on and coordinating the behaviour of citizens.

Many accounts of the rule of law emphasize the first level – imposing legal limits on government. Non-state systems of justice usually cannot

fill these functions because their norms do not address the behaviour of government officials and non-state systems typically have limited enforcement mechanisms.

Non-state systems of justice, however, do play an important role in connection with the second level – maintaining relations among citizens. In contrast to state legal institutions (in the rural ring), these informal institutions are *of* the community, closer in derivation and proximity. Their norms, processes and modes of decision-making are understood by members of the community. The proceedings are less costly, more timely, and do not require legal professionals. The community knows the decision-makers. Remedies or sanctions issued by decision-makers rely upon the acquiescence of the parties and community support, which usually necessitates that the result be perceived as acceptable.

These local tribunals must not be overly idealized. The norms they enforce may be objectionable, their processes may be skewed, and decision-makers may have warped motivations or be self-interested or corrupt. They may fail to meet due process standards like neutrality, opportunity to be heard and equal application of the rules without regard to the identity or status of the parties. The fact that they are *of* the community does not necessarily mean they are *for* the entire community; nor is it always the case that everyone in the community respects them. But they usually enjoy at least one major advantage over state legal systems: they work in ways that people recognize and can generally anticipate. This awareness makes the results more predictable to the people and less uncertain. This awareness provides the participants with a greater sense of control over their fate and it makes the decision-makers more accountable because what they are doing can be evaluated against shared community standards and expectations.

The fact that these decisions are not made in strict accordance with rules does not mean they are unpredictable, ad hoc decisions. As the Afghanistan report explains, "Because community members share common values and attitude, the informal system often provides more certainty than the formal court system because all the players understand the logic of the system and because it focuses more on substance than on procedure." (Barfield 2006)

These local informal institutions thus provide vital rule-of-law functions: helping coordinate behaviour and resolve disputes between members of a community, bringing security, certainty, predictability and a sense of justice. The fact that non-state legal institutions handle

roughly 90 per cent of disputes in development contexts provides strong evidence of their usefulness.

4.4. Two realms of the rule of law

A common objection to non-state systems of justice is that they do not meet the requirements of the rule of law. Now we can take a more nuanced view of the situation.

Rule-of-law requirements are based upon systems of formal legality. These requirements can and should be applied to state legal systems that govern the core – that govern commercial activities and the government, and maintain social order within large urban environments (the core and the urban ring) where many people, indeed millions of people, have come together and do not share in the binds of a close-knit community. At the core the rule of law defined in these terms is essential to a properly functioning economy, polity and society.

But rule-of-law requirements based upon formal legal systems should not be applied to cohesive rural communities – indeed their application might be socially harmful. That is because the norms of the legal system do not reflect the actually lived norms followed by the community, and because what matters most is to come to a resolution of the dispute that is satisfactory to the parties and the broader community. Substantive justice systems are superior in these situations.

Hybrid societies manifest a twist in connection with the rule of law: substantive justice systems violate rule-of-law standards, but satisfy rule-of-law functions in relations between people; whereas legal justice systems might meet rule-of-law standards (if achieved), but fail to satisfy rule-of-law functions in the relations between people for all the reasons stated earlier. The mismatch between law and society gives rise to this twist.

4.5. What about human rights and women's rights?

This analysis answers a number of objections that have been raised against non-state justice systems, but it does not address the objection that many of these systems violate human rights and women's rights. These are indeed matters of serious concern. Still, one clarifying observation must be made.

These violations occur not for reasons inherent to these institutions. Rather, the violations are embedded within prevailing views of the community. As I have described, the outcomes are generally seen as acceptable in accordance with community values. Thus ultimate responsibility for any violations of human rights norms must be placed on

community values. What must change are the views of the community that produce these violations. The processes and outcomes of non-state institutions will become less objectionable as a result.

Some reformers propose altering the composition of non-state institutions to solve these problems, for example making authority positions electable (rather than filled by tribal elders) or requiring women decision-makers. Perhaps these proposals will succeed. But it is also possible that initiatives like these will undermine the authority or effectiveness of non-state institutions. Non-state justice institutions are embedded in society. In the absence of corresponding shifts in social and cultural attitudes, reforms targeted at changing the composition or operation of informal justice institutions may have unintended consequences.

5. Conclusion

A major objection to non-state justice institutions is that they are detrimental to the state-building project. If informal systems are encouraged to continue, critics say, these societies will perpetually struggle with underdevelopment and defective state legal systems. In closing, I offer two responses: one about law generally; and the second specific to law in these societies.

Relations between law and the state are undergoing profound changes in many societies around the world today. State legal systems are giving away formerly exclusive legal authority to transnational entities – like the European Union, the World Trade Organization and the International Criminal Court. State legal systems are also devolving authority away, allowing greater legal autonomy to sub-communities – communities – from Quebec in Canada to the Kurds in Iraq. Legal functions are also devolving outward from the state to private actors. Private policing now takes place in gated communities, shopping malls, universities and business facilities around the world. Private arbitration handles a growing percentage of legal problems, siphoning cases away from state courts and prisons in some societies are privately run.

The longstanding unified, monopolistic view of state law can no longer be taken for granted. It is far from obvious that developing countries should strive to create a unified legal system when other societies, in various ways, are moving away from this ideal.

Furthermore, the monopolistic view of law might well be harmful when applied to countries that exhibit the mismatch between law and society I have detailed herein. When a society is marked by pluralism,

legal uniformity entails that many people must live under systems of law with which they do not identify. Legal uniformity under these circumstances works poorly. Non-state justice systems provide essential functions for millions of people in hybrid societies who live in rural areas, and will not disappear soon.

Part I

Recognizing Non-State Justice Institutions: Five Cases

2
Pakistan: *Jirgas* Dispensing Justice without State Control

Tilmann J. Röder and Naveed A. Shinwari

1. Introduction

The Federally Administered Tribal Areas (FATA) are a semi-autonomous region in the north-west of Pakistan, bordering Afghanistan to the west and north, and the Pakistani provinces of Khyber Pakhtunkhwa to the east and Baluchistan to the south. Pakhtun tribes mainly inhabit the territory. Here, and in the neighbouring areas, the traditional justice system of the Pakhtuns, called *jirga*, continues to be dominant.

In FATA, the resolution of conflict is mainly governed through the Frontier Crimes Regulation (FCR) that dates back to the early days of British rule over the area in the mid-19th century. The FCR remained almost unchanged between its major reforms in 1901 and 2011. It was, however, increasingly criticized for stripping tribal citizens of, among others, three fundamental rights summarized with the words *appeal, wakeel, daleel* – i.e. the rights to appeal against detention, to legal representation and to present reasoned evidence.

After the most recent changes of the FCR in 2011, the legal status of the citizens of FATA has to some extent improved. However, the main features of conflict settlement remain intact and the territory of FATA is informally, but effectively, divided into two different types of zones.[1] In the so-called unprotected areas, the Pakhtun habitants may settle conflict among themselves through *jirgas* according to their traditional set of rules called *pakhtunwali*.[2] Here, the state does not exert any control over conflict settlement. Differently, the so-called protected areas, which extend around places of public interest such as highways, schools and government buildings, fall under the direct jurisdiction of the Pakistani government – noteworthy, the executive but not the judiciary. Here, civil servants exercise authority on behalf of the government. If a civil

or criminal dispute occurs, they may task a *jirga* with searching for a solution according to *riwaj* (tribal custom).[3]

This chapter explains the hybrid system of conflict resolution through tribal councils that are here called traditional *jirgas* if they operate in the unprotected areas, and FCR *jirgas* if formed and mandated by state officials in the protected areas. It further analyses the influence of armed conflict and radical Islam on the practice of dispute resolution and discusses the difficult question of legitimacy of the existing system from different perspectives.

2. Governance and dispute settlement in FATA

The FATA host a population of an estimated four million inhabitants, who mainly belong to Pakhtun[4] tribes. With less than 5 per cent of its citizens living in towns, FATA is the most rural region of Pakistan.[5] Its economy is chiefly pastoral due to the mountainous character of the landscape, where only 10 per cent of the land is arable, and the tribal nature of society. The majority of the population depends on forestry, livestock and crops, thus generating a per capita income of about 250 USD per year, which is far lower than half the national average. Transportation is also important for the economy. Additional revenues stem from a shadow economy that is based on the production and trafficking of opium. Nonetheless, about 60 per cent of the population live below the national poverty line.

The socio-economic weakness is only one aspect of underdevelopment in FATA. The level of illiteracy is extraordinarily high with only about 40 per cent of men and 3 per cent of women able to read and write. Public infrastructures only slowly improve even in sectors as important as education, health, energy, agriculture, transportation and banking. In FATA, comparatively small economic shocks can translate into significant increases in destitution and poverty. Big-scale events caused by, for example, floods or the sudden escalation of armed conflict can lead to large-scale socio-economic disasters or forced migration.

The weakness and instability of FATA to some extent result from its specific political status and uncommon governance system. When the Islamic Republic of Pakistan achieved independence and full sovereignty in 1947, it was divided into five provinces: Sindh, East Bengal, West Punjab, Balochistan and the North-West Frontier Province (renamed "Khyber Pakhtunkhwa" in 2010). FATA was never integrated into one of these provinces, but maintained its semi-autonomous status. Established

at the beginning of the 20th century by the British colonial forces in an attempt to create a buffer zone between the Emirate of Afghanistan and British India, FATA, to date, consist of six so-called frontier regions[6] and seven tribal agencies.[7] On behalf of the Federal Government of Pakistan and under the supervision of the Ministry of States and Frontier Regions in Islamabad, the Governor of Khyber Pakhtunkhwa exercises state authority in FATA. He is assisted by the FATA Secretariat, which is based in Peshawar, the capital of Khyber Pakhtunkhwa Province.

Civil servants called political agents administer the tribal agencies. In the frontier regions, the district coordination officers of the adjoining districts of Khyber Pakhtunkhwa province function as political agents.[8] Numerous lower ranking officials and informal agents, many of whom are recruited from among the indigenous tribes, assist them.[9] The political agents and district coordination officers have broad political, administrative, financial and judicial powers. Among other tasks, they oversee the work of line departments, handle inter-tribal disputes, control the use of natural resources and supervise development projects. There is little transparency in the day-to-day work of the local administration, which includes the collection of tolls and disbursement of funds.[10]

FATA does not have any elected political organs of its own; nor is its population represented in the Khyber Pakhtunkhwa Provincial Assembly. Only since 1996, have FATA citizens been entitled to participate in national elections.[11] However, according to Section 247 paragraph 3 of the Pakistani Constitution, acts of the national parliament do not extend to FATA unless the President of the Republic so directs. Political party activity was prohibited until President Zardari signed the extension to FATA of the Political Parties Act in 2011.

The lack of representation in democratic institutions, combined with the non-applicability of parliamentary acts in FATA, constitutes a serious democratic deficit. Civil society cannot mitigate this shortcoming. However, an increasing number of organizations and initiatives are active in FATA, with many calling for fundamental reform. A prominent example is *Qabail Aman Taroon* (Tribal Peace Network), which represents more than 200 civil society organizations.

The legal situation of citizens living in FATA is particularly precarious due to the fact that the state courts, pursuant to Section 247 paragraph 7 of the Pakistani Constitution of 1973, do not exercise jurisdiction in this territory. The question of how their disputes are settled depends on whether a dispute has occurred in, or is related to, a so-called protected

area, where the state exerts control, or an unprotected area, where the state is absent and the tribes manage all affairs. These terms are not official terminology, but widely used.

With a view to dispute settlement, this means that in the protected areas, the political agents and district coordination officers bear responsibility for the settlement of all criminal as well as civil disputes, which they may pass on to tribal councils commonly known as FCR *jirgas* or *sarkari jirgas*, if they deem it appropriate. The FCR Commissioner, a civil servant appointed by the Governor of Khyber Pakhtunkhwa, functions as appellate authority. Since the FCR reform in 2011, final review lies with the FATA Tribunal, the members of which are also appointed by the Governor of Khyber Pakhtunkhwa.

In the unprotected areas, traditional *jirgas* settle disputes without any involvement of, and recourse to, state institutions. This system is described in the following section.

2.1. The traditional *jirga* and the *pakhtunwali*

To date, most of the Pakhtuns of FATA live together with their relatives by blood or marriage in fortress-like compounds (*qala'a*) that comprise several houses. Elders head extended families, which consist of married sons and their wives and children as well as unmarried sons and daughters. Each family belongs to a clan (*khel*), which is part of a larger tribe. *Maliks* lead the clans and sub-clans.

The centuries old, uncodified, but strictly observed set of norms, that guides the Pakhtun way of life, is called *pakhtunwali*. Four concepts are central to *pakhtunwali*. Firstly, honour is of cross-cutting importance; it forms the basis of the principles of respect for anyone (*izzat*), bravery (*turah*) and protection of the weak (*nang*) and of women (*naamus*). Secondly, *milmastya* means open-handed hospitality and protection accorded to all who may or may not demand it. Thirdly, *badal* refers to a set of customs and actions concerning revenge. The custom gives an offended person the right to revenge by retaliation regardless of the consequences. Fourthly, *nanawati* is the principle of forgiveness and asylum. It literally means to enter a house begging for pardon. Other principles, values and local rules add to a complex, but fluid, normative system that is also applied in the Pashtun areas of neighbouring Afghanistan (Shinwari 2011: 25–7).

While *pakhtunwali* is a set of rules, the term *jirga*[12] refers to an institution and a practice. A *jirga* is a gathering of respected men who are concerned with matters of relevance for their community. Besides, doing *jirga* means practising collective decision-making and dispute-settling

on the basis of *pakhtunwali*, local customs, rules derived from precedents (*narkh*) and Islamic law. The combination of the different normative sources changes from tribe to tribe, village to village and case to case (Shinwari 2011: 36–7).

Two main forms of traditional *jirga* must be distinguished: *qaumi jirga* and *shakhsi jirga*.

A *qaumi jirga* (tribal or community council)[13] is an assembly of notables such as *maliks*, *khans* and *lungi* holders and other elders called *spingiris* (white-bearded), and other respected men from the community. Women are not involved; the Pakhtun society is highly patriarchal, and the marginalization of women is reflected in their exclusion from most of public life. *Qaumi jirgas* deal with issues of interest or concern to the whole community. For instance, they may decide on the use of grazing land and the distribution of irrigation water, select a site for a school, raise taxes, invite volunteers for community purposes, form a militia (*badraga* or *lakhkar*) to punish a perpetrator, negotiate with neighbouring tribes, or declare war and peace (Yousufzai and Gohar: 47–8).

In contrast, a s*hakhsi jirga* (private council) is formed to end a dispute between two individuals or families. Should they still communicate, both parties may agree that each of them names a certain number of *jirga* members. Alternatively, they can ask a mediator to set up the *jirga* by inviting respected and experienced persons (*jirgamaar* or *jirgabaaz*). Typical cases settled by s*hakhsi jirgas* concern family and inheritance matters, conflicts over land and other property, violations of "honour" and intra-tribal killings.

When a violent confrontation arises and an end is not in sight, local notables or elders can approach the rivalling parties and negotiate a temporary truce (*teega* or *kanray*) to prevent further bloodshed. They will usually determine a fine (*nagha*) that must be paid by any party that violates the agreement. The parties can be asked to deposit a surety or bond, which would be confiscated if the agreement is violated. Then a mediator accepted by both parties will convoke a *jirga* in order to restore permanent peace.

When a *shakhsi jirga* convenes for the first time, the parties of the dispute can decide to give the *jirga* absolute authority (*waak*) to take a decision. The alternative to *waak* is called *haq* (right), which means that a solution of the conflict is proposed by the *jirga*, and may be accepted or rejected by each party by claiming breach of specific rules. In this case, another council is formed to re-examine the issue. At this point, the original *jirga* may become a party as well, as the failure of a conflict party

to accept the suggested solution puts the credibility of the original *jirga* at stake. Of course, this cannot be continued without end; according to the custom, the decision given in the same matter by the third *jirga* is considered final.

The actual proceedings comprise the hearing of the parties and the collecting and analysing of evidence. The *jirga* may take as much time and hold as many sessions as they deem necessary to find their decision. The parties only communicate to each other indirectly through members of the *jirga*. In serious cases, they can be asked to clear themselves of the charges by swearing upon the Holy Qur'an.

The implementation of *shakhsi jirga* decisions is usually ensured by both parties publicly accepting the verdict or proposed solution. If a perpetrator is unwilling to yield or ask for forgiveness and therefore outlawed by the *jirga*, the victim and his family are not prevented from seeking revenge. In such a situation, the *jirga* may also raise a militia to expel the perpetrator from the community. Other sanctions can include the social isolation of a non-compliant person or group, confiscation of their arms, financial fines and the destruction of the party's house. If someone still remains defiant and does not comply with the *jirgas* orders, he is considered to be *kabarjan*, the arrogant one. By doing so, he loses the security promised by the *jirga*, and thus may be killed by his opponents without any consequence (Tanguay-Renaud 2002: 559). *Qaumi jirga* decisions are implemented in a similar manner; if not respected, they may be enforced by a group of volunteers with a mandate specified by the *jirga* (Yousufzai and Gohar: 20–2; 48–9).

This description of the traditional *jirga* is certainly simplified; but despite possible variations, it is still practised in the described, or similar, forms in the unprotected areas of FATA. Tom Ginsburg regards *jirga* as an example of "adjudicating in anarchy" and explains it as "a cultural system that channels, and thus limits, violence":

> In a society in which there is no effective state government, citizens will have to develop alternative ways of resolving disputes. Sanctions in such a society are private and carried out by the victim himself (usually not herself) rather than any centralized government. But private violence carries the risk of retaliation [...]. The need to limit the escalation of violence requires institutions both to define violations and to adjudicate disputes so that parties do not spend too many resources on conflict. The [*pakhtunwali*] provides a rough guideline for determining legitimate subjects of conflict and also a system,

> the jirga, for resolving disputes once they arise. It thus presents a protolegal system, cohabitating with, supplementing, and sometimes clashing with the formal system of state law.
>
> (Ginsburg 2011, 90ff.)

Ginsburg's convincing interpretation of *jirga* largely corresponds with the reality of traditional dispute resolution in FATA. However, over the past decades, two particular factors have considerably changed its character. Firstly, *jirgas* in FATA have become instrumental in the regulation of illegal businesses – inter alia, because disputes related to smuggling or the production and trafficking of drugs cannot be taken to any state tribunal. Secondly, militant Islamists have undermined and abused the *jirga* system in some parts of FATA. This development will be described further below.

2.2. The *FCR*: A colonial relic in a post-colonial state

The role of the state in dispute settlement in FATA is fundamentally different from that in all other parts of the country. It was conceived by British colonial forces when they faced militant opposition in the strategically important territory along the border to the Emirate of Afghanistan, which was feared to fall under Russian influence. In order to ensure access to the passes through the Hindu Kush, the British Raj applied a policy of persuasion, control and armed intervention in these areas. The conflict was finally resolved through agreements with the Pakhtun tribes, granting them extensive autonomy rights. Several acts aimed at implementing the agreement followed. The principle instruments were the so-called FCRs that were introduced in the six Pakhtun frontier districts from 1848.

With these regulations, the British began to adapt their colonial legal framework to the tribal context. On the basis of careful observation of tribal customs and local power structures, they decided to integrate the *maliks* and other tribal notables and elders into the system of governance and dispute resolution through a skilful combination of favours and fears. On the one hand, the British provided goodwill payments (*moajib*) in return for ensuring free access to and passage through their territory, and gave them a powerful role in the resolution of conflicts on their turf.[14] On the other hand, they made the *maliks*, notables and elders accountable for illegal acts committed by any member of their respective tribes and threatened collective punishment against their entire clans and tribes in case of resistance or revolt. This repressive method of enforcing peace and order was probably also informed by

Pakhtun tribal customs, which encompassed forms of collective responsibility as well. It was also a reaction by the colonial administration to the fact that the ordinary civil and criminal law in force in British India had little effect in these areas: despite numerous crimes committed, the rate of conviction was very low.

The regulations proved to be an effective tool in the hands of the British authorities. In 1872, a more encompassing FCR was enacted. It was amended in 1887, with the Pakhtun tribes officially entitled to arrange their own affairs according to their customs and the tribal areas granted semi-autonomous status. But at the same time, the fines for crimes were increased and imprisonment of up to seven years introduced. However, this renewed policy of sanctions and incentives did not have the desired effect; on the contrary, over the next decade in the tribal areas the British met the strongest resistance on the subcontinent. In these circumstances, the British administration amended the FCR again in 1901 and consolidated the hybrid state–tribal system of governance and dispute resolution in the protected and unprotected areas in the form that continues to persist. In the same year, the North-West Frontier Province was formed and its chief commissioner assumed responsibility for the implementation of the FCR in the adjacent tribal areas.

Two decades later, in 1921, the North-West Frontier Committee examined the FCR, which had become the target of criticism. The committee came to the conclusion that

> [t]o repeal its civil sections would be to inflict grave hardship on the Pathans, who rely on them for a cheap and expeditious settlement of their disputes by a jirga [. . .]. To repeal the criminal sections would be to undermine the forces of law and order and to deprive the Hindus, in particular, of one of their greater safeguards, in a land where passions are hot, blood feuds are endemic, legal evidence is exceedingly difficult to obtain, and refuge from the arm of the law is close to hand across the border. To repeal the trans-frontier sections would be to paralyze our whole system of trans-frontier control.
>
> (Shah 1991: 376)

All later commissions came to different conclusions and recommended changes to the FCR, if not its abolishment. In 1931, a committee headed by Justice Naimatullah of the Allahabad High Court proposed to extend

the ordinary court system to all areas where the FCR was applied and to use the regulation only for some specific offences. It further demanded that also in FCR cases, juries instead of *jirgas* should clarify the question of guilt, judges instead of civil servants should make the decisions and lawyers be allowed to assist the accused. However, the British authorities did not follow the recommendations of the committee (Bangash 1996: 322).

In 1947, Pakistan gained independence. Two years later, the Extra-Provincial Jurisdiction Order confirmed the authority of the Governor-General of Pakistan to establish courts and appoint judges and magistrates in the tribal areas.[15] In 1956, the first Constitution of Pakistan provided the President of Pakistan with administrative authority over the "special areas", referring to the tribal areas that today form FATA. The National Assembly was not given legislative power over the special areas. Moreover, the Constitution expressly excluded them from the jurisdiction of the Supreme Court and the high courts of the country. The Constitution of 1962 (Section 225, paragraph 5) and that of 1973 – which is still in force – contained similar provisions. The applicability of the FCR was not called into question through any of these acts. Section 247 of the Constitution of 1973, which is still valid, reads:[16]

(1) Subject to the Constitution, the executive authority of the Federation shall extend to the Federally Administered Tribal Areas [...]
(3) No act of Majlis-e-Shoora [17] shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs [...].
(5) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good government of a Federally Administered Tribal Area or any part thereof.
(6) The President may, at any time, by Order, direct that the whole or any part of a Tribal Area shall cease to be Tribal Area, and such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper:
Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the Tribal Area concerned, as represented in tribal jirga.

(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora by law otherwise provides:
Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.

On this basis, the FCR of 1901 has remained in force without any significant change until well into the 21st century as special law prescribing procedures for the handling of criminal offences as well as civil disputes occurring in the tribal areas.[18] Over the following decades, several commissions re-examined the regulation and recommended its abolition or, at least, its reform to meet basic trial standards, but their proposals were mostly not taken into consideration.[19] The FCR thus constitutes a rare, although not unique, example of colonial law in a post-colonial state.[20]

However, lawyers, human rights activists, journalists and local politicians, as well as ordinary FATA citizens, increasingly began to criticize the hybrid state–tribal framework for dispute resolution enshrined in the regulation. Besides the lack of human rights guarantees, the concept of collective responsibility – as opposed to the generally accepted principles of individual responsibility and liability – were widely denounced as draconian and cruel.

The calls for fundamental reform did not fall silent even after President Zardari signed two Orders in 2011, which set into motion the most comprehensive changes to the FCR since its last major reform in 1901. But before discussing these recent changes in detail, we shall take a closer look at the functioning of the FCR framework that has been in force since 1901 and is still applied in almost the same manner.

2.3. Dispute settlement under the FCR until 2011

The FCR of 1901 has been analysed and appraised by many expert authors. While Sabine Lentz has described it primarily as a procedural regulation concerning civil as well as criminal cases (Lentz 2000: 264ff.), one of the authors of this chapter has argued that the regulation was not designed to deliver justice but that it was "essentially about controlling the people of FATA" (Shinwari 2011: 42). These views do not necessarily contradict each other; the FCR has always been an instrument with a dual nature.

The FCR of 1901 entitles the FCR Commissioner and the deputy commissioners – an office performed by the political agents, who can

appoint magistrates to execute some of these functions – to refer important civil as well as criminal cases to FCR *jirgas*, which are called councils of elders in the regulation. FCR *jirgas* are not permanent institutions, but are formed ad hoc in each single case by the responsible political agent. In civil cases, the *jirga*'s task is to establish the facts and propose a decision. The political agent may follow this proposal and enforce it through a decree, initiate further investigation or refer the case to a civil court. In criminal matters, FCR *jirgas* are tasked to investigate the facts – if necessary, on site – and advise the FCR Commissioner or political agent on the question of guilt or innocence of the accused persons. The political agent may adopt a decision proposed by at least three-quarters of the FCR *jirga* members or, if he is not convinced by the proposal, refer the question to a second *jirga* or take his own decision. If a case is tried before a Court of Session, the Commissioner or the political agent can also intervene by instructing the Public Prosecutor to stay the proceedings and tasking an FCR *jirga* in the afore-described manner.

The range of possible punishments includes monetary fines, whipping, transportation for life and imprisonment of up to ten years. In some cases, property of the accused may be subject to forfeiture. The death penalty cannot be imposed under the regulation; it was introduced by neither the colonial nor the Pakistani administrations, probably because they feared revenge against their officials by family members of executed Pakhtuns.

Some features of the FCR *jirgas* are reminiscent of trial juries in the common law system, which emerged centuries ago to help courts settle disputes on the basis of local customs. In civil cases, juries determine which party wins the dispute, while in criminal cases, they decide on the question of guilt or innocence. Juries, like FCR *jirgas*, are primarily used for serious criminal charges. But in contrast to the FCR *jirgas*, which are appointed by the political agents, members of juries are randomly selected in order to ensure their independence and impartiality. Another difference is that juries usually have to reach unanimous verdicts.

To some extent, the FCR *jirga* also differs from the traditional Pakhtun *jirga*, in that neither its composition nor the applicable rules and procedures are subject to the decision of the local community, as they are when a traditional *jirga* is formed and performed. While the latter is part of an oral culture and proceedings are usually not recorded, FCR *jirgas* are required to collect all statements and testimonies of the parties and witnesses in written form. But certainly the most significant difference is that FCR *jirgas*, unlike traditional *jirgas*, cannot take any final decision, which is instead taken by the political agent. This comparison hardens

the assumption that the FCR *jirga* was a result of efforts of the British colonial officers to combine Pakhtun forms of dispute resolution with the judicial structures and practices that they knew best – the common law of England and Wales.

The existence of principles aiming at the protection of the rights of accused persons is another similarity between the two normative traditions even though they may differ considerably in detail. Some of them are enshrined in the FCR, such as the rights to object the nomination of FCR *jirga* members, to have the claim or charge fully explained, to defend themselves and not to be tried twice in the same matter.

However, when it comes to punishment, the FCR of 1901 strongly deviated from British standards of the time by introducing harsh collective penalties on members of tribes acting "in a hostile or unfriendly manner to the British Government or persons residing within British India" (Section 21). The political agents, with the approval of the FCR Commissioner, could detain persons without any due process and debar them from all parts of British India, confiscate their property, demolish their buildings, impose fines on communities and take other measures. The power to impose such sanctions could be easily abused and provoked sharp protest.

In addition to the doubtful provisions of the FCR of 1901, many cases have been reported where provisions of the regulation were ignored or violated. For instance, it is alleged that in many cases, *jirga* members sign blank decision proposal forms that are later filled out by the political administration according to their own interests (Shinwari 2011: 40). Other observers have criticized that the lack of transparency in FCR *jirgas* procedure disabled societal control and opened the gates for corruption and arbitrary decisions by the involved elders. Last, but not least, due to the unchecked discretionary power placed into the hands of the political agents, magistrates and members of FCR *jirgas*, and due to the human rights violations that ensued, the FCR came to be known as the "black law" (*toor qanun*) among the residents of FATA.

2.4. Militant competitors: State and tribes under Taliban pressure

Since the early 2000s, state and tribal actors involved in dispute resolution in FATA have been facing competition from an unexpected faction. The Taliban's shadow rule over parts of the tribal areas enabled the formation of courts connected to the militants, the verdicts of which are based on a fundamentalist interpretation of Sharia.

Radical religious views were brought to Pakistan during the *jihad* against the Soviet occupation of Afghanistan (1979–1989). Foreigners

supporting the Afghan resistance movement introduced the teachings of the fundamentalist Wahhabi and Deobandi schools of Islam to Afghan and Pakistani fighters, who used FATA as one of their main bases. In the early 1990s, the Taliban movement emerged in their camps and *madrasas* and succeeded in conquering Afghanistan in 1996 and ruling the country until 2001, when they were ousted and withdrew to the tribal areas of Pakistan. FATA became a refuge for tens of thousands of militant Islamists and terrorists from the region and other parts of the world (Shah 2012: 9ff.).

Between 2005 and 2007, a recovered Taliban movement gained *de facto* control of significant territories along the Afghan-Pakistani border and established their own "shadow" administration and court system. Where the state is present, their *qazis* (judges) operate as so-called mobile courts by using motorcycles that enable them to quickly appear, hear, decide and disappear. Where the state is not in sight, they also establish permanent facilities (Amnesty International 2010: 43). In the Mohmand and Bajaur districts, for example, the Taliban set up different judicial zones with a courthouse and two *qazis* each.[21] As previously in Afghanistan, they decide criminal as well as private law cases on the basis of their rigid interpretations of the Sharia, which is to some extent combined with Pakhtun tribal custom.[22]

Many FATA residents initially saw the Taliban courts, which promised speedy and fair justice, as a viable alternative to the unpopular FCR system. But perceptions changed when Taliban began to deprive traditional *jirgas* of cases, overrule decisions taken by elders (Amnesty International 2010: 43ff.) and even attack tribal elders cooperating with the state. In October 2008, a suicide bomber of the local Tehreek-e Taliban Pakistan (TTP) attacked a *jirga* discussing strategies to resist incursions of the militants in Orakzai Agency and killed over 80 tribal *maliks* and elders. In July 2010, the TTP attacked a *jirga* of tribal elders at a local government building in the Mohmand Agency, killing more than a 100 people. These and many other smaller incidents aimed to break resistance to the Taliban in the area.[23] The government of Pakistan tried to regain control with a so-called comprehensive approach that combined negotiation, military action and support to the civilian population. It went as far as to sign a peace agreement with the Tehrik-e-Nifaz-e-Shariat-e-Mohammadi (TNSM) in February 2009, permitting the militants to establish Islamic courts in the Malakand district of the neighbouring North-West Frontier Province. This agreement, which only held up for a few weeks, was sharply criticized, as the government had traded away not only the authority of the state, but also the basic rights of the

local residents for an insecure ceasefire (Amnesty International 2010: 37; 58).

To sum up, the Taliban have offered FATA residents another option for the resolution of their conflicts, which, however, they combine with their absolute claim to power. Bloody attacks against tribal elders cooperating with state officials have proven that their promise to kill those who refuse to subject themselves is not an empty threat. The response of the local population mainly depends on the individual, local Taliban judges and commanders. According to recent reports, single *qazis* seem to maintain some acceptance, particularly in civil case, which even reaches beyond FATA.[24]

2.5. Improvements but no system change: The FCR reform of 2011

In 2008, the newly elected government of President Zardari and Prime Minister Gilani announced political, administrative and legal reforms in FATA and mandated an expert committee to make recommendations. Three years later, in August 2011, the President enacted amendments to the FCR along with the extension of the Political Parties Order to FATA. These orders have led to the most far-reaching changes to the FCR since 1901.

However, the overarching structure of the regulation and its hybrid system of dispute resolution under tight executive control remained essentially untouched. The FCR reform of 2011 mainly aimed at improving the protection of human rights and diminishing the misuse of power by the political agents, and their subordinate officers and agents, as well as the tribal leaders. Under the new FCR, any person accused of a crime must be brought before the authorities within 24 hours; the previously allowed and frequently applied detention at the sole discretion of the political agents was thus made unlawful. With some restrictions, and at the discretion of the political agent, the regulation now grants the right to bail to FATA citizens. Women, children below the age of 16 years and persons above the age of 65 may no longer be subject to collective punishment and the extent to which male FATA citizens can be held responsible has also been changed to make it a stepped process. Cases must now be disposed of within a fixed timeframe.

For the first time in the history of the tribal areas, there is an effective right of appeal against decisions of the political agents and the FCR Commissioner. The afore-mentioned FATA Tribunal was created in 1997, but totally lacked independence and judicial capacity at the time. Since the 2011 reforms, decisions by a political agent can be brought

before the so-called appellate authority, which consists of commissioners and judicial additional commissioners appointed by the Governor of Khyber Pakhtunkhwa Province. Their decisions can also be appealed to the FATA Tribunal. Both instances are empowered to review decisions, decrees, orders and sentences made by a political agent or FCR Commissioner. In addition, the FATA Tribunal may review its own decisions by request of any aggrieved person. According to Section 48 of the FCR in the 1997 version, the FATA Tribunal consisted of secretaries of the federal Home and Law Departments, which means that only active government officials decide, as the highest judicial authority, on judicial cases in FATA. The 2011 reform freed the court from direct government control. It now consists of two retired high-ranking civil servants with experience in tribal administration and one lawyer. The latter must qualify to be appointed as judge of a high court and must be familiar with *riwaj*.

However, critics of the 2011 reform had hoped to see a straight extension of the jurisdiction of the Pakistani higher judiciary to FATA or at least appeals and review instances composed of more independent individuals such as retired justices instead of former government officials. Subsequent to the reforms, the new FATA Tribunal was constituted and soon took its first decisions. As of 2013, however, FATA citizens continued to be largely unaware of the enhanced right of appeal provided by the 2011 reforms (Chaudhry 2013: 11).

Another development, the effects of which are still to be seen, is the connection of the *qaumi jirgas* with the FCR justice system. The traditional *qaumi jirgas* that deal with all kind of matters of relevance for their community without any involvement of the state may now, "in exceptional circumstances" and "in the interest of justice and public peace", submit to the political agent "recommendations" with regard to criminal as well as civil cases. This relation between community representatives and a quasi-judicial authority is reminiscent of the concept of *amicus curiae*, where groups or persons who are not party to a case may submit relevant information to the court without having been solicited by any of the parties to do so. As of 2013, the implementation of this novelty was sporadic and not well monitored (Chaudhry 2013: 12).

After the 2011 reform, the judicial hierarchy in FATA comprises four levels:

(1) The FATA Tribunal
(2) The Commissioner and judicial additional commissioner as appellate authority

(3) The political agent (in tribal agencies; district coordination officer in frontier regions), who takes judicial decisions, the assistant political agent and magistrates appointed by them
(4) The FCR *jirga* (Council of Elders) that advises the political agent on the question of guilt or innocence in criminal cases and proposes decisions in civil cases.

The *qaumi jirga*, which is recognized in the regulation for the first time, is not involved in the investigation or the decision-making and remains outside of the system.

Further elements of the FCR reform include a new section protecting citizens against false accusations, the right to compensation of persons deprived of their property, audit control of the use of public funds by political agents and regular prison inspections by the FATA Tribunal, the appellate authority and the political agents to help prevent the mistreatment of prisoners. At the time of writing, critical voices from FATA claimed that the reform orders of 2011 had only partly and poorly been implemented.

3. Legality and legitimacy of decision-making in the existing framework

3.1. Arguments from the perspective of constitutional and international law

According to Article 1 of the Constitution of 1973, FATA is part of the territory of the Islamic Republic of Pakistan. Articles 8–28 enshrine a comprehensive catalogue of fundamental rights that are guaranteed to the citizens of Pakistan; further guarantees are provided in other articles of the Constitution.

In the view of most Pakistani jurists, Article 247(3) renders these provisions inapplicable in FATA. The provision reads: "No act of Majlis-e-Shoora [national parliament] shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs", and the Constitution of 1973 was indeed voted and approved by the national parliament. One could argue that "act of Majlis-e-Shoora" only refers to ordinary laws and not to provisions of the Constitution itself, but the members of parliament voting in favour of the Constitution in 1973 certainly did not want to render it applicable in FATA and therefore, implicitly, abolish the FCR.

However, Article 25, which establishes the equality of citizens and entitles them to equal protection of law, allows for another view.

If this provision were strictly applied, full constitutional rights would have to be granted to all Pakistani citizens including those residing in FATA. But the equality clause conflicts with the cited Article 247(3), which seems to quash all constitutional norms including the equality clause. Pakistani jurists have not yet found consent on the question of whether the principle of equality or the clause excluding FATA from the Pakistani constitutional and legal system prevails. If the Constitution is interpreted in the light of international law, the principle of equality must take precedence, as it is also enshrined in the Universal Declaration of Human Rights (Articles 1, 7 and 10) and other treaties and conventions that have been ratified by Pakistan and bind the state. This particularly includes the International Covenant of Civil and Political Rights (ICCPR) that clearly states: "All persons shall be equal before the courts and tribunals" (Article 14, Section 1, sentence 1).

The legality of the FCR is even more doubtful if the whole catalogue of fair trial rights of the ICCPR is taken in consideration. Pakistan ratified the ICCPR on 23 June 2010 without any reservations on the relevant Articles 9, 10, 13, 14, 15, 16 and 17, which thus must be implemented without any exception and limitation in the whole of the country. This means that the state is bound to bring its entire legal system, including the FCR, into conformity with the ICCPR.[25]

In the following lines, only the essential rights of accused persons that are enshrined in the ICCPR and the Constitution of 1973 but not granted according to the FCR will be mentioned.

Article 9 of the ICCPR outlines rules for arrest and detention: arbitrary arrest or detention is forbidden; an arrested person must be informed of the reasons for his arrest and the charges against him, and brought promptly before a judge or other officer authorized by law to exercise judicial power; and he is entitled to have a court deciding on the lawfulness of his detention. Moreover, victims of unlawful arrest or detention have an enforceable right to compensation. In a similar manner, Article 10 of the Constitution prohibits unlawful arrest and detention. Even after the reform of 2011, the FCR does not meet these requirements. Under the new Section 11, the accused "shall be produced before the Assistant Political Agent concerned within twenty four hours of the arrest of the accused excluding the time necessary for the journey from the place of arrest to the Assistant Political Agent having jurisdiction". But court review of arrest or detention is not envisaged in the regulation at all, and the possibility of collective punitive measures against "hostile or unfriendly" tribes, which includes the arrest and detention of persons

notwithstanding their personal involvement in the incriminated acts, has not been deleted (Section 21(a–b) FCR).

This leads to the general problem of collective punishment, which includes, besides arrest and detention, the possibilities of confiscation of property, prevention from entering other territories of Pakistan (Section 21 FCR) and fines on communities (Articles 22 and 23 FCR). Collective punishment may be imposed without any process at all and is thus in sharp violation of Article 14 of the ICCPR and Articles 10 and 10A of the Constitution, which will be now discussed.

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals, and persons accused of a crime have the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Constitution is less specific and generally states, in its Article 10A, that "a person shall be entitled to a fair trial and due process". The equality clause in Article 25 of the Constitution has already been cited above. With a view to the FCR, the discrepancies are obvious: firstly, Pakistani citizens in FATA are treated differently from their fellow citizens in other parts of the country, as the Penal Code and the Criminal Procedure are not applied when they are criminally prosecuted. Secondly, the hearings of the political agents, other state officials and FCR *jirgas* are not public, which means that societal control of their decisions is made difficult, if not impossible. The ICCPR recognizes reasons for excluding the public from court hearings, such as the protection of public order or national security, but such exceptions must be justified in every single case, which is not done in FCR proceedings. Thirdly, the political agents are appointed civil servants and FCR *jirgas* are formed by them; neither qualify as independent tribunals. The impartiality of the FCR *jirgas* is also doubtful, if reports of their members acting according to family or clan interests are true.

Article 14(3)(c) of the ICCPR establishes the right to be tried without undue delay.[26] This requirement is not transposed into the FCR, which does not define a timeframe for the process. Only the time limits for appeal and review are mentioned in the regulation.

The possibility of adequate defence, which is promised in Article 14(3)(d) of the ICCPR and Articles 10(1) as well as 10A of the Constitution is problematic in an area where most residents are illiterate and few lawyers are available to support them. The state must ensure that such conditions are created. The right to receive legal assistance for free if the interests of justice so require – which is the case if the accused cannot defend himself alone because he is not able to understand the matter and its legal implications or he is threatened with severe

punishment – is not even mentioned in the FCR. The same is true of the right of the accused to examine, or have examined, the witnesses against him and to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him (Article 14(3)(e) ICCPR).

Last, but not least, of the most important trial guarantees, Article 14(5) of the ICCPR recognizes the right of a convicted person to have the judgement and sentence reviewed by a higher tribunal according to law. The FATA Tribunal was introduced in 1997 and through the FCR reform of 2011 it has gained further powers. But the main problem remains that both instances of appeal, i.e. the commissioners and judicial additional commissioners. as well as the FATA Tribunal, are appointed by the Governor of Khyber Pakhtunkhwa alone, and thus lack independence.

The only positive aspect of the FCR is that it does not provide for the death penalty, which may be imposed by other courts throughout Pakistan.

Thus, Pakistan is in violation of the ICCPR as long as the FCR is not suspended or its provisions are not aligned with those of the Covenant. If the Constitution was applied to FATA as a consequence of the facts that FATA is a territory of Pakistan, its residents are Pakistani citizens and the Constitution guarantees equal treatment of all citizens, the FCR could also not remain in force in its current form. Article 8 of the Constitution is clear about the legal consequences, stating that any law that is inconsistent with the fundamental rights conferred by the Constitution "shall, to the extent of such inconsistency, be void".

Article 8 equates "any custom or usage having the force of law" that are not in compliance with its fundamental rights guarantees with such laws. Here, the question arises of whether *riwaj* applied by the FCR *jirgas* may be deemed such "custom or usage". *Riwaj* is described as tribal custom, but it is not coherently applied. This leads to a low degree of legal certainty and predictability. However, a final answer to the question of whether *riwaj* qualifies as a custom or usage that is inconsistent with fundamental rights would need a more thorough analysis. As to the FCR, however, the dictum by the late Supreme Court Chief Justice Alvin Robert Cornelius of 1954 is still valid; he found that the regulation was "obnoxious to all recognized modern principles governing the dispensation of justice".[27]

Several courts have come to similar conclusions with regard to the constitutionality of the FCR. These decisions are not related to FATA, where the higher judiciary has no authority, but to Balochistan and the former North-West Frontier Province, where the FCR was at least

temporarily applied.[28] Here, citizens could challenge the regulation before courts.

In *Toti Khan* v. *District Magistrate Sibi and Ziarat*, the accused defendant challenged the provision enabling the political agent to refer his case to a hand-picked FCR *jirga* before the Supreme Court in 1957. Chief Justice Sheikh Abdur Rehman came to the conclusion that these provisions were "*ex-facie* discriminatory" and in violation of the Constitution of 1956.[29] However, soon after this decision, martial law was imposed in the country and the Constitution abrogated.

Two decades later, further ground-breaking rulings were given by Pakistani higher judiciary. In a case of an arrest, the Supreme Court held in 1975 that the high courts are authorized to intervene in the tribal areas of Khyber Pakhtunkhwa.[30] In 1979, the FCR was challenged before the Shariat Bench of the Balochistan High Court. The Court found that the FCR was contrary to the injunctions of the Muslim faith, since

> Islam invalidates discriminations on the basis of caste, creed, colour, social status, place of birth or of residence, and any other considerations of the like nature, as its basic principle is "adal" [...]. In particular, "Justice" as far as it concerns the decision of cases, both of civil and criminal nature, has to be administered on the basis of equality with all religiousness [...]. The basic principle with regard to justice is to be found in the Qur'anic direction [...]. "Justice strictosensu" which in turn, is not possible without "just" laws, and one of the qualifications of "just" law is its universality, or oneness for all, without any kind of discrimination; for discriminations, on any account, much less for administrative or political conveniences, offend against the principle of "Justice" [...]. Accordingly all discriminatory law are against the injunctions of Islam.[31]

Many later court decisions have referred to these decisions. In a case over an arbitrary arrest, the judges of the Peshawar High Court gave expression to their indignation:

> In such circumstances, we cannot sit with our eyes shut, with our hands folded and with our legs crossed, so as to acquiesce to what is illegal altogether on the face of it.[32]

A legal analysis of the system of dispute resolution in FATA would not be complete without looking at the traditional *jirga*, which takes many

decisions that infringe the rights of individuals. Among others, perpetrators may be punished and expelled from their communities. Even the rights of uninvolved persons can be severely affected by *jirga* decisions, particularly of girls or young women, who may be forcibly married as part of punishment for a murder or other severe crime committed by male relatives and in order to avoid blood feud between the families.[33]

From the perspective of constitutional and international law, traditional *jirgas* cannot be considered courts or tribunals. They are societal actors; as such, they are not entitled to impose any punishment or take any other measure that infringes the rights of an individual. From a state perspective, such decisions and acts can only be considered crimes. In 2013, the Supreme Court heard a case brought before it by the Human Rights Commission where a Baloch *jirga* declared a man accused of a killing guilty, announced that he had to give three females from his family in marriage and pay one million rupees in compensation to the rival party, and decreed he would be killed if he failed to implement its orders. The Supreme Court declared both the *jirga* procedure and the forced marriage as inhuman practices, and directed the Inspector Generals of Police of all Provinces and Islamabad to ensure that no *jirga* or other traditional institution were held in such matters. Nine *jirga* members were arrested and prosecution against them initiated.[34] Such operations against a traditional *jirga* could also take place in FATA, and the state would even be obliged to act if *jirga* members violated criminal law. However, it must be borne in mind that the Pakistan Penal Code and the Criminal Procedure that were applied against the *jirga* members in the above case are not in force in FATA.

3.2. Popular Acceptance or Not? Views of the Citizens of FATA

The legitimacy of a system of dispute resolution does not only depend on its legality, which was discussed above from the perspective of constitutional and international law. Popular acceptance, which mostly depends on the fairness and efficiency of a dispute resolution system as well as their compliance with local and social values (Guzmán 2003: 53), matters as well. The views of FATA residents of the hybrid system of dispute resolution in their area, with the state and FCR *jirgas* on the one side and traditional *jirgas* on the other, have been systematically analysed by the independent Pakistani organization Community Appraisal & Motivation Programme (CAMP).

In a survey with 1500 interviewees, 571 persons who had experienced disputes reported where they had first taken their dispute for resolution. In was found that 43.1 per cent had taken their disputes to a

jirga; 30.8 per cent to the local leaders (*maliks* or *khans*); and 10.3 per cent to a *mullah* or *imam*. Only 6.3 per cent of respondents said that they had brought their disputes before courts in the adjoining districts of Khyber Pakhtunkhwa; and 5.0 per cent had accessed Taliban courts. Obviously, the respondents were far more satisfied with the informal actors – *jirgas*, local leaders and religious authorities – than with the state and militants as the providers of dispute resolution (Shinwari 2011: 81–3).

Qaumi jirga proved to be the best accepted form of *jirga* in the view of the people of FATA: over two-thirds of the respondents (70.5 per cent) identified *qaumi jirga* as the most trusted one. 70.1 per cent of the respondents found that the *qaumi jirgas* acted fairly, while only 18.1 per cent believed that *qaumi jirgas* were unfair. In contrast, only 31.3 per cent perceived FCR *jirgas* as fair, and 44.3 per cent regarded them as unfair. However, the respondents were more in favour of the FCR *jirgas* settling criminal cases as compared to civil cases, while the traditional *jirgas* were believed to be more effective in resolving civil cases as opposed to criminal cases.

The main reasons for popular dissatisfaction with FCR *jirgas* were alleged corruption and lack of independence and impartiality. In fact, 41.6 per cent of the respondents believed that the more powerful party of a dispute influenced FCR *jirga* decisions. Most of them stated that this included intimidation. Almost one-third of all interviewees thought that FCR *jirga* members take bribes; and more than two-fifths agreed that they are influenced by the political administration (Shinwari 2011: 86–9).

With regard to the law applied, 57.4 per cent supported the idea that FCR *jirgas* should continue to be conducted under local *riwaj*. However, almost 69.5 per cent demanded that it should be combined with Islamic law. Interestingly, 60.3 per cent of interviewees disagreed with the statement "*jirga* violates basic human rights"; 63.6 per cent with the statement "*jirga* violates minorities' rights"; and even 71.7 per cent with the statement "*jirga* violates women's rights". This result strongly differs from the legal analysis above and the views of most Pakistani judges and lawyers. Reasons might be widespread ignorance of the concept of human rights and conservative views with regard to the treatment of alleged criminals and the role of women in society. Further survey findings reveal that FATA residents seem to like *jirgas* for their ability to prevent conflict and restore social order after serious disruptions of peace, with a clear preference of the traditional *jirga* over the FCR *jirga* (Shinwari 2011: 90–4).

3.3. Doing *Jirga* as a Protected Indigenous Legal Tradition?

There is yet another possible perspective on the question of legitimacy of traditional *jirgas* in FATA. A significant recent development in international law and politics has been the tendency towards the protection of cultural, social and political rights of indigenous peoples. This includes a trend towards the official recognition of non-state laws and justice institutions, which many consider a core aspect of self-government (Tamanaha 2015). Two documents are of particular relevance: the United Nations Declaration on the Rights of Indigenous Peoples of September 2007 and the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels of September 2012.

The Declaration on the Rights of Indigenous Peoples was debated for over 20 years prior to being adopted by the General Assembly. Pakistan voted in favour of the Declaration both in the UN Council on Human Rights in 2006 and in the General Assembly in 2007. The document emphasizes the rights of indigenous peoples to live in dignity, to maintain and strengthen their own institutions, cultures and traditions, and to pursue their self-determined development, in keeping with their own needs and aspirations.

At this point the question arises of whether the tribal Pakhtuns of FATA can be considered an indigenous people. This term is generally defined as being the original inhabitants of a land that has been invaded and colonized by outsiders.[35] These criteria might be true for the Pakhtuns, even though they have never been fully colonized by the British or any other foreign power. According to the definition proposed by José Martinez Cobo, an indigenous people must be a minority on their ancestral territories,[36] which the Pakhtuns certainly are not. Differently, the International Labour Organization (ILO) in its Convention No. 169 on Indigenous and Tribal Peoples of June 1989 defines indigenous peoples as:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations
(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present

> state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, spiritual, cultural and political characteristics and institutions,

and adds that:

> [s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply.

Thus, if the tribal Pakhtuns consider themselves an indigenous people[37] – which the authors cannot judge – they seem to meet both alternatives of the ILO definition. But both definitions have been much criticized because they tend to exclude peoples that consider themselves "indigenous".

The question of whether the Pakhtuns of FATA may be considered an indigenous people must therefore remain unanswered in this chapter. Nonetheless the provisions of the UN Declaration on the Rights of Indigenous Peoples with regard to traditional forms of dispute resolution are of relevance. Article 34 states that

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 46 of the Declaration adds that limitations to the rights of indigenous peoples must "be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society". This careful balancing of the rights of indigenous peoples to practise their own forms of dispute resolution with individual human rights and fundamental freedoms as well as democratic values offers orientation with regard to the difficult question of how to harmonize these practices with state law and how to integrate them into, or link them with, state justice systems.

Being a UN declaration, the document is not legally binding and thus does not create new rights. But it reflects the commitment of the supporting states to abide by it and provides guidance for the interpretation of the rights enshrined in other international human rights instruments.

Some states, such as Bolivia, went even further and decided to enforce the Declaration as domestic law, in order to provide it with binding force (Ossio Bustillos 2015: 115). Pakistan has not done so.

The Declaration of the General Assembly's High-level Meeting on the Rule of Law is not binding either, but it further enhances the legitimacy of traditional forms of dispute resolution by acknowledging that "informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone [...] should enjoy full and equal access to these justice mechanisms". The Declaration was adopted by common consent and thus supported by all present states, including Pakistan.

Even though both UN documents may not be directly applicable, they are not irrelevant. Firstly, they give evidence of international, almost global consent that traditional forms of dispute resolution shall be preserved and strengthened not only as an integral part of the culture of indigenous groups, but also in order to improve access to justice in areas where state institutions are ineffective or absent. This international consent generally strengthens the legitimacy of traditional approaches towards justice as far as they comply with human rights standards and other, internationally recognized values. Secondly, states that have endorsed these documents in the General Assembly of the United Nations – as Pakistan did – have to align their laws and policies accordingly if they do not want to create doubt over their credibility in the international as well as the domestic arena.

Thus, the two UN documents do not directly strengthen the legitimacy of traditional *jirgas* in FATA – also because these, as explained above, tend to violate human rights. They do, however, exert influence on future state policies in this matter: any reform of the justice system of FATA must take the existence of traditional *jirgas* into consideration and may not aim at merely abolishing them; otherwise, Pakistan would contradict its voluntary and express support to the UN Declaration on the Rights of Indigenous Peoples and the Declaration of the High-level Meeting on the Rule of Law at the National and International Levels.

4. Conclusion

Almost six decades after Pakistan's independence, the system of governance and dispute resolution that was introduced by the British Raj in the lands along the border to Afghanistan remains in force in FATA. The mostly Pakhtun inhabitants of FATA are still subject to the application of the FCR. Where the authority of the state ends, their fate lies

in the hands of the traditional *jirgas* that operate without any public control.

The FCR system stands in blatant violation of constitutional and international law, particularly the ICCPR. From a legal point of view, it needs to be abolished or brought into full compliance with the Constitution, the ICCPR and other international instruments with the effect that Pakistani citizens residing in FATA have the same rights as their fellow citizens in other parts of the country.

The fact that the existing systems of dispute resolution enjoy some local acceptance among FATA citizens can be explained by the lack of better alternatives and low awareness of human rights. Surveys have revealed that FATA citizens are very sceptical of the political administration as well as the FCR *jirgas*, and they clearly prefer traditional *jirgas*. Taking this in consideration, the legitimacy of the FCR system is even weaker.

However, traditional *jirgas* tend to violate human rights and the state is obliged to protect its citizens in such cases. Meanwhile, banning traditional *jirgas* does not seem realistic if one takes the unrelenting persistence of Pakhtun customs and traditions over centuries, if not millennia, into account. Besides, Pakistan would contradict her own support of the UN Declaration on the Rights of Indigenous Peoples of 2007 and the Declaration of the High-level Meeting on the Rule of Law at the National and International Levels of 2012.

The concept of restorative justice could offer a new path. In a reformed justice system, traditional *jirgas* could find a positive role as pre-trial mediators if human rights are not violated and access to court is guaranteed for any party of a conflict that is not satisfied with a *jirga* decision. The principles of restorative justice that were adopted by the UN Economical and Social Council in 2002 provide guidance for the transformation of the traditional systems of dispute resolution and their linking with state justice systems. Efforts of this kind have already been successful in countries as different as Australia, Bangladesh, Canada and Uganda (Sullivan and Tifft, 2008; Johnstone and Van Ness, 2007).

Meanwhile, in FATA, opposition to the system of dispute resolution and governance in general is getting stronger, particularly because the FCR reforms of 2011 have not yet been effectively implemented. Many sides are calling for change, including political parties that have formed umbrella organizations such as the All FATA Political Parties Alliance (AFPPA), the FATA Reforms Committee, members of the National Assembly who stem from FATA, lawyers' associations such as the FATA Lawyers Forum (FLF), and numerous civil society organizations, intellectuals and

journalists. With regard to the justice system, four main demands shared by most of them can be identified: effective protection of fundamental rights of FATA citizens as guaranteed in the Constitution and human rights instruments, separation of the judiciary from the executive, the extension of the jurisdiction of superior courts to FATA and a fully independent FATA Tribunal.[38] Due to their presence, further steps for reform may be hoped for.

Notes

We are very grateful to Justice Nasir-ul-Mulk of the Supreme Court of Pakistan and Malik Abdul Razaq of the Zakha Khel Clan, Afridi Tribe, Khyber Agency (FATA) for the contribution of valuable ideas to this chapter. Nevertheless, we remain solely responsible for our viewpoints and errors.

1. Ali distinguished between three types of zones: directly administered, protected and inaccessible/unadministered (Ali 1999: 185).
2. *Pakhtunwali* is usually blended with *riwaj* (customs) and Islamic Sharia. However, the element of Sharia is quite low.
3. Some, but rather few, tribes have codified their *riwaj* in written form.
4. Also called Pashtuns or Pathans. Important tribes are the Orakzai, Afridis, Mahsuds, Bangash and Wazirs.
5. Estimated figure. According to the 1998 census, 97,3 per cent of FATA's 3,176.000 inhabitants were living in rural areas and 2,7 per cent in the five urban centres of the area (Population Census Organization 2001).
6. Frontier regions are Peshawar, Kohat, Bannu, Lakki Marwat, Tank and Dera Ismail Khan.
7. Agencies are Bajaur, Mohmand, Khyber, Orakzai, Kurram, North Waziristan and South Waziristan.
8. The FCR throughout mentions the district coordination officers besides the political agents. In this chapter, they are not mentioned but are also meant when political agents are mentioned.
9. The first of six main categories of support staff are the assistant political agents. Second, the *tehsildars* are administrative heads of sub-districts; *naib tehsildars* are their deputies. The *tehsildars* wields police, civil and revenue powers. Levies are selected on merit, and trained and armed by the government. *Khassadars* are raised on the basis of a tribal quota system; their tasks include guarding roads, providing safe passage to travellers and ensuring communication between the state and tribes. The scouts of the Frontier Corps are trained and armed to defend the state border, provide security to the lines of communication, recover kidnapped persons and other tasks. Finally, the Frontier Constabulary is a sort of police force with special tasks such guarding the inter-tribal borders.
10. The allowances paid to tribal notables and informers of the political agents are particularly problematic.
11. Before this date, only tribal notables (*maliks* and *lungi* holders) were allowed to vote.
12. Also called *maraka*.

13. These *jirgas* are also called *olasi jirgas*, i.e. popular jirgas.
14. Ali (1999: 184) explains the contemporary *moajib* system in detail.
15. Extra-Provincial Jurisdiction Order, Section 4 paragraph 2.
16. The provisions of Section 247 that relate to PATA, the *provincially* administered tribal areas, which consist of districts of the provinces of Khyber Pakhtunkhwa and Balochistan, are not cited here.
17. The term was substituted for "parliament" in 1985.
18. Prior to 2011, the FCR was amended in 1928, 1937, 1938, 1947, 1962, 1963, 1995, 1997, 1998 and 2000, but the substance and structure of the regulation remained essentially the same. In April 1962, the regulation was extended to the areas of Shahdadkot, Sukkur, Sargodha and Shikarpur but soon again withdrawn.
19. A commission headed by Sheikh Abdul Hamid in 1958 examined the judicial system in the Quetta and Kalat Divisions and recommended.

    > the withdrawal of the Frontier Crimes Regulation, 1901, in the two divisions, and the abolition of special areas (now Tribal Areas) but if for any reason, it was found necessary to retain these special areas, then the jurisdiction of the High Court and the Supreme Court should be extended to these areas.

    A commission headed by Justice S.A. Rahman of the Supreme Court of Pakistan in 1958 also found that, in view of the peculiar conditions prevailing in the tribal areas, the special laws might continue to operate; the ultimate aim, however, should be to replace these laws by ordinary laws. The Commission proposed amendments to the existing *jirga* system. (Bangash 1996: 323). Another commission headed by Mr Justice Hamood-ur-Rehman, Supreme Court Judge and Chief Justice of Pakistan (1967–1970), found that the laws and regulation applied in the tribal areas.

    > have neither expedited the trial of criminal cases nor have they proved a deterrent in the matter of serious crime. They have not inspired public confidence and it can hardly be said that they have advanced the cause of substantial justice. On the contrary, they are open to serious objections, on principle, as being in violation of the doctrine of equality before law, and constituting the usurpation of the judicial power by the executive at all levels. Apart from this, there are strong intransigent feeling and intrinsic hatred about the FCR, 1901, which had been applied to these areas, with ambivalent intentions of taming the tribal people. They had the effect of supplanting the regular procedures of ordinary court and thus violation the basic human right.
    >
    > (Bangash 1996: 324)

20. Another example is criminal law in Myanmar, where the Criminal Law of 1860 and the Code of Criminal Procedure of 1898 are still applied.
21. M. Ilyas Khan, *Taleban set up "Pakistan courts"*, BBC News, 15 July 2008, http://news.bbc.co.uk/2/hi/south_asia/7508008.stm (date accessed 10 July 2014).
22. There are no scientific analyses of the Taliban courts in FATA but there are on those in Afghanistan (Franco et al. 2013).
23. For a list of attacks on *jirgas* and elders, see http://www.satp.org/ satporgtp/countries/pakistan/database/Tribalelders.htm (date accessed 18 June 2014).

24. See, for example, the report in *The Guardian* of 16 June 2014, "Pakistan's parallel justice system proves Taliban are 'out-governing' the state", http://www.theguardian.com/ world/2014/jun/16/pakistan-parallel-justice-system-waziristan-taliban-outgoverning-state (date accessed 14 July 2014).
25. Article 2 of the ICCPR reads:

    (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
    (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

    See also Nowak (2005: 27–62).
26. The Constitution of Pakistan does not expressly mention this right.
27. *Sumunder Khan v. The Crown* (PLD 1954 FC 228). Interestingly, Cornelius qualifies decisions under the FCR as administrative, not judicial acts. In his minority view in *Dosso v. The State* (PLD 1958 SC 533) he found that the application of the FCR was based on intelligible differentia and not discriminatory, and that trial by *jirga* was trial by one's peers, akin to juries.
28. The Regulation was applied in the North-West Frontier Province until 1956 and in Balochistan until 1973.
29. The decision *Toti Khan v. District Magistrate Sibi and Ziarat* of (PLD 1957 W.P. Quetta 1) was mainly based on Articles 4 and 5 of the Constitution of 1956. In *Khan Abdul Akbar Khan v. Deputy Commissioner Peshawar* of the same year (PLD 1954 Peshawar 100), Justice Kayani came to a similar conclusion and noted that the fact that FCR provisions were only applicable to Pathans (Pakhtuns) and Balochis amounted to "racial discrimination".
30. *Chaudhry Manzoor Elahi v. Federation of Pakistan* (PLD 1975 Supreme Court 66).
31. *Muhammad Ishaque Khosti v. Government of Baluchistan* (PLD 1979 Shariat Bench of the High Court of Balochistan 217 at 222, 224–26).
32. *Murad Ali v. Assistant Political Agent, Landi Kotal* (2009 YLR Peshawar 2497).
33. This practice is called *swara* or *vana*.
34. "Breaking traditions: Supreme Court wants checks on Vani customs" *The Express Tribune*, 12 July 2013, http://tribune.com.pk/story/575909/breaking-traditions-supreme-court-wants-checks-on-vani-customs/ (date accessed 18 June 2014) The Baloch *jirga* had forced the man to prove his innocence by remaining under water until a man walked 60 steps, a practice called *doobah*, which does not exist among Pakhtuns. The accused could not hold his breath long enough. At the time of writing, news about the results of the criminal prosecution of the *jirga* members was not available.
35. The definition of the term "indigenous people" is strongly debated (for details, see International Law Association 2010: 6ff.).

36. José R. Martinez Cobo, Special Rapporteur, appointed by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, defined indigenous communities, peoples and nations as being those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present of one of or more of the following factors:

    (a) Occupation of ancestral lands, or at least part of them
    (b) Common ancestry with the original occupants of these lands
    (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)
    (d) Language (whether used as the only language, as the mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)
    (e) Residence in certain parts of the country, or in certain regions of the world
    (f) Other relevant factors.

    Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations, Final Report, UN ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Document E/CN.4/Sub.2/1986/7Add.1–4 (1986) (by Jose Martinez-Cobo).
37. The Pakhtuns of FATA seem to lack the organizational structure that would be necessary, for instance, to discuss such a matter and possibly to join the Asia Indigenous Peoples' Act (see aippnet.org). Ali and Rehman do not seem to class Pakhtuns as indigenous; they do expressly stated that, for example, the Kalash people are indigenous (Ali and Rehman 2001: 79).
38. See, for example, the FATA Reforms News Update editions of November 2013–February 2014 and April–May 2014 that are posted at www.slideshare.net (date accessed 3 July 2014).

3

South Sudan: Linking the Chiefs' Judicial Authority and the Statutory Court System

Katharina Diehl, Ruben Madol Arol and Simone Malz

1. Introduction: Traditional authorities and customary law in South Sudan

South Sudan is a country in transition that is still struggling with the consequences of the 50-year civil war with its northern neighbour and resurging internal ethnic conflict. The most recent ethnic clashes in South Sudan are evidence that one of the main challenges for the newly independent country in its continued effort in state building is the implementation of a rule-of-law strategy that meets modern human rights standards and incorporates the legal traditions of the many ethnic groups. In a country as ethnically diverse as South Sudan, with its more than 60 different ethnic groups,[1] the role of the different traditional justice systems that exist alongside a weak statutory legal system cannot be underestimated.

This country study therefore examines the role and functions of the customary law courts, called chief courts,[2] and analyses their relationship with statutory courts to explain the significance of customary law for the establishment of sustainable peace and a political system based on the rule of law in South Sudan.

One main factor that contributes to the prominent role of customary law in the current pluralistic legal system of the country is the historic development of the judicial system in South Sudan. Even though chief courts are not actually an indigenous judicial institution, but a product of colonial rule (Leonardi et al. 2010: 19), they enjoy overall acceptance and have been integrated into the indigenous political structures. Given the absence of state institutions during the civil war, local authorities

have been the main decision-makers in most areas of the country for the last five decades and thus enjoy strong support among the South Sudanese population.

Reflecting the fundamental cultural values of the people of South Sudan, the customary law system is also considered an integral element of the South Sudanese identity (Deng 2011: 285) – an identity the South Sudanese fought for in the civil war against the government of Sudan. The current legal structure of South Sudan under its transitional constitution therefore recognizes the important role of customary law and traditional authorities.

At the same time, however, the country lacks an adequate framework for a transparent judicial system linking statutory courts and customary law courts. A critical review of the appellate structure, procedural inter-linkages and substantial intersections between the statutory court system and the customary law courts helps to shed light on how the two systems work and interact in practice.

As the existing shortcomings and gaps in the current legal framework cause legal uncertainty, the relationship between customary law and the statutory system should be addressed in upcoming legal reforms. In particular, the on-going process of making a new permanent constitution could provide a solution for the current unsatisfactory situation. Considering the immense practical and political relevance of customary law courts in the post-conflict situation of South Sudan, the constitutional process could provide an opportunity to reach a consensus on the future role of customary law in a judicial system based on human rights and rule-of-law principles.

1.1. Traditional authorities and the establishment of chiefdoms during colonial rule

The South Sudanese consider customary law and traditional authorities as an integral part of their identity. The cultural heritage enshrined in the customary court system can only be understood in the light of the historical implications during the last century. Even though chief courts in their contemporary form are a product of the former British colonial regime, chiefs have proved to be important mediators between state interests and the needs of the local population.

Prior to British colonial rule, tribal communities in South Sudan were organized in a large variety of differing political systems. Some communities, such as the Shilluk, Anyuak and Azande were traditionally organized as hereditary kingdoms governed centrally by sovereign rulers who appointed other traditional sub-leaders. In contrast, the Dinka,

Nuer and Bari developed decentralized systems, in which leaders were chosen mainly according to personal attributes and skills. Decision-making powers were usually divided between a spiritual-religious and a secular sphere in decentralized systems, whereas in kingdoms traditional leaders often combined both functions.[3]

Due to a lack of personnel, the British colonial regime had to rely on compliant Sudanese leaders to maintain their administrative system of indirect rule. Although British officials headed the political hierarchy and local administration, Sudanese traditional leaders remained the main decision-makers on the local level. However, the diffuse and complex political systems of most Sudanese tribes, which often involved more than one decision-maker, were not suited for this purpose. Ignoring the principles of separation of powers, the British thus established a new system of local leadership vested with judicial and administrative powers.

To accommodate the Arab and African heritages, the British divided Sudan into two different administrative units within a centralized state governed from Khartoum. While the local administration in the North was based on Sharia law, a special "southern policy" was implemented in the southern parts of the British-Egyptian Condominium, which was treated as a "closed district".[4] There the British introduced a new system of native administration based on customary law with chiefs tasked with judicial and administrative powers on the local level under the Chiefs' Courts Ordinance of 1931.[5]

The Chiefs' Courts Ordinance established a three-tier hierarchy of chief courts,[6] but remained silent on the selection of chiefs. In general, the British officers preferred to appoint secular leaders as chiefs, often selecting young men educated in missions who were considered to be familiar with the government's positions and reliant on the government (Leonardi 2007: 544). Spiritual leaders, in contrast, were seen as a possible source of resistance as their base of power was too independent from the British regime. Nevertheless, in some cases the colonial officers selected these leaders to integrate them into the government patronage networks (Leonardi and Jalil 2011: 111).

The British, for the first time, established a legal pluralistic framework combining three different legal systems in Sudan: the chief courts in South Sudan applying "native law"[7]; the sheikh courts applying Sharia law in Northern Sudan; and the formal courts applying English common law throughout the country (Deng 2011: 287). The colonial regime thus introduced a pluralistic judicial system in Sudan that recognized customs as a source of law.[8]

At the same time the implementation of the southern policy and the resulting differences in the legal system reinforced cultural differences between the North and the South, thus contributing to the causes of the later conflict between the two parts of the country.

1.2. The challenges of traditional authorities in Southern Sudan after the independence of Sudan in 1964

The administrative segregation left an insuperable split between Northern and Southern Sudan when the country became independent in 1964. As a result, Southern Sudan fought for autonomy in the First Sudanese Civil War, which came to an end with the Addis Ababa Agreement of 1972, finally granting a semi-autonomous status and a regional government to the South (Johnson 2003: 40).

During the same time, Jaafer Nimeri, who had gained power after a military putsch in 1969, started to implement reforms to combat regionalism and tribalism. Attempting to disempower local leaders who were seen as collaborators of the former colonial regime, he issued the People's Local Government Act in 1971, which repealed the Chiefs' Courts Ordinance of 1931. The Act established a new hierarchy of regional, district and area councils as well as magistrate benches, which took over judicial and administrative functions on the local level all over Sudan (Biel 2004: 41).

However, Nimeri's reforms were not successful, as the people of South Sudan did not accept the new institutions. Judgements issued by the new benches generated an increasing number of appeals to higher courts, with which the magistrates could not cope. Therefore, judicial authority had to be transferred back to former chiefs in 1976, whereas administrative competences often remained in the hands of government officials (Leonardi and Jalil 2011: 114).

The chief court system, however, was under threat again a few years later. Following a programme of Arabization and Islamization all over Sudan, Nimeri introduced the so-called September Laws in 1983, imposing Sharia law on all the people of Sudan (Deng 2011: 288). The Islamization of the judicial system followed, and common-law trained judges were dismissed "in the public interest" and were replaced by judges familiar with Sharia law (Deng 2010: 7ff.). At the same time, the regional government of Southern Sudan was dissolved. The consequence was the Second Sudanese Civil War, in which South Sudanese fought for their right to practise their own "cultural heritage enshrined in customary law" (Mennen 2010: 239).

1.3. The role of traditional authorities during the civil wars

The long-lasting civil war was considered to be a war of cultures by many South Sudanese (Deng 2011: 293).[9] The Sudan People's Liberation Movement/Army (SPLM/A) under the command of John Garang de Mabior fought for a secular legal system recognizing cultural differences in the country and reducing the marginalization of rural regions in the South (cf. Deng 2011: 289; Woodward 2011: 92).

In the course of the war, rule-of-law principles were completely disregarded. A series of military regimes imposed continuous states of emergency, suspended or abolished various constitutions, shut down media stations and dissolved the bar association. Hundreds of judges were dismissed and security organs were given extensive powers (Deng 2011: 290).

Numerous South Sudanese, even entire communities, were displaced in the course of the atrocities of the war. Due to the lack of documentation during the war, it is difficult to deduce whether there were any functioning local institutions in the liberated areas governed by the SPLM/A (Rolandsen 2005: 64). In general, there were no stable state institutions as the leadership of the SPLM/A was continuously contested (Mijak 2004: 91; Johnson 2003: 91ff.).

During the civil war, the Political Military High Command (PMHC) of the SPLM/A, which met three times between 1991 and 1994, made significant political decisions in the South (Rolandsen 2005: 54). The first of these meetings produced the Torit Resolutions, which included regulations on local government reforms and established autonomous local administrative units at the levels of "county", "*payam*" and "village" (Garang 1992 (1987): 282ff.),[10] thus recognizing the need for an effective local administration.

Nevertheless, traditional authorities were facing serious challenges during the war. In line with the militarization of society, chief courts were often transformed into military courts (Leonardi 2007: 540). Many chiefs who had been living archives of the collective cultural memory were killed or had to flee, leaving behind vast gaps in traditional authority structures. At the same time, new forms of leadership emerged as traditional leaders were replaced by military commanders or were compelled to undergo military training to guarantee the execution of military orders (Unger and Wils 2007: 19ff.).

It took the SPLM/A until the second half of the 1990s to realize that the legitimization of their power in the local communities could not be achieved without the cooperation of local chiefs. Despite the

militarization during the civil war, chief courts had been able to maintain a level of trust and accountability among the population (Mennen 2010: 239). In addition, a wave of cultural revivalism arose in South Sudan (Deng 2011: 312), and traditional conflict resolution mechanisms were often seen as the most appropriate means of settling disputes in the communities. The SPLM/A commanders consequently accepted chiefs as civil administrators and judges (Leonardi 2007: 538) although they imposed strict control mechanisms and sanctions in cases of opposing behaviour (Unger and Wils 2007: 19).

1.4. The role of customary law since the signing of the Comprehensive Peace Agreement in 2005

The civil war between Northern and Southern Sudan ended with the signing of the Comprehensive Peace Agreement (CPA) in 2005. The Interim Constitution of Sudan of 2005 (INC) established a united Sudan while granting a semi-autonomous status to the South. It restricted the application of Sharia law to the North of Sudan and established the region of Southern Sudan with its own regional constitution, the Interim Constitution of Southern Sudan of 2005 (ICSS), its own executive, the Government of Southern Sudan (GoSS), and its own legislature and judiciary. At the same time, it granted the South the right to self-determination in the form of a referendum at the end of an interim period of six years (Section 2(5) CPA, Machakos Protocol and Articles 219 and 221 INC).

Due to weak administrative and judicial institutions after the war, the GoSS relied on traditional justice systems to administer justice at the local level (Deng 2013: 12). Therefore both the INC and the ICSS (Article 5(2) INC and Article 5(c) ICSS)[11] strengthened the role of customary law as an important source of legislation (Deng 2011: 285). In addition, they acknowledged the role of traditional authorities at a constitutional level in Southern Sudan (Article 5 ICSS). Important reforms were initiated to strengthen local government and traditional authorities, such as the enactment of the Local Government Act in 2009, which remains the basis of local government institutions in South Sudan today.[12]

After independence, South Sudan started a process of developing a new permanent constitution. In January 2012, a National Constitutional Review Commission was established,[13] which is responsible for conducting nation-wide public information and civic education programmes to collect suggestions and views for a permanent constitution. However, due to lack of financial resources, the constitutional process

has been delayed,[14] and the deadline has been adjourned indefinitely. It thus remains to be seen how the role of customary law will be regulated in the future constitution.

2. Contemporary legal framework of the judicial system

In the referendum conducted at the end of the interim period in 2011, 98.83 per cent of the South Sudanese citizens voted for secession. Consequently, South Sudan became independent on 9 July 2011, and the Transitional Constitution of the Republic of South Sudan of 2011 (TCSS) simultaneously entered into force. Building largely on the structures established by the ICSS, the TCSS commits to a "decentralized democratic multi-party system of government" (Preamble of the TCSS, Article 1(4) TCSS) and retains the division of the country into ten states with their own state constitutions.[15] It commits to the rule of law and establishes a system of government based on the principle of separation of powers with an independent judiciary (Preamble, Articles 51, 122(2) and 124 TCSS). With regard to customary law, it emphasizes its importance and, similar to its predecessors, stipulates "custom and traditions of the people" as one of the sources of legislation in South Sudan (Article 5(c) TCSS, Article 5(c) ICSS).

2.1. The judiciary

Despite this decentralized system of government, the judiciary is centralized under the TCSS,[16] and all courts are supervised by the Chief Justice (Article 127(1)(a) TCSS). The Supreme Court is the highest court of the country. It determines constitutional matters (Article 126(2)(a) TCSS), examines the constitutionality of laws, interprets laws and decides conflicts of jurisdiction; at the same time, it is the final judicial instance in all civil, criminal and customary law matters (Article 126(2) TCSS and Section 11(1) Judiciary Act of 2008). The TCSS also foresees courts of appeal, high courts, county courts and additional lower courts that can be established by law (Article 123 TCSS). Currently, three courts of appeal are located in different areas of South Sudan and decide appeals from the lower courts.[17] In addition to that, high courts have been established as the highest courts on the state level and County Courts of First Grade have been established in the counties (Section 14 Judiciary Act of 2008). Moreover, the Judiciary Act of 2008 provides for *payam* courts at the local level as the lowest judicial instance (Article 131 TCSS and Section 16 Judiciary Act of 2008).

2.2. Customary law courts

Alongside the statutory court system, traditional authorities and customary law courts all over South Sudan adjudicate cases relying on different tribal justice systems and customary laws. The administration of customary law and the functioning and composition of its institutions are not regulated by the TCSS nor in the Judiciary Act, which does not even mention the customary courts. Customary courts are administered on the basis of the Local Government Act of 2009,[18] which has, however, scarcely been implemented to date.

2.3. Customary law courts as local government institutions

The Local Government Act defines local government institutions as "community governments, which exist at the levels of government closest to the people in the states" (Section 6(3) Local Government Act of 2009). It establishes institutions at three levels: in rural areas at the county, *payam* and *boma* levels,[19] and in urban areas at the city/municipal/town and block/quarter council levels (Article 166(5) TCSS; Section 16(2) and (3) Local Government Act of 2009).[20] Traditional authority systems are to be incorporated into these different tiers of local government (Section 19 Local Government Act of 2009 in line with Article 166(6)(i) TCSS).

The Act establishes a hierarchy of customary law courts as the judiciary branch of these local government institutions. It establishes A-courts of first instance or executive chief's courts at the level of *bomas*; B-courts or regional courts on the level of *payams*; C-courts on the level of counties; and town bench courts in the urban areas (Sections 97, 99(1), 100(1), 101(1) and 102 Local Government Act of 2009).[21] Appeals are possible against decisions of the A-courts to the B-courts, and from there to the C-courts (Sections 99(7)(a), 100(3) and 101(6) Local Government Act of 2009). Decisions of the C-courts or the town bench courts may be appealed to the County Court Judge of First Grade (Sections 99(3) and 102(2) Local Government Act of 2009).

The highest authority regarding customary law in the county is the Customary Law Council, which is responsible for monitoring the administration of customary law and selecting all staff of customary law courts (Sections 93, 95 and 96 Local Government Act of 2009).[22] It is thus not the judiciary that is in charge of the administration of customary law. Rather, the Local Government Act of 2009 sets up a separate system of customary law courts as part of local government institutions, which "have judicial competence to adjudicate customary disputes and make judgements in accordance with the customs, traditions, norms

and ethics of the communities" (Section 98(1) Local Government Act of 2009).

On the national level, the Local Government Board – founded by the President – has the constitutional mandate "to review the local government system and recommend the necessary policy guidelines and action in accordance with the decentralized structure enshrined in the TCSS" (Article 166(3) TCSS). In this function, it also develops uniform standards for the establishment and functioning of local government institutions, among them the customary law courts (Section 123(2) Local Government Act of 2009).

2.4. Composition of customary law courts

Customary law courts are traditionally composed of chiefs. The status of the members of the court depends on the court hierarchy: whereas A-courts or executive chief's courts are composed of a chief as chairperson and additional sub-chiefs as members, B-courts or regional courts have a head chief as chairperson and chiefs as members and C-courts are chaired by the paramount chief with the head chiefs of the regional courts as members (Sections 99, 100 and 101 Local Government Act of 2009).[23]

Chieftainship is traditionally reserved for men. Although the Local Government Act of 2009 requires a 25 per cent quota in customary law councils (Section 96(3) Local Government Act of 2009)[24] and stipulates the objective "to ensure gender mainstreaming in local government" (Section 12(8) Local Government Act of 2009), female members of customary law courts are still very rare.[25] In particular, considering the disadvantages women still face in many traditional systems, the involvement of women in court procedures could help to reduce unequal treatment and give women a voice in customary systems (Deng 2013: 48).

2.5. Selection of chiefs

The criteria for the selection of chiefs have been changing continually during the last century (see section 2 above). In particular, the replacement of traditional authorities by democratically elected authorities and military leaders during the past decades has repeatedly resulted in a competition over legitimacy between authorities, each claiming power on a different basis.

The Local Government Act of 2009 contains only vague rules for the selection of chiefs. It stipulates that a committee presided over by the county court judge and appointed by the county commissioner is

responsible for conducting the elections or supervising the selection of chiefs. Chiefs in general can be either selected "according to traditional practices" or can be elected (Section 117(1) Local Government Act of 2009). In the case of an election, executive chiefs are to be elected by the sub-chiefs and all the people who are eligible to vote in their jurisdiction, including women; head chiefs are to be elected by the executive chiefs; and sub-chiefs and paramount chiefs are to be elected by the head chiefs and chiefs in the county (Sections 105(5) and (6), 117 Local Government Act of 2009).

These rather vague regulations can be interpreted rather flexibly, and in many rural areas the responsible authorities do not even know about these legal provisions (Leonardi et al. 2010: 24; Santschi 2010: 110). As a result, authority tends to be negotiated locally, and the selection of leaders follows different principles: while some positions are hereditary, other leaders are selected democratically or are appointed by official authorities (Höhne 2008: 14).

In most communities, chieftainship still is, or has become, hereditary along patrilineal lines as authority is linked to spiritual powers of the ancestors. In this context, the hereditary line usually does not include only the chiefs' children, but a larger pool of family members from among whom a chief is selected in a consensus-finding process (Deng 2011: 301).

Since the 1970s, some communities have elected their leaders. Here again, the procedures used to elect leaders differ greatly. A common practice is the public lining-up of candidates with their supporters gathering behind them. This practice, however, continues to rely on hereditary lines as the winning candidates usually belong to the families of chiefs (Leonardi et al. 2010: 24). Classic democratic elections are not common among South Sudanese communities as they are considered to contradict the traditional principle of consensus. The people who voted against them would not accept democratically elected chiefs; consequently, they would not be able to reconcile communities after conflicts (Deng 2011: 301).

In other communities, leading elders or other prominent figures of the chiefdom, e.g. church leaders or teachers, shortlist candidates, from whom the county commissioner then selects a winning candidate. In other cases, county commissioners simply appoint their preferred chief candidate. The affected communities, however, often react with passive resistance or outright opposition to these appointees, who may not be familiar with the local traditions. Thus, most of the commissioners recognize the need to consult with communities before selection processes (Leonardi et al. 2010: 24).

As a consequence of the different selection processes and the historical implications, indigenous forms of local authority related to both spiritual power and secular leadership continue to exist in parallel (Leonardi et al. 2010: 23). In some areas both forms of authority even seem to be "complementary and independent rather than competitive". For example, spiritual leaders may still perform sacrifices, take oaths and act as mediators in conflicts. In contrast, the "government" chiefs act as more formal judicial authorities that render binding judgements in cases of conflict (Wassara 2007: 8).

2.6. Jurisdiction

According to the Local Government Act of 2009, customary law courts "have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities" (Section 98(1) Local Government Act of 2009). Regarding subject-matter jurisdiction, there is no specialization, so customary courts deal with disputes in all areas of law. All cases are dealt with under the same body of law, with the same procedures and fundamental ethos (Springvale Monash Legal Service 2008: 39).

Most customary law cases focus on family law, including marriage, divorce, inheritance, child custody and gender-based violence, but customary courts also play a major role in conflicts over land and property (Sections 99(7), 100(4), 101(2) and 102(3) Local Government Act of 2009; Mennen 2010: 239). According to the law, criminal cases are not to be adjudicated by customary law courts, unless a case interfaces with customary law and is referred to the court by a competent statutory court (Section 98(2) Local Government Act of 2009).[26]

As most tribal groups are governed by their own body of customary laws, courts have to determine which customary laws to apply. The competence of customary law courts is mainly based on personal jurisdiction, which is determined by tribal membership. As the core element of tribal identity is ancestry and not territorial homeland, "personal jurisdiction is determined first, territorial second" (Mennen 2010: 245). Thus, courts usually apply the set of laws that belong to the community that administers the court (*lex fori*), unless this principle has been repealed by prior agreement (Danne 2004: 204). Insofar as some laws clearly refer only to members of a specific ethnic group, they can only be applied to individuals of that group.[27] Cases that involve more than one set of customary law should be decided by the C-court according to the Local Government Act.[28]

3. Decision-making in the customary court system

While the Local Government Act of 2009 regulates the establishment and composition of customary law courts, it is silent on the procedural rules that are to be applied. Thus, mainly customary law, which may differ greatly between the different traditional justice systems in the country, regulates the decision-making process in chief courts.

There are, however, underlying principles that are common to most of these systems. A closer look at the cultural background and the traditional role of the chiefs in South Sudanese society may thus help to better understand the role and functioning of traditional justice in South Sudan.

3.1. The normative basis of decision-making and the role of the chiefs

Traditional conflict resolution in South Sudan is based on mediation to restore social harmony and consensus within the respective community, rather than on strict legality or punishment (Springvale Monash Legal Service 2008: 39). Instead of retribution, compensation is a common instrument to restore the social equilibrium and harmony (Deng 2011: 297). The fundamental idea is to balance out the negative effects within the affected group and re-establish the status quo before the conflict. The ethos of customary conflict-resolution mechanisms is thus reconciliation (Springvale Monash Legal Service 2008: 39). To facilitate reconciliatory justice, customary law is and has to be applied flexibly, and each decision has to consider the particular context of each case (Unger and Wils 2010: 20). This individual and flexible approach to decision-making also makes it possible to find solutions in cross-tribal disputes, as it allows for compromise and can thus accommodate different sets of rules.

The role of the chiefs in this context is to mediate between the conflicting parties through neutral and fair arbitration. As mediators they usually do not limit themselves to indigenous conflict-resolution mechanisms, but rather apply a hybrid legal system, which is an amalgamation of local judicial principles and statutory laws (Leonardi 2011: 111ff.). Nevertheless, statutory laws are considered underlying principles rather than strict rules (Leonardi et al. 2010: 28).

3.2. Procedures

Rules of procedure are uncomplicated in order to facilitate a fast and effective settlement of disputes. There are usually no pre-trial

proceedings; individuals can address the court directly by means of an oral or written petition. Once the president of the court has determined there is a case and has questioned the litigant, the case is admitted and summonses are issued to the defendant and the witnesses.[29]

To allow for transparency and community participation, trials are held in public.[30] During the trial, chiefs act as both advocate and arbiter, as lawyers are not allowed (Jok et al. 2004: 42). In line with the principle of collective solidarity and responsibility, a suit or a case is usually not raised by or against an individual, but rather by or against the whole family or clan.[31] Therefore, representatives of the family contest the case before court.[32] It is the chiefs' function to investigate, while the community members present the public's opinion. In addition, there is a master of ceremonies who administers the trial, regulates the discussion and translates between the different local languages and colloquial Arabic if necessary.[33]

As the legal systems are mainly based on oral cultures, evidence is gathered primarily in the form of witness statements. In case of contradicting depositions, litigants can prove their honesty by taking an oath.[34] After both the plaintiff and the defendant state their case and the witnesses are heard, all present judges deliver their judgement – starting with the least senior one (Deng 2010: 25ff.). Decisions are reached either by consensus or by majority (including the chairperson of the court). If no consensus can be reached and the chairperson supports the minority, the court session is adjourned to give the panel the opportunity to deliberate and deliver their judgement at another public gathering (Makec 1988: 238).

3.3. Judgements

As stated above, the main objective of customary justice is reconciliation and compensation. In general, retributive punishments such as imprisonment or the death penalty are not common, as they are considered to hinder reconciliation rather than facilitate it. As such punishments diminish the local workforce, they also impose costs on the community. By punishing the individual alone, such sanctions also fail to address community and family responsibilities for the act (Jok et al. 2004: 39).

The "currency" in which compensation is paid, however, varies considerably. In cattle-raising communities, cattle are often paid as compensation; whereas in agricultural communities, compensation can include tools, weapons, beads or modern currencies (Jok et al. 2004: 21).[35]

Nevertheless, in the aftermath of the civil war, customs enshrining restorative justice seem to have been replaced, and retributive

punishments, such as imprisonment, corporal punishment or monetary penalties, have become more common due to the militarization of society (Mennen 2010: 230, 240ff.).

3.4. Common cases

As cattle-raising is the main economic activity of most South Sudanese communities, many cases are linked to this issue. Especially during the dry season, conflicts over water access and grazing rights are quite common as pastoral communities struggle for scarce grazing grounds and water resources. Disputes over land ownership and land use resulting from displacement during the civil war and the wave of returnees since the signing of the CPA have escalated, as have conflicts over competences between local authority leaders (Wassara 2007: 6).

While these inter-communal conflicts are typically presented before the courts, family affairs are traditionally considered internal problems that should be solved by autonomous decision-making processes outside the courts. Only in major conflicts, when no consensus can be reached within the family, are cases presented to a judicial authority (Deng 2010: 16ff.). Such cases often encompass family disputes such as blood feuds, divorce suits or disputes related to inheritance. As a result of the displacement during the years of civil war, disputes over the remarriage of partners separated during the war are also quite common (Wassara 2007: 6).

4. Interaction of statutory courts and customary courts – two parallel systems or two branches of the same legal structure?

While statutory courts and customary law courts exist in parallel, and in theory apply different sets of laws, there are various linkages between the two systems. Even though they are established as two distinct judicial systems, procedural and substantial provisions tie them together and ensure that, on the one hand, customary law is applied within the limitations of the constitution, while on the other hand, customs and traditions of the peoples of South Sudan are respected as an integral part of the South Sudanese culture and identity.

On the national level, there are several institutions that are supposed to develop policy guidelines and reforms regarding local government and customary law, but none of these reforms have been implemented and information is difficult to obtain.[36] Even though the State Ministries of Local Government and Law Enforcement are supposed to develop

frameworks "for effective coordination of Local Government Councils affairs between the State Ministries and Local Authorities and between the Local Authorities and Local Community institutions" (Section 125 Local Government Act of 2009), there are no generally binding standards. In practice, the relationship between the two systems thus often remains unclear and is usually handled rather flexibly.

4.1. The courts

At the *boma* level, customary law courts are generally the only judicial instance available, but at the *payam* and county levels, there are both customary law courts as well as statutory courts.[37] However, due to the lack of trained legal personnel, it is still impossible to establish state courts in all *payams* and counties.[38] Thus, statutory courts are often still almost non-existent on the local level,[39] and even where statutory courts do exist, they are usually seriously understaffed. As a consequence, it is often difficult to draw a line between the two court systems in practice. In particular at the *payam* level, statutory and customary law courts are often combined and function as one hybrid court.[40] Similarly, at the county level, the court hierarchy in practice does not implement the legal provisions. As only very few county courts have been established so far, there are often intermediate courts that rely more on written documents like case registers and law books than on customary law courts, and they are often headed by literate laymen who might even have undergone paralegal training. But in all other aspects these courts cannot be distinguished from lower chief courts (Leonardi 2010: 34ff.).

While customary law courts decide cases independently from the judiciary, the parties involved have the possibility of appeal, at first within the hierarchy of customary law courts, and then from the highest customary law court in the county: the C-court, where decisions can be appealed to the county court judge as part of the statutory judiciary (Section 99(3) Local Government Act of 2009).[41] However, apart from stipulating the mere possibility of appeals, the Local Government Act of 2009 remains silent about the procedures to be used for those appeals. As the Code of Civil Procedure Act of 2007 does not contain any provisions about appeals from customary law courts either, there is currently no comprehensive set of rules regulating this important linkage between the two systems. Presently, appeals reaching statutory courts are governed by the rules of procedure provided under the Civil Procedure Act of 2007 and the Code of Criminal Procedure Act of 2008 (Table 3.1).

Table 3.1 The judicial system in South Sudan

Rules → / **Admin. unit ↓**	**TCSS 2011 (Article 123)**	**Judiciary Act of 2008 (for statuary courts) Sections 7, 17**	**Local Government Act of 2009 (for customary courts) Sections 97(1), 99(4), 100(5), 101(3)**		**Judicial hierarchy in practice**
National	Supreme Court	Supreme Court	–		Supreme Court
Regional	Court of Appeal	Court of Appeal	–		Court of Appeal
State	High courts	High Court	–		High Court
County	County courts	County courts: three grades of judges	C-courts: paramount chief (chairperson), head chiefs (members)		County court, in some cases intermediate courts
Payam	[lower levels to be determined by law]	*Payam* courts: three grades of judges	B-courts/regional courts: head chief (chairperson), chiefs (members)		Hybrid *payam* courts/paramount chief's court
Boma		[other courts or tribunals . . . in accordance with the provisions of the ICSS or any other law]	A-courts/chief courts: chief (chairperson), sub-chiefs (members)	Town bench court (town chief)	Chief courts Sub-chief courts (village): headman courts (clan, neighbourhood)

4.2. Jurisdiction and applicable law

According to the Local Government Act of 2009, the jurisdiction of customary law courts is limited to customary disputes (see section 2.6 above). In practice, however, jurisdiction of customary law courts and statutory courts often overlap. As a consequence, people can choose whether they want to appear before a customary law court or a statutory judge (Leonardi et al. 2010: 52ff.). This overlap even exists with regard to criminal cases, although the Local Government Act of 2009 stipulates that customary courts have no competence to adjudicate criminal cases unless a competent statutory court refers the case.[42] In practice, however, customary law courts, due to the limited reach of the statutory court system, adjudicate criminal cases and even capital offences such as murder (Deng 2013: 26, 27).[43] In fact, customary law also plays an important role in statutory courts. The TCSS stipulates that customary law is to be applied by the courts (Article 167(3) TCSS, Article 174(3) ICSS). Accordingly, Section 6(a) of the Code of Civil Procedure Act of 2007 determines that in civil proceedings concerning

> successions, inheritance, legacies, gifts, marriage, divorce, or family relations, the rule for decision of such questions shall be [...] any custom applicable to the parties concerned; provided that, it is not contrary to justice, equity or good conscience and has not been by this, or any other enactment, altered or abolished or has not been declared void by the decision of a competent court.[44]

Considering the additional possibility to appeal decisions of customary law courts to county courts, it becomes evident that judges need to have basic knowledge of the existing customary law in their county and have to be able to apply it to a certain degree. In particular in the lower courts, judges regularly refer to customary law; county judges even estimate the number of cases involving customary law in their courts at between 70 and 90 per cent (Leonardi et al. 2010: 36ff.).

On the other hand, even in customary law courts in remote rural areas, the influence of principles that originated in state institutions is evident as the customary laws that are applied in the courts have been a product of the intense interaction between state institutions and traditional authorities since the establishment of chief courts under colonial rule.[45]

4.3. Customary law and human rights

While the application of customary law emphasizes the acceptance of the country's different indigenous cultures after decades of heteronomy,

it also risks perpetuating discriminatory practices and customs that may contradict the human rights enshrined in the TCSS.[46] In particular, the promotion of human rights on the one hand and the international support of arrangements empowering traditional authorities on the other can thus be seen as contradictory (Leonardi 2007: 538). In particular, the lack of rule-of-law principles in customary law is often criticized in this regard, as the flexible approach of most customary law systems can lead to different verdicts in seemingly identical cases, even in the same court (Mennen 2010: 238).[47] In addition, many customs and traditions are based on patriarchal power structures and are discriminatory against women and girls.[48]

In response to these objections, the Local Government Act of 2009 tasks the Customary Law Council, as highest customary law authority in the county, with guaranteeing "that the freedoms and rights enshrined in the Constitutions are upheld and respected in the Customary Law Courts" (Section 96(4) Local Government Act of 2009). In addition, the Act contains several provisions explicitly protecting women's rights to prevent any discrimination due to tradition.[49] At the same time, the TCSS establishes a clear hierarchy of laws regarding the application of customary law. Accordingly, "courts shall apply customary law subject to this Constitution and the law" (Article 167(3) TCSS, Article 174(3) ICSS), meaning that traditional authority is bound by the constitution and the law like any other state institution. In particular, the human rights and fundamental freedoms enshrined in the constitution thus take precedence in case of any conflict with customary law. In practice, however, constitutional and statutory protections are still rarely invoked (Deng 2013: 47).

4.4. Judgements and enforcement

Customary law is usually based on compensatory justice (see section 4.3 above). The TCSS tries to accommodate this principle by requiring courts to recognize and enforce voluntary reconciliation agreements between parties (Article 122(5)(d) TCSS, Article 126(5)(d) ICSS), and even South Sudanese criminal law accommodates customary law principles by combining compensation and punitive penalties.[50] While compensatory agreements are often well-suited to maintaining harmony within the communities, and effectively limiting the potential for revenge killings, the state has to balance these advantages with the necessity to prevent such agreements from coming at the expense of the rights of innocent third parties such as women or girls. In addition, the state has to be careful that the possibility of such agreements is not seen as

an incentive for premeditated murder by persons who can pay the compensation (Deng 2013: 27). Therefore, some scholars suggest that the prosecution and punishment of major crimes should not be subject to reconciliatory agreements between the parties, but should be decided by statutory courts only.[51]

The different legal principles and punishments in statutory and customary law courts, together with the absence of a clear appellate hierarchy, encourage litigants to choose the court they consider to be most advantageous for them. While the possibility to petition different forums allows for flexible solutions, it also creates the risk that litigation will be heard before different forums, preventing the parties involved from obtaining legal certainty about their cases (Deng 2013: 18).

In addition, the enforcement of judicial remedies is difficult. In particular at the *payam* and *boma* levels, enforcement gaps due to the lack of police and financial resources as well as the proliferation of small arms undermine both the local statutory and the customary systems.[52]

5. Conclusion: The political relevance of chief courts in the post-conflict situation of South Sudan

Even though the relationship between the statutory and customary justice systems is ambiguous, most South Sudanese consider customary law and traditions as a fundamental component of their cultural identity. South Sudanese claim that the right to practise the cultural heritage enshrined in customary law was an integral part of their struggle for independence. By combining customary norms with statutory laws, customary law courts furthermore played an important role in filling the vacuum of post-conflict dispute resolution. The recognition of the importance of customary law in the constitution is thus of enormous political importance in the country.[53]

Nevertheless, customary justice is not undisputed in South Sudan. Education, Christianization and migration during the past decades have exposed communities to new social and cultural values. As a result, traditional stratifications based on ancestry, gender and age are challenged openly. Moreover, changes in society, such as alternative sources of income, have a deep impact on interdependencies and traditional obligations among the population, and the traditional division of labour has been called into question during the years of civil war and displacement. In particular, women, who during the war had to take over tasks that traditionally had been assigned to men, are challenging customs that deprive them of certain rights (Deng 2011: 309). Similarly,

international authors and civil society groups criticize the fact that customary laws often fail to conform to international human rights norms (see also section 4.3 above).

In spite of these changes, the practical importance of customary law in the country is undeniable. During half a century of civil war, state institutions were not able to govern the vast areas of Sudan, and bureaucratic and physical infrastructures collapsed. During that time, 80 per cent of the population was governed by customary law. To date it is the most frequently used source of law in South Sudan, and the significance of the corresponding traditional authorities cannot be overestimated. Even though the status of some chiefs was affected by the war, they still represent the cultural values of their tribes and enjoy overall acceptance. Thus, they are still considered to be the key traditional authorities in South Sudan (Hinz 2009: 5).

Moreover, customary law courts are a practical necessity in a country with seriously limited resources. Due to the lack of trained judicial personnel, infrastructure and resources, statutory courts have yet to be established in many rural areas where customary law courts remain the only forum that allows people access to justice.

Even where litigants can easily access statutory courts, they often prefer to settle their disputes in customary law courts as proceedings are less expensive and are able to process cases faster than statutory courts.[54] In addition, decisions of customary law courts are usually based on local norms and are thus easier to understand and to accept, as they are culturally familiar to the population (Deng 2013: 23).

Thus, for both political as well as practical reasons, traditional authorities and customary law are central to the endeavour to establish an effective and stable judicial system in South Sudan. However, further reforms of the legal system are necessary to adjust to the new post-conflict situation and to ensure the compatibility of South Sudanese customs and traditions with the legal and judicial system of the country (Deng 2011: 312). Major concerns among South Sudanese in this regard are the need for a clear definition of the relationship between customary courts and statutory courts, as well as easy access to justice (Cook et al. 2013: 7). As of July 2014, the Local Government Act has not yet been effectively implemented and remains disputed.[55] It remains to be seen if this process will be continued after the civil war that began in 2013, or if relations between courts and chiefs will be reshuffled once again.

In addition to legal reforms, the country urgently needs adequate infrastructure in rural areas to guarantee access to justice as well as effective enforcement of judicial decisions. The establishment of

special tribunals, including mobile courts, could help to mitigate the most pressing problems in this regard, as could the development of employment incentives to encourage judges to remain in rural areas.[56]

In the light of the ethnic conflicts that escalated after independence the importance of such reforms becomes even more apparent. By clarifying the boundaries of jurisdiction and providing solutions for cross-jurisdictional disputes within a pluralistic legal system, such reforms could help to accommodate people's values and to deliver justice directly rooted in local communities.

For sustainable peace to have a chance the country thus needs to establish a legal and judicial framework that strengthens the rule of law, supports the resolution of internal conflicts and recognizes the cultural history of its different ethnic groups, while ensuring the full protection of the rights and freedoms guaranteed by international law and the TCSS. Considering the current instability of the country this remains to be a key challenge for the young state.

Notes

1. Important ethnic groups are, among others, the Dinka, Kakwa, Bari, Azande, Shilluk, Kuku, Murle, Mandari, Didinga, Ndogo, Bviri, Lndi, Anuak, Bongo, Lango, Dungotona and Acholi. See Central Intelligence Agency, The World Factbook, South Sudan, https://www.cia.gov/library/publications/the-world-factbook/geos/od.html (date accessed 29 August 2013).
2. "Chief courts" is the term introduced by the British regime in 1931 (see Chapter 2.1), but general terminology has undergone changes under different governments. Terms like "people's local courts", "native courts" and "rural courts" are still in use (Leonardi et al. 2010: 19). To avoid confusion the authors use the official term "chief court" throughout the chapter.
3. The traditional political hierarchy of the Bari, for example, was traditionally headed by the rainmakers (Bari: *matat lo kudo*), who were believed to have power over the rain. Their role is described as mostly ritualistic. While they also had non-ritualistic responsibilities in their function as judges of appeal, those rights were seldom exercised. Instead, the district chief (*bongun*) did most of the political and judicial work. He settled disputes in the district, was responsible for land distribution and was the war-leader. He also settled conflicts between clan leaders (*temeji*) (Simonse 1992: 7). Kingdoms can be found, for instance, among the Luo people (Wassara 2007: 9), the Azande and the Shilluk (Höhne 2008: 14).
4. The Passports and Permits Ordinance excluded Muslim merchants from access to the region and fostered the cultural division of both parts of the country. See Collins 2010 (2008): 40, 54.
5. Section 3 of the Chiefs Courts Ordinance 1931: "Chief includes tribal or village headman or any native exercising with the approval of the Government tribal or customary powers over a tribe or section of tribe or over a village or

district." Section 4 of the Native Courts Ordinance 1932: "Sheikh includes any tribal or territorial chief vested with authority over a tribe or section of tribe, or over any district or part of a district or over a village."

6. Section 4(1) of the Ordinance established three types of chiefs' courts, including (a) a chief sitting alone, (b) a chief as president sitting with members and (c) a special court. Section 5(1) states that courts under (a) and (b) shall be established by means of a warrant under the hand of the Chief Justice, courts mentioned under (c) were only established temporarily by the Governor in cases in which the accused was a chief, the accused and the complainant were subject to the jurisdiction of two different chiefs or in case the alleged offence was of such gravity that the jurisdiction of any ordinary court appeared to be insufficient (Section 8).
7. Section 7(1) of the Chiefs' Courts Ordinance 1931: "A Chief's Court shall administer (a) the native law and custom prevailing in the area over which the Court exercises its jurisdiction provided that such native law and custom is not contrary to justice, morality and order."
8. Section 5 Civil Justice Ordinance:

> Where in any suit or other proceeding in a civil Court any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, or the Constitution of wakfs, the rule of decision shall be: – (a) any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience.

9. Francis Dengquoting Deng Biong Mijak served as Chairman of the Customary Steering Committee.
10. Torit Resolution, No. 7 (published in Garang 1992: 282ff.). These three levels of local administration can also be found in the contemporary Local Government Act of 2009.
11. The ICSS is based on, and must comply with, the INC.
12. All laws that were passed during the Interim Period by the GoSS remain in force under the new Transitional Constitution of South Sudan, TCSS (Article 200 TCSS).
13. Presidential Decree No. 3/2012 for the Appointment of full-time and part-time members of the National Constitutional Review Commission (NCRC), 2012.
14. South Sudan Human Rights Society for Advocacy 2012. Human Rights Society calls for extension of the Constitutional Commission's mandate and urges for the amendment of the Constitution and resourcing of the commission, Press Release, http://www.sudantribune.com/spip.php?article44555 (date accessed 18 June 2014).
15. The state constitutions are to be in accordance with the TCSS. (Article 162(1) and (2) TCSS).
16. While the judiciary used to be decentralized as well under the ICSS, Article 126(2) of the ICSS, the TCSS attributes all competences regarding the judiciary to the national level, see Schedule A No. 8 of the TCSS.
17. One Court of Appeal is located in Upper Nile (based in Malakal), one in Equatoria (based in Juba) and one in Bahr el Ghazal (temporarily based in Rumbek). See Government of South Sudan, available at www.gurtong.net/

Governance/JudiciaryofSouthSudan/tabid/344/Default.aspx (date accessed 11 September 2013).

18. The Local Government Act of 2009 remains in force due to Article 200 of the TCSS. Even though the TCSS enumerates customary law as a state responsibility (Schedule B No. 42 TCSS), the national government has the power to establish uniform norms regarding matters enumerated in Schedule B (Schedule A No. 39 TCSS).
19. "*Payam*" can be translated as district, while "*boma*" means village in Dinka (Unger and Wils 2007: 13).
20. Section 17 of the Judiciary Act of 2008 foresees County Court Judges of First, Second and Third Grade.
21. There are, however, no customary law courts in cities and municipalities, Section 19(5) of the Local Government Act of 2009.
22. Only the chiefs are not selected by the Customary Law Council but are elected or selected according to Section 105 of the Local Government Act of 2009 (see also section 2.5).
23. Town bench courts in urban areas are composed like A-or B-courts, depending on their competences, Section 102 of the Local Government Act of 2009.
24. In addition, the TCSS stipulates a 25 per cent quota for women in all legislative and executive organs, Article 16(4)(a) of the TCSS.
25. The South Sudanese Law Society reports that a woman was recently appointed to a town chief court by the county commissioner in the County of Prior. Furthermore, a woman was appointed as a court member in the Shilluk kingdom in Upper Nile (Deng 2013: 48). Nevertheless, it remains to be seen whether these isolated cases can be considered a new trend.
26. These cases are then decided by the C-courts as highest customary law courts in the county, Section 99(7)(c) of the Local Government Act of 2009. Lower customary law courts have no criminal jurisdiction whatsoever.
27. For instance, the family laws of the Dinka (Makec 1988: 106).
28. Section 99(7)(b) Local Government Act of 2009 stipulates that the C-court has the "competence of deciding on cross cultural civil suits".
29. Failure to attend the trial at the specified time may result in arrest and seizure of property (Jok et al. 2004: 42).
30. Generally, large trees and open buildings serve as court rooms, giving large numbers of community members the opportunity to observe and comment (Jok et al. 2004: 42).
31. Section 108(1) of the Local Government Act: "The clan or neighbourhood shall be the family tree of all the families residing in the villages of a Boma or the residential areas of a Quarter Council."
32. Every member of the family is a party to the case, and is therefore entitled to attend the court hearing. Since it is fairly impossible that an entire family appears before the court, representatives are needed (Jok et al. 2004: 42).
33. In Dinka courts, this person is called *agamlong,* which literally means repeater of speech. He sums up, clarifies statements and maintains order during heated discussions. His function is probably an amalgamation of indigenous practices of conflict resolution and the translators introduced by the British regime (Leonardi et al. 2010: 32).

34. Oath-taking varies from court to court but is either done by swearing on the holy books of the Bible or the Qur'an or by holding or licking symbolic items that are associated with death, like hoes or spears. As lying or breaking the oath will cause harm to the swearing person or his relatives, it is an effective method in investigations (Leonardi et al. 2010: 32ff.).
35. In some cultures compensation might also encompass the exchange of women or young girls, but this practice is declining. The reason is that "successive governments have prohibited the practice and the Catholic Church, which is predominant in the area, condemns the practice and equates it with neo-slavery" (Unger and Wils 2010: 20).
36. The Local Government Board established in Article 166(3) of the TCSS has developed a work plan for the operationalization of the Local Government Act in consultation with the Local Government Recovery Programme of the United Nations Development Programme (UNDP-LGRP) and the German Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit, GTZ) (Klerk, Marianne de and Kuon Jacob 2009). A Scan of the Current State Affairs of Local Government in Southern Sudan, http://www.cbtf-southsudan.org/sites/default/files/a_scan_of_the_current_state_of_affairs_of_local_government_in_southern_sudan.pdf (date accessed 18 June 2014). The work plan was published on the official website of the South Sudanese government, http://www.goss-online.org/magnoliaPublic/en/Independant-Commissions-and-Chambers/Local-Government-Board-html (date accessed 12 September 2013), but information on the status of the still on-going process is lacking. In addition, a Customary Law Steering Committee was established in 2004 to investigate options in how far customary law could be incorporated into the statutory legal system, but there is no information about the status of this committee (Deng 2011: 318–20).
37. The lowest-level state court is established on the level of the *payam*, Article 123 of the TCSS, Sections 97–101 of the Local Government Act of 2009 and Section 7 of the Judiciary Act of 2008.
38. The Judiciary Act stipulates that every state judge "shall be a holder of at least LLB Degree or its equivalent qualification in law from a recognized university or higher institution of law", Section 20(c) of the Judiciary Act of 2008. As a result there is just one statutory judge per 100,000 people (Pimentel 2010: 16).
39. In the last years, just very few county courts have been established according to the South Sudan Law Society and still not a single *payam* court (Deng 2013: 18).
40. See also Leonardi et al. 2010: 20–2.
41. See also section 3.2.
42. In general people tend to opt for traditional authorities for dealing with disputes about marriage or sexual crimes while they prefer to address the courts for dealing with murder, theft, abduction and physical assault, see Deng 2013: 21, 70.
43. According to Section 12 of the Code of the Criminal Procedure Act of 2008, the high courts have original jurisdiction for all capital offenses.
44. It also states that in cases where the parties are Muslims, Sharia law is to be applied.

45. Chiefs' courts were originally established as government courts under colonial rule (Leonardi 2010: 26ff.).
46. See also the World Bank, *Strengthening Good Governance for Development Outcomes in Southern Sudan: Issues and Options*, supra, in Appendix III: 140.
47. The fact that customary law is usually not codified further contributes to the perception that there is no legal certainty.
48. Customary practices related to marital disputes and sexual crimes, such as forced marriage and the practice of requiring a rape victim to marry her rapist if he pays the bride price to her family, are certainly not in accordance with international human rights standards. The same is true of the use of women or girls as blood money as a traditional remedy for homicide. See in this regard Deng 2013: 26, 47.
49. For example, Section 110 of the Local Government Act of 2009 contains the obligation to "enact legislations to combat harmful customs and traditions which undermine the dignity and status of women" and stipulates that "women shall have the right to own property and share in the estate of their deceased husbands together with any surviving legal heirs of the deceased". These provisions are also contained in Article 16 of the TCSS. In addition Section 98(3)(a) of the Local Government Act of 2009 explicitly contains the principle of equality before the law (Article 14 TCSS) as a binding principle for customary law courts.
50. The South Sudanese Penal Code Act of 2008 allows the negotiation of blood money in murder cases decided by the High Court after the judge has found the accused guilty. In the case that the family of the victim opts for blood money, the accused can be sentenced to up to ten years of imprisonment, Section 206 of the Penal Code Act of 2008.
51. See in this regard Auer et al. 2011: 33.
52. Furthermore, the severely limited presence of policemen at the *payam* and *boma* levels, in combination with widespread corruption, alcoholism and abuse of power by members of the police, undermine the credibility of the statutory system and discourage people from addressing their complaints to the police. (Deng 2013: 30–4).
53. Former Chief Justice Ambrose Thiik stated in this regard that customary law "embodies much of what has been fought for these past twenty years" (Jok et al. 2004: 7).
54. In statutory court proceedings, lawyers have to be hired and court fees have to be paid. In contrast, proceedings in customary law courts are conducted without lawyers, and the fees are usually less expensive (Mennen 2010: 229).
55. Mainly civil society activists are criticizing the Local Governance Act, while judges demand its full implementation.
56. These are some of the measures that are recommended by the South Sudan Law Society (Deng 2013: 3ff.).

4

Ethiopia: Legal and Judicial Plurality and the Incorporation of Traditional Dispute Resolution Mechanisms within the State Justice System

Girmachew Alemu Aneme

1. Introduction

Even though Ethiopia is a country with many ethnic groups[1] with their own language, religion and cultural traditions, its long line of local rulers maintained a unitary administration subservient to their own political and economic interests. The last violent change of government occurred on 8 May 1991 as a result of an armed victory by the Ethiopian People's Revolutionary Democratic Front (EPRDF), which toppled the *Derg*[2] that presided over 17 years (1974–1991) of unitary rule characterized by serious human rights violations that constitute terror as a governmental policy.

The EPRDF singled out the lack of accommodation of ethnic and religious diversity as the most acute political problem that pushed the country and its people to civil war and underdevelopment. Hence, the promulgation of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution),[3] which established a federal system of government and recognized, *inter alia*, the right of every "nation, nationality and people" in Ethiopia to "a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits" (FDRE Constitution, Article 39(3)).

The recognition of the right to self-government of ethnic groups and the establishment of a federal system under the FDRE Constitution gave

rise to dual state justice systems at the federal and regional/state levels. Moreover, the FDRE Constitution recognized the application of religious and customary laws in personal and family cases. To add to an already diverse and complex legal system, the state justice system incorporates the traditional dispute resolution mechanism of *shimglina* to resolve various kinds of disputes. The second part of this chapter elucidates the plurality in laws and judicial institutions within the state system. The third part explains the incorporation and application of the *shimglina* traditional dispute resolution mechanism within the state justice system. The fourth part analyses the non-state justice systems. The fifth part offers a conclusion.

2. The state justice system

2.1. Formal laws

Federal laws

The FDRE consists of the federal government, two federal cities (Addis Ababa and Dire Dawa) and nine member states. The FDRE Constitution establishes a two-house parliament for the federal government: the House of Peoples' Representatives and the House of the Federation (FDRE Constitution, Article 53). The federal legislative authority is vested in the House of Peoples' Representatives, whose members are elected by a plurality of the votes cast in general elections every five years (FDRE Constitution, Article 54(1)). The House of Peoples' Representatives enacts laws on matters assigned to federal jurisdiction and ratify national policy standards (FDRE Constitution, Article 55; see Article 51 for the federal jurisdiction).

The Council of Ministers is vested with the highest federal executive authority. The Council of Ministers comprises the prime minister, the deputy prime minister, ministers and other members as may be determined by law. The Council of Ministers has the power to enact regulations based on the mandate vested in it by the House of Peoples' Representatives (FDRE Constitution, Article 76(13)). The City Councils of the federal towns of Addis Ababa and Dire Dawa also enact laws applicable in the two towns by virtue of power vested in them through parliamentary laws.[4]

State laws

The nine member states of the FDRE have legislative power over matters falling under state jurisdiction.[5] The nine member states of

the federation are the state of Tigray, the state of Afar, the state of Amhara, the state of Oromia, the state of Somalia, the state of Benshangul/Gumuz, the state of the Southern Nations, Nationalities and Peoples, the state of Gambela and the state of Harare People (FDRE Constitution, Article 47). Within their legislative mandate, the member states of the federation have the power to enact and execute state constitutions (FDRE Constitution, Article 50(5)). All member states of the federation have enacted their respective constitutions, which provide the details of the legislative, executive and judicial branch of state administration.[6]

2.2. Formal courts

The FDRE Constitution has established a dual judicial system with two parallel court structures: the federal and the state courts, each with its own independent structures and administrations (FDRE Constitution, Article 79 and Article 80). Apart from the federal and state courts, municipal towns under the federal and state governments establish municipal and social courts respectively. The following sections will briefly explain the four types of formal courts.

Federal courts

The federal courts are composed of the Federal Supreme Court that sits in Addis Ababa with national jurisdiction and the federal high courts and first-instance courts, which were, until recently, confined to the federal cities of Addis Ababa and Dire Dawa. In recent years, federal high courts have been established in five national states.[7] A federal court may hold circuit hearings at any place within a state or "area designated for its jurisdiction" if deemed "necessary for the efficient rendering of justice".[8] Each court has a civil, criminal and labour division with a presiding judge and two other judges in each division.

The Federal Supreme Court includes a cassation division with the power to review and overturn decisions issued by lower federal courts and state supreme courts containing fundamental errors of law. Judicial decisions of the Cassation Division of the Federal Supreme Court on the interpretation of laws are binding on federal as well as state courts.[9] It is worth noting that the power to interpret the FDRE Constitution and decide over constitutional disputes is given to the House of the Federation rather than courts of law.[10] The House of the Federation is the second or upper chamber at the federal level composed of representatives of nations, nationalities and peoples (FDRE Constitution, Article 61(1)). Each officially recognized ethno-national group is entitled to have one representative in the House of the Federation and

one extra representative for each million of its population (FDRE Constitution, Article 61(2)). Members of the House of the Federation are elected by the state councils in each regional state (FDRE Constitution, Article 61(3)).

State courts

The FDRE Constitution provides for the establishment of three levels of state courts: state supreme courts (which also incorporate a cassation bench to review fundamental errors of state law), state high courts, and state first-instance courts (FDRE Constitution, Article 78(3)). State supreme courts sit in the capital cities of the respective states and have final judicial authority over matters of state law and jurisdiction. State high courts sit in the zonal regions of states while state first-instance Courts sit at the lowest administrative levels of states.

The FDRE Constitution delegates to state supreme courts and state high courts the jurisdictions of federal high courts and federal first-instance courts respectively (FDRE Constitution, Article 78(2)). In order to guarantee the right of appeal of the parties to a case, decisions rendered by a state high court exercising the jurisdiction of a federal first-instance court are appealable to the state supreme court, while decisions rendered by a state supreme court on federal matters are appealable to the Federal Supreme Court (FDRE Constitution, Article 80(5) and (6)).

Municipal courts

Towns that are administered either by the federal government or state governments establish municipal courts. There are a lot of municipal courts at the federal and state levels.[11] Addis Ababa town, administered by the federal government, has established two levels of courts exercising municipal jurisdiction: first-instance and appellate municipal courts (Addis Ababa City Government Revised Charter Proclamation 311/2003, Article 39(1) and Article 43). There is no supreme court in the municipal system, although a cassation bench is included within the appellate court. Applications for cassation review of the appellate court decisions can be lodged at the Federal Supreme Court, which also decides jurisdictional conflicts between the town and federal courts (Addis Ababa City Government Revised Charter Proclamation 311/2003, Article 42). The Addis Ababa municipal courts have civil, criminal and petty offence jurisdiction.[12]

Social courts

Social courts are established at the *kebele*[13] level in both federal and state territories. The Addis Ababa City Charter established *kebele* social

courts (more than 200 *kebeles* exist in Addis Ababa) to hear property and monetary claims up to 5,000 birr. Social court decisions can be appealed to the first-instance municipal courts (Addis Ababa City Government Revised Charter Proclamation 311/2003, Article 50(3)). If there is a fundamental error of law in the decisions of the first-instance municipal courts on appeal from social courts, it can be a ground to lodge cassation before the Appellate Court of the City (Addis Ababa City Government Revised Charter Proclamation 311/2003, Article 50(4)). Some regional states have also established social courts that handle small claims and minor disputes.[14] Unlike other courts, social courts are allowed to deviate from formal procedural rules and apply ad hoc procedures in the process of settling disputes within their jurisdiction.

3. The incorporation of the traditional dispute resolution process of *shimglina* within the state justice system

3.1. The *shimglina* process of dispute resolution

The meaning of shimglina

Shimglina refers to the widely practised traditional process of dispute resolution in Ethiopia. Even though the word *shimglina* is an Amharic word for elderliness, it has now become a generic name that denotes similar traditional dispute resolution processes in communities all over Ethiopia. The main actors that carry out the *shimglina* process are the *shimagles* (elders in Amharic) who are selected by the parties to a dispute, or by their relatives on the basis of factors that include age, kinship, integrity, religious authority and knowledge of the custom of a given community (Alula Pankhurst and Getachew Assefa 2008: 50ff.).

There is no fixed number of *shimagles* that would be selected and the number may decrease or increase depending, *inter alia*, on the kind of case at hand and the availability of suitable individuals. Cases that involve all sorts of issues including personal and family disputes, criminal offences and inter-community conflicts are made subjects of a *shimglina* process of dispute resolution (Desalegn Chemeda Edosa et al. 2007). The *shimglina* process allows the parties to a dispute to present and explain their case and respond to questions from the *shimagles*. In most communities, the *shimglina* process is initiated by the parties to a dispute on an ad hoc basis (Alula Pankhurst and Getachew Assefa 2008: 64).

Objective and outcome of the shimglina *process*

The objective of the *shimglina* process is what is called *irq* (Amaharic for reconciliation) and forgiveness between parties in a dispute and the wider community rather than the assignment of individual responsibility for wrongs committed (Kelemework Tafere Reda 2011). As such the *shimagles* employ all kinds of procedures that allow them to bring the parties to some kind of settlement. Thus, a given *shimglina* process may exhibit a combination of "all qualities of what can otherwise in modern terms be offered by arbitration, conciliation, mediation, and compromise" (Fekadu Petros 2009).

Since the main objective of a *shimglina* process is reconciliation, the settlement issued by elders does not aim at financial compensation or criminal punishment akin to the modern justice system *per se*. The outcome of *shimglina* may range from apology in simple cases to monetary and other forms of compensation in serious cases such as homicide, all in a form of symbolic gesture of reconciliation and all involving some kind of customary ritual (Trarkegn Gebreyesus Kaba 2007). Enforcement of the decisions is effective because of the threat of social exclusion and public shaming (Trarkegn Gebreyesus Kaba 2007).

3.2. The incorporation of *shimglina* within the state justice system

The Ethiopian state justice system incorporates the traditional dispute resolution process of *shimglina* in relation to many kinds of disputes including personal, family, commercial and land disputes. It is worth noting the following points from the outset on the incorporation of *shimglina* in the official state justice system. Firstly, state laws do not always use the word *shimglina*. In many instances state laws use other Amharic terms and phrases to refer to the same process of traditional dispute resolution process. Secondly, state laws have added different procedural aspects to the traditional *shimglina* process. Nonetheless, the procedural rules do not change the essence of the process. Thirdly, the English version of the state laws that incorporate the *shimglina* process refer to modern concepts of dispute resolution mechanisms such as arbitration as equivalents to *shimglina*. The translation is misleading in so far as it uses English words and phrases that refer to processes that are conceptually different than *shimglina*. Thus, the explanation in subsequent sections uses the Amharic version of the laws and refers to *shimglina* or other traditional Amharic terms and phrases that are interchangeably used to refer to the process of *shimglina*. The following sections provide examples of instances of the incorporation of *shimglina* in the

state justice system. Because of the limitation in space and time, the explanation is focused on four selected laws of the state justice system: the Civil Code, the Family Code, the Labour law and the Rural Land Administration laws.

The Ethiopian Civil Code

(1) Irq: In its traditional sense, *irq (reconciliation)* is the outcome of a *shimglina* process that is aimed at bringing together the parties in dispute to restore their relation. Similarly, the Ethiopian Civil Code (Code) defines *irq* as a process where parties to a dispute entrust a third party with the mission of bringing them together for the purpose of reconciliation and if possible negotiating a settlement between them (Ethiopian Civil Code 1960, Article 3318(1)).[15] The third party *astaraki* (conciliator) is appointed by the parties in dispute or by an institution at the request of the parties on a voluntary basis and without mandatory remuneration except expenses incurred in the process (Ethiopian Civil Code 1960, Article 3318(2), Article 3323).

Irq can be carried out between parties as a first instance of dispute resolution process or between parties who have already instituted their dispute in a court of law (Ethiopian Civil Code 1960, Article 3318; Civil Procedure Code 1965, Article 274). In the latter case, the *irq* process can be initiated by the parties or by the court during the hearing or out of court (Ethiopian Civil Procedure Code 1965, Article 275(1)). Where the process ends with a positive result as explained below, it has the effect of terminating the court case upon the application of the parties (Ethiopian Civil Procedure Code 1965, Article 277(1)–(3)).

The Civil Code provides rules that govern the *irq* process. Firstly, the Code enumerates the duties of the parties to the *irq* process. Thus, the parties in the dispute are required to provide all information necessary for the performance of his or her duties and refrain from "any act that would make the conciliator's task more difficult or impossible" (Ethiopian Civil Code 1960, Article 3319). The Civil Code further declares that the parties cannot take their case to a court before a negative or positive outcome of the process of conciliation to which they have submitted themselves voluntarily (Ethiopian Civil Code 1960, Article 3321(1) and (3)). Secondly, the Civil Code provides that the conciliator has the duty to give the parties a chance to state their views and "draw up the terms of a compromise or, if none can be reached, a memorandum of non-conciliation" (Ethiopian Civil Code 1960, Article 3320). Moreover, the conciliator is duty bound to carry out the *irq* within the period of time fixed by the parties (Ethiopian Civil Code 1960, Article

3321(1)). Where the parties did not fix any time limit, the Code provides that the conciliator shall finish his or her work within six months from the date of his or her appointment (Ethiopian Civil Code 1960, Article 3321(1)). The *irq* process can end up in drawing a non-conciliation memorandum (a negative outcome) or it may end up in drawing a *gilgil* (see below) document (a positive outcome) (Ethiopian Civil Code 1960, Article 3320(2)).

(2) Gilgil: Where the outcome of the *irq* process is *gilgil,* its meaning and legal consequences are provided under Title XX, Chapter 1, Section 1 of the Civil Code. In a traditional sense, *gilgil* denotes a negotiated outcome of a dispute between two parties usually through a *shimglina* process. The Civil Code defines *gilgil*[16] as a mechanism where parties to a dispute "terminate an existing dispute" or prevent future dispute "through mutual concessions" (Ethiopian Civil Code 1960, Article 3307). In terms of format, a *gilgil* document drawn up as a result of the *irq* process should be made in writing and the parties to *gilgil* are bound by the terms only when they declare their acceptance in writing (for the contents of a *gilgil* document, see Article 276 of the Ethiopian Civil Procedure Code 1965).

Once a *gilgil* is properly drawn and accepted by the parties, it has "the force of res judicata without appeal" (Ethiopian Civil Code 1960, Article 3312(1)). This means the *gilgil* agreement that resulted from the *irq* process is taken as final and binding. The *gilgil* agreement can be invalidated only when there is a fundamental mistake (where for instance the agreement of one of the parties was based on a false document) or when there was a court judgement on the same issue that is subject of the *gilgil* and when such judgement was unknown to at least one of the parties (Ethiopian Civil Code 1960, Articles 3313 and 3314). The *gilgil* is considered *void ab initio* where it relates to a contractual agreement the object of which is contrary to the law or public morality (Ethiopian Civil Code 1960, Article 3316).

The Federal Revised Family Code

(1) Disputes arising out of marriage: The Federal Revised Family Code (Family Code) regulates the conclusion, effects and dissolution of marriage in territories accountable to the federal government. The Family Code proclaims that all disputes arising out of marriage shall be resolved through a *shimglina* process (Revised Family Code Proclamation 213/2000 (Revised Family Code), 4 July 2000, Article 118).[17] The *shimagles* (elders) running the process are elected by the spouses and are paid for their service (Revised Family Code, Article 118(1); Ethiopian Civil

Procedure Code 1965, Article 318(5)). The *shimglina* process to settle disputes arising out of marriage follows the rules under the Civil Procedure Code, which proclaims that the procedure of the *shimglina* process "shall, as near as may be, be the same as in a civil court" (Revised Family Code, Article 108; Ethiopian Civil Procedure Code1965, Article 317(1)). Thus, the spouses have, among other rights, the right to be heard and the right to produce evidence (Ethiopian Civil Procedure Code 1965, Article 317).

The Civil Procedure Code further proclaims that the *shimagles* should base their decision on the applicable law unless the parties made an agreement that allows them to decide the case based on equity (Ethiopian Civil Procedure Code 1965, Article 317(2)). The *shimagles* are required to pass their decision within the period fixed by the spouses and, when there is difference of opinions, on the basis of majority vote (Ethiopian Civil Procedure Code 1965, Article 318(1) and (3)). If one of the spouses is not satisfied with the decision of the *shimagles*, he or she can file an appeal to a court of law (Revised Family Code, Article 118(2); Ethiopian Civil Procedure Code 1965, Articles 350 and 352). The grounds of appeal include procedural irregularities, corruption in favour of one party, a mistake of law or facts, and personal interest of one of the *shimagles* in the subject matter of the dispute (Ethiopian Civil Procedure Code 1965, Article 351). The appellate court may amend, approve or reverse the decision of the *shimagles* (Revised Family Code, Article 118(3)).

(2) Petition for divorce: Another instance of the application of *shimglina* under the Revised Family Code is during divorce, which is one of the causes for dissolution of marriage (Revised Family Code, Article 75). A petition for divorce can be filed in a court of law by spouses jointly or individually (Revised Family Code, Article 81(1)). In such a case, the court has the mandate to request the spouses to settle their differences through a *shimglina* process on a voluntary basis. If the spouses agree to use *shimglina*, they are required to select the *shimagles* (elders) that would carry out the process and submit their names to the court within 15 days (Revised Family Code, Article 82(2) and Article 119(1)). The court is required to register the names of the *shimagles*, give them directions on how to carry out the *shimglina* process and instruct them to submit the result of the process within three months (Revised Family Code, Article 119(2)).[18]

The *shimglina* process may result in *irq,* which will have the effect of terminating the petition for divorce when approved by the court. The spouses may also fail to resolve their differences through the *shimglina*

process. In such a case, the court is required to accept the report of the *shimagles* and pronounce divorce within one month (Revised Family Code, Article 82(4)). The court may also request the *shimagles* to present their proposal on the conditions of the divorce if the spouses fail to agree on the conditions (Revised Family Code, Article 83(2)).

The Labour Proclamation

The Labour Proclamation 377/2003 (Labour Proclamation) recognizes and protects the rights of employees and employers and governs their relationship.[19] One of the objectives of the proclamation is the expeditious settlement of labour disputes (Labour Proclamation No. 377/2003, 26 February 2004, Preamble). Labour disputes include disputes between workers and employers over the application of laws, work rules and working conditions (Labour Proclamation No. 377/2003, Article 136(3)). The Labour Proclamation provides for a voluntary process of *shimglina* called *masmamat* (conciliation) between parties in a labour dispute (Labour Proclamation No. 377/2003, Article 136(1)). *Masmamat* is defined as a process aimed at "bringing the parties together and seeking to arrange between them voluntary settlement of a labour dispute which their own efforts alone do not produce" (Labour Proclamation No. 377/2003, Article 136(1)). The persons presiding over the *masmamat* process are individual(s) (*asmame* or *asmamewoch* – conciliator or conciliators respectively) selected by the parties or appointed by the Ministry of Labour and Social Affairs at the joint request of the parties (Labour Proclamation No. 377/2003, Article 136(1)).

There is no mandatory procedure that should be followed by the *asmame* in finding amicable settlement to labour disputes. The Labour Proclamation rather provides that the *asmame* "shall endeavour to bring about a settlement by all reasonable means as may seem appropriate to that end" (Labour Proclamation No. 377/2003, Article 142(2)). The *asmame* is expected to write a report of non-conciliation and distribute the same to the parties and the Ministry of Labour and Social Affairs, if he or she cannot find amicable settlement to a dispute within 30 days of submission by the parties (Labour Proclamation No. 377/2003, Article 142(3)).[20] Once a non-conciliation report is drawn, any of the parties can take the case to formal judicial organs.[21]

The rural land administration and use proclamations

The federal and regional rural land administration and use laws are additional examples of the incorporation of the traditional *shimglina* dispute resolution mechanism in the state justice system. The Federal

Rural Land Administration and Land Use Proclamation (Federal Proclamation), the Rural Land Administration and Use Proclamation of the Oromia National Regional State (Oromia Proclamation), the Revised Rural Land Administration and Use of the Amhara National Regional State (Amhara Proclamation) and the Rural Land Administration and Utilization Proclamation of the Southern Nations, Nationalities and Peoples National Regional State (Southern Nations Proclamation) are all similar in so far as they provide *shimglin*a run by *shimagles* elected by parties as one form of dispute resolution mechanism in a dispute over rural land-holding rights. Nonetheless, as explained below, the laws do not have the same clarity on issues such as whether the process is mandatory, on the procedure that should be observed during the *shimglina* and on the relation between the *shimglina* process and formal judicial organs.

The Federal Proclamation generally provides that a dispute arising over rural land-holding rights may be resolved through *shimglina* established by the parties (Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, Article 12). The Oromia Proclamation provides that a complaint over land should be submitted to a *kebele* administration, which shall cause the parties to elect two *shimagles* each (Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Administration and Use, 29 July 2007, Article 16(a–b)). A chairperson that would preside over the *shimglina* would be elected by the parties or the four *shimagles* or, in cases of disagreement, by the local *kebele* administrator (Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Administration and Use, 29 July 2007, Article 16(c)). The law does not impose particular procedure to be followed in the *shimglina* process. The *shimagles* are required to issue their *irq* report in 15 days to the *kebele* administration, which shall register the same and distribute a sealed copy to the parties (Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Administration and Use, 29 July 2007, Article 16(d–e)). A party that is not satisfied with the outcome of the *shimglina* can file a case in the *woreda* (district) court within 30 days of registration of the *irq* report by the *kebele* administration (Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Administration and Use, 29 July 2007, Article 16(f)). The law provides that a *woreda* court should not receive the application if the *irq* report given by the *shimagles* is not attached thereby making the *shimglina* a mandatory process

(Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Administration and Use, 29 July 2007, Article 16(g)).

The Southern Nations Proclamation contains similar provisions that declare that a complaint over rural land rights should be filed at the *kebele* land administration committee, which should cause the resolution of the dispute through a *shimglina* process run by *shimagles* elected by the parties (Southern Nations, Nationalities and Peoples Region Rural Land Administration and Use Proclamation No. 110/2007, Article 12(1)). The law does not provide a specific procedure to be followed during the *shimglina*. An party aggrieved by the decision on *irq* by the *shimagles* can file his or her case in the *woreda* court (Southern Nations, Nationalities and Peoples Region Rural Land Administration and Use Proclamation No. 110/2007, Article 12(2)). The Amhara Proclamation states that all disputes over land use and holding rights should primarily be resolved by *irq* and negotiation through a *shimglina* process before their submission to a regular court (Revised Amhara National Regional State Rural Land Administration and Use Proclamation No. 133/2006, Article 29(1)). The law provides that the parties may agree to follow the customary practice of the community in electing the *shimagles* and on the procedure of the *shimglina* process (Revised Amhara National Regional State Rural Land Administration and Use Proclamation No. 133/2006, Article 29(2)).

4. The non-state justice systems

Apart from the state justice systems explained above, the FDRE Constitution proclaims that citizens can use religious and customary justice systems to resolve their disputes (FDRE Constitution, Article 34(5) and Article 78(5)). Specifically, Article 34(5) of the FDRE Constitution allows "the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties of the dispute" while Article 78(5) of the same proclaims the following:

> Pursuant to sub-article 5 of Article 34 [of the FDRE Constitution] the House of Peoples Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.

According to Article 78(5) of the FDRE Constitution, the Ethiopian state has three ways of giving official status to religious and customary courts. The first is the direct establishment of religious and customary courts by the law-making organs at the federal and state level.[22] Establishment is the process of setting up new religious and customary justice systems on the basis of long-standing religious and customary beliefs. The second is the recognition of religious and customary courts, which were functioning as *de facto* informal justice systems by the federal and state legislatures. The third is the automatic recognition of religious and customary courts, which were functioning on the basis of official recognition before the promulgation of the FDRE Constitution. Both cases of establishment and recognition signify that the state would develop standards that need to be observed by the religious and customary systems (Forsyth 2007: 94–6). Following, the historical background and modalities of the recognition of the Sharia justice system are explained.

4.1. The Sharia justice system

The Sharia justice system is a system of religious law used by followers of Islam. Historical accounts explain that Islam arrived in Ethiopia in the year 615 AD with the arrival of Muslim migrants fleeing persecution in the Arabian Peninsula (Abbink 1998). According to a recent official estimate, about 60 per cent of the Ethiopian population follows the Christian religion while about 33 per cent follows Islam and a small minority of the population follows traditional religions.[23] Historically, Ethiopian Muslims have used Sharia law to resolve dispute among Muslims. The Ethiopian state gave recognition to Sharia law as early as the beginning of the 19th century (Singer 1971: 136). The first legislative recognition of the Sharia justice system was made in 1942.[24]

To date, the Sharia justice system is the only religious justice system that has been officially recognized in Ethiopia. The following three reasons were identified as possible reasons for the state recognition of the Sharia justice system (Singer 1971: 131). The first is the intention of the state to accommodate the needs of the large number of its citizens who are members of its Muslim community. Throughout its existence, Christians, who managed to devise a legal system that largely reflects Christian values, have dominated the Ethiopian state. The second reason relates to the fact that Sharia law is a complex and self-contained system with its own sources. The third reason has to do with the geopolitical context and importance of Islam as a dominant religion in the part of the world where Ethiopia is located.

Currently, the Sharia justice system is recognized and functioning both at the federal and state levels.[25] The following section will provide an overview of the Sharia justice system at the federal level, which is identical with the Sharia justice systems recognized by national regional states.[26]

The "recognition" of courts of Sharia

To date, the federal and state governments have not recognized the informal Sharia justice system as a whole. However, the religious courts of Sharia that have been running in the country for years on the basis of earlier official recognition are automatically recognized by the FDRE Constitution. The Federal Courts of Sharia Consolidation Proclamation states the basis for the recognition of the already existing Courts of Sharia as follows (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, 7 December 1999, Preamble):

> [. . .] Courts of Sharia, which have been in existence for more than half a century and been left to remain without any structural changes, need to be consolidated pursuant to the provisions of the [FDRE] Constitution that religious and customary courts, which functioned and had state recognition prior to the adoption of the Constitution, may be organized anew, on the basis of recognition accorded to them by the Constitution.

The federal courts of Sharia apply Islamic law (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 6(1)). However, a reading of the provisions of the Federal Courts of Sharia Consolidation Proclamation shows that the federal legislature has gone beyond mere recognition and has provided its own standards that need to be followed by the Sharia courts. To begin with, the federal courts of Sharia are required to apply the Civil Procedure Code and other relevant procedural rules promulgated by the state (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 6(2)). The use of the Civil Procedure Code and other relevant procedural rules imply that enforcement of the decisions of the federal courts of Sharia is done by the state.

Furthermore, the federal courts of Sharia run on direct budgetary subsidy from the state and have been reconstituted by law into a three-level judicial structure, distinct from the regular federal judicial structure (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Articles 11, 12 and 19). These are: (1) the Federal First-Instance Court

of Sharia, (2) the Federal High Court of Sharia and (3) the Federal Supreme Court of Sharia (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Articles 8, 9 and 10). Moreover, akin to the federal and state judicial organs, all federal courts of Sharia have been made accountable to the Federal Judicial Administration Commission (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 3). The Federal Judicial Administration Commission is the organ that, *inter alia*, appoints the judges for the federal courts of Sharia upon the recommendation of the Supreme Council of Islamic Affairs and decides on disciplinary matters related to the judges (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 17).

Consent of parties

The mandate of the federal courts of Sharia is based on voluntary consent of parties to the jurisdiction of the courts (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 5).[27] Consent should be expressed clearly on a confirmation form provided by the legislature (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 5(1)). Where one party has objected to be adjudicated by the federal courts of Sharia or where there is no clear consent from one of the parties, the court of Sharia before which the case is brought should transfer the case to the regular court having jurisdiction (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 5(3)). However, the Federal Courts of Sharia Proclamation contains elements of implied consent in the following terms (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 5(2)) :

> Where a party properly served with summons [...] does not confirm his objection or consent by appearing before the registrar of the court, he shall be presumed not to have objected and the case shall be heard ex parte.

The possibility of implied consent is a serious problem. This is especially so in Ethiopia where a party can misunderstand the importance of a court summons because of many reasons that may range from the capacity to read and understand to the absence of proper legal advice.

In practice, the issue of consent is not as clear as it appears in law. There is credible evidence that shows that the requirement of consent is simply ignored by some judges in courts of Sharia.[28] A good example is the landmark *Kedija Bashir* case. As the House of Federation pointed out in its decision of May 2004, in the *Kedija Bashir* case, repetitive and

clear objections to the jurisdiction of the courts of Sharia by the defendants were ignored by the judges of the courts, giving rise to a long judicial battle to prove the absence of consent. The *Kedija Bashir* case began at the first-instance court of Sharia when in November 2000 the applicants Aysha Ahmed and three other individuals filed a case against Kedija Bashir and three other defendants claiming a right of inheritance over a house that allegedly belonged to a common grandfather to the applicants and defendants.

The defendants presented a preliminary objection stating that they did not consent to the jurisdiction of the first-instance court of Sharia. The court passed a decision on the merits of the case after it rejected the preliminary objection of the defendants. The defendants' appeals to the High Court of Sharia and the Supreme Court of Sharia on the issue of consent were also rejected. Similarly, the Cassation Division of the Federal Supreme Court rejected the defendants' appeal. Finally the defendants brought the case to the House of Federation, which is empowered to interpret the Federal Constitution claiming that their constitutional right had been violated by the decision of the first-instance court of Sharia. In May 2004, the House of Federation held that the initial adjudication of the case by the first-instance court of Sharia, despite the objection of the defendants to its jurisdiction, was a violation of Article 34(5) of the Federal Constitution, which requires consent from all the parties to a case before courts of Sharia.

Exclusive jurisdiction over personal and family matters

Article 34(5) of the FDRE Constitution specifies that religious courts have jurisdiction only over personal and family matters. The federal courts of Sharia have common jurisdiction over the following personal and family matters (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 4(1)):

(a) any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded or the parties have consented to be adjudicated in accordance with Islamic law
(b) any question regarding wakf, gift, hiba, succession of wills, provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death
(c) any question regarding payment of costs incurred in any suit relating to the aforementioned matters.

The federal courts of Sharia have exclusive jurisdiction over a case brought before them. Thus, once a case is brought before a court of Sharia and consent is clearly given by the parties, such a case cannot be transferred to a regular court (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 5(4)). It is also not allowed under any circumstance to transfer a case before a regular court to a federal court of Sharia (Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 5(4)).

4.2. The *de facto* existence of customary justice systems in Ethiopia

Customary justice systems have strong *de facto* normative existence in most parts of Ethiopia. Many studies show that the majority of citizens living in the countryside and some of those who live in towns use customary justice systems to resolve disputes and ascertain their rights.[29] Customary justice systems regulate wide-ranging areas including serious criminal offences (Sommer 2007; Gebre Yntiso 2007: 64–70). Although the state has not officially recognized or established customary justice systems over the years, it did not actively work for their extinction. In some instances the state justice system gave qualified recognition for customary practices and norms in limited areas such as the conclusion of marriage.[30]

The FDRE Constitution took a radical step when it recognized the application of customary laws in personal and family matters based on the consent of the parties (FDRE Constitution, Articles 34(5) and 78(5)). In 2012, the newly adopted Federal Criminal Justice Policy recognized the wide application of customary justice systems when it gave mandate to prosecutors not to press charges if the Prosecutor General believes that public interest will be served better if a case (including serious criminal cases) is adjudicated through customary laws and institutions rather than the formal justice system (Federal Criminal Justice Policy, Ministry of Justice, March 2012, Article 3.12(c)). The Policy is not clear on what constitutes public interest. More importantly, the Policy's recognition of customary justice systems in criminal cases contradicts the FDRE Constitution, which limits the recognition of customary laws and courts to personal and family matters and which requires the consent of parties.

5. Conclusion

The Ethiopian state and non-state justice systems present a complex web of laws and institutions that make up the national legal system. Reflecting the federal system of governance, the formal state justice system is

made up of laws and institutions at the federal and regional state levels. The formal state justice system employs the *shimglina* traditional dispute resolution mechanism to resolve various kinds of disputes including family, labour and land disputes. Unlike formal procedures of law, the *shimglina* process aims at finding a win–win solution and reconciliation between parties to a dispute.

The non-state justice systems are made up of religious and customary justice systems. As part of the effort to accommodate diversity and pluralism, the FDRE Constitution gave limited recognition to the employment of religious and customary justice systems in personal and family matters with the consent of the parties involved in a dispute. To date, courts of Sharia are the only religious justice system functioning in the country. As shown in this chapter, the courts of Sharia are to a certain level regulated by the state. Nonetheless, their relation with the formal justice system is not clear. Moreover, the lack of clarity on the requirement of consent in the law and in practice is a serious problem.

There are no customary justice systems that are officially regulated by the state. Nonetheless, customary justice systems are extensively employed by the people in the settlement of various kinds of disputes. The new Federal Criminal Justice Policy has recognized the possibility of employing customary laws and institutions to resolve criminal cases. The recognition shows, among other things, the importance of customary justice systems and the need to work out their relation with formal state justice systems.

Several aspects of the relation between state and non-state justice systems need to be clarified. Among the main issues are the mandate and level of oversight of the formal state justice system over the non-state justice systems and the jurisdiction of the non-state justice systems.

Notes

1. Currently Ethiopia has a population of about 80 million people and is home to over 80 different ethnic groups with their own languages and cultural traditions. The 2007 Population and Housing Census Results of Ethiopia published by the Federal Democratic Republic of Ethiopia Population Census Commission in November 2008 give the total population as 73,918,505.
2. *Derg* is a name assumed by a committee of 120 constituting commissioned and non-commissioned low-rank officers of the army consisting the air force, police force and the territorial army. In 1987 the *Derg* established the Workers Party of Ethiopia to rule the country up to its downfall in 1991.
3. Proclamation No. 1/1995, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), 21 August 1995, Article 1; see also Proclamation No. 2/1995, Proclamation to declare the

establishment of the Federal Democratic Republic of Ethiopia, 22 August 1995.

4. See the Addis Ababa City Government Revised Charter Proclamation No. 361/2003 as amended by Addis Ababa City Government Revised Charter (Amendment) Proclamation No. 408/2004; Diredawa Government Charter, Proclamation No. 416/2004, as amended by the Diredawa Administration Charter (Amended) Proclamation No. 483/2006, and the Proclamation to Amend the Diredawa Administration Charter (Amendment) Proclamation No. 514/2007.
5. FDRE Constitution, Article 52 enumerates the powers and functions of the member states of the federation. All powers not expressly given to the federal government alone, or concurrently to the federal and state governments, are reserved to the states.
6. For reflections on state constitutions, see Yonas Biremeta (ed), Some observations on Sub-national, Constitutions in Ethiopia, Ethiopian Constitutional Law Series, Vol. IV, January 2011, School of Law, Addis Ababa University; See also Tsegaye Regassa, "Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level", *Mizan Law Review*, Volume 3, 2009, pp. 33–69.
7. See Federal High Court Establishment Proclamation No. 322/2003. Federal high courts have been placed in the following states: Afar, Benshngul/Gumuz, Gambela, Somali and Southern Nations, Nationalities, and Peoples' Region (SNNPR).
8. Federal Courts Proclamation 25/1996, as amended by Federal Courts (Amendment) Proclamation 138/1998, Federal Courts (Amendment) Proclamation 254/2001, Federal Courts (Amendment) Proclamation 321/2003 and Federal Courts Proclamation (Re-amendment) Proclamation 454/2005 (Federal Courts Proclamation), Article 24(3).
9. See Federal Courts Proclamation Re-amendment Proclamation 454/2005, Article 2(1). Precedent is a recent development in the Ethiopian legal system.
10. Articles 62(1), and 83 of FDRE Constitution. For details on the issue of Constitutional Interpretation, see Assefa Fiseha, "Constitutional Adjudication in Ethiopia: Exploring the experience of the House of Federation (HOF)", *Mizan Law Review*, Volume 1, No. 1 June 2007, pp. 1–32.
11. The Municipality Administration Proclamation of the national regional state of Oromia allows the establishment of municipal courts in cities with more than 10,000 people.
12. See Article 41 of the Addis Ababa City Government Revised Charter Proclamation 311/2003 (No. 10) for the full list of matters under the jurisdiction of Addis Ababa City Courts.
13. Addis Ababa City Government Revised Charter Proclamation 311/2003 (No. 9) Article 2(6) defines *kebele* as the third administrative stratum of the city. See also Article 50(1) of the same.
14. The federal states that have established social courts are Tigray, Amhara, Oromia, Southern Nations, Nationalities and Peoples, and Harari.
15. The English version of the Civil Code uses "conciliation" to refer to *irq*.
16. The English version of the Ethiopian Civil Code translates *gilgil* as compromise.
17. The Amharic version is clear when it refers to *shemaglewoch* (elders).

18. See also the exceptions under Articles 119(3) and 120 thereof.
19. The FDRE Constitution, Article 55(1) and (3) provide that the mandate of enacting a labour code is given to the federal government.
20. The report provides the reasons why amicable settlement of the dispute was not possible.
21. The application is not an appeal on the report but rather a first-instance application. The judicial organs include the labour court and the labour relations board. The later is mandated to apply procedure that would lead to conciliation between the parties and as is not obliged to follow formal procedures of law. See Article 150(1) of the Labour Proclamation No. 377/2003.
22. The federal legislature is the House of Peoples' Representatives while the state councils are state law-making organs.
23. See a 2009 estimate by the United Nations found at http://data.un.org/Country Profile.aspx? crName=Ethiopia. The 2007 Population and Housing Census Results of Ethiopia published by the Federal Democratic Republic of Ethiopia Population Census Commission in November 2008 give the total population as 73,918,505.
24. Proclamation No. 12 of 1942, Kadis Court Proclamation of 1942. After two years, the Kadis and Naibas Councils Establishment Proclamation No. 62/1944 was issued to consolidate the courts.
25. See Comprehensive Justice System Reform Program, Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, February 2005, p.81.
26. Except Addis Ababa City and the regional state of Gambella, all other regional states have established courts of Sharia. See Comprehensive Justice System Reform Program, Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, February 2005, p.81.
27. The requirement of consent is also clearly stated under Article 34(5) of the FDRE Constitution.
28. See Hilina Tadesse (2001: 142) where the author stated that: "During an EWLA workshop some kadis [judges in Muslim courts] made it clear that they simply ignored Article 34(5)'s consent requirement."
29. For a comprehensive study on customary systems in Ethiopia, see Alula Pankhurst and Getachew Assefa 2008.
30. The Ethiopian Civil Code, 1960, Article 580 and later the Revised Family Code, Article 4 gave a qualified recognition to customary marriage.

5

Bolivia: Normative Equality between State and Customary Law. Utopia or the Future of Hybrid Normative Systems?

Lorena Ossio Bustillos

1. General introduction to the country and the justice system

Bolivia is a country with great diversity associated mainly with the geographical areas, and the natural and ecological resources of its territory. In the 112 existing provinces of the Bolivian plurinational state (*Estado Plurinacional de Bolivia*), 2.5 million indigenous peasants still keep to their traditional methods of administration and internal decision-making spread throughout some 190 rural Andean municipalities and in 33 other municipalities in the lower eastern lands. A total of 3.1 million people, that is, 38 per cent of the total Bolivian population, live in rural areas. Bolivia's highland (Andean high plateau) occupies only 28 per cent of the national land area, but harbours 46 per cent of the country's rural population. Thus, the poverty rates are much higher in this area (69.8 per cent), as there is less land to share and a lower quality of life.[1]

The geographical location of indigenous communities and their great distance from urban centres play an important role in the preservation of their traditional forms of applying customary law as well as the way they designate themselves. The identities that communities themselves assume in the different regions of Bolivia vary according to the names of the types of organization they adopt, so, for example, in the high-plateau region the *ayllus* are peasant communities; in the valley region, native communities; and in the lowlands, indigenous communities. This was the reason why it was so difficult to define a common denomination, which contemplates all the

indigenous groups in Bolivia, in the constitution. To give an idea of this diversity, the indigenous languages, which are sometimes used to identify the ethnicity of the indigenous communities, include: aymara, araona, baure, bésiro, canichana, cavineño, cayubaba, chácobo, chimán, ese ejja, guaraní, guarasu'we, guarayu, itonama, leco, machajuyai-kallawaya, machineri, maropa, mojeñotrinitario, mojeñoignaciano, moré, mosetén, movima, pacawara, puquina, quechua, sirionó, tacana, tapiete, toromona, uru-chipaya, weenhayek, yaminawa, yuki, yuracaré and zamuco.

For an analysis of each case study of customary law, it is necessary to differentiate the self-designation of the community in question. In this analysis, we will focus on the customary law of the communities of the Bolivian high plateau.

The challenge posed by the new Bolivian Constitution of 2009 therefore is not about creating new structures that intend to homogenize this diversity, but about reinforcing the coordinating mechanisms. Indeed, due to the inadequacy of the formal state, community members strengthened their original forms of organization as a means of addressing their basic needs. The economic limitations of the Bolivian state reveal, through the following data, its limited presence and outreach in rural areas: only 55 per cent of the country's municipalities have a judge, only 23 per cent have a prosecutor and only 3 per cent have a public defender on site. In relation to the municipal justice services (dedicated exclusively to the protection of the victims of intra-family violence or related to gender), only 35 per cent of the municipalities have municipal integrated legal services and 61 per cent have defenders of children and adolescents. In the case of alternative justice services, such as conciliation or mediation centres, these only exist in urban areas (Participation and Justice Network 2007).

1.1. Traditional forms and institutions of conflict resolution and the normative basis of the decisions of the traditional institutions

Despite the existence of Indian law, in the 17th century the Spanish Crown pursued an authoritarian, unilateral vision to create a system of law, basically as an administrative solution for the organization of new legal relations. The body of laws known as the *Recopilación de Leyes de los Reinos de las Indias* (Compilation of Laws of the Reigns of the Indies) of 1680 is the first systematic example of Castilian-legislated law. However, we cannot deny the existence of customary law, which evolved from the end of the Middle Ages from the need to strengthen political power in the face of pressure to adopt Justinian Roman law and continued

to break the authoritarian pattern of the Castilian state. Indeed, Indian law would develop a very peculiar characteristic: the recognition of a customary element in the legal regime concerning indigenous societies. At that time, some religious people seemed to recognize, although from their own perspective of evangelism and paternal tutelage, that juridical indigenous customs needed protection. This is reflected in chronicles related to indigenous customs by the Jesuit Acosta (Acosta 1962: 318). This hierarchical idea between law (Castilian-legislated law) and customary law (indigenous tutelage) has to be considered in this analysis in order to understand the legal culture in Bolivia and the unwillingness to accept that customary law is subordinated to the law. The words "traditional justice" are used as a synonym for customary law in Bolivia. The concept of ordinary jurisdiction is used to refer to formal state law.

Due to several factors, access to information regarding indigenous legal customs in Bolivia is not easy to achieve. These factors mainly include lack of investigation and the complexity and means of dissemination. Also, there is a lack of trust as a result of the distortion of information about indigenous institutions and because they are seen as a threat to the rule of law; they are dealt with only partially, without systematically considering them as an integral part of a different cosmovision (view or understanding of the world). Below is a summary of the unpublished research results of interdisciplinary teams investigating particularly the Aymara, the Uru and the Quechua cultures in the high plateau and valley regions, in order to bring the reader closer to a legal reality that is hard to grasp. These considerations, however, do not pretend to be exhaustive in terms of describing the full content of the indigenous legal systems.

1.2. The Aymara and the organizational model in the ayllus

The *ayllus* organizational model, particularly in regions of Aymara language-speaking indigenous communities like in Jesús de Machaca, has kept a series of cultural customary elements despite a climate advocating integration and national assimilation.

The Jesús de Machaca region is located in the Ingavi Province of the La Paz Department, west of the Desaguadero River, some 100 km from the city of La Paz. Therefore, Jesús de Machaca's La Marka (a conglomerate of *ayllus*) formed a community, equivalent to the *ayllus's marka*, that did not show any significant penetration of the Hacienda until the Republic of 1817 (Albó 1985: 51). According to Choque and Ticona, there were only two Haciendas: Chhichha and Qurpa, owned by *caciques*, located on the outskirts of the community. However, under Spanish influence, the native authorities (*kuruka, lantin and jilakata* or *mallku, kamana and*

irasiri), whose functions were government and the administration of justice, were driven to combine respectively into the peasant community and the Spanish town council, leading to the existence of the *caciques*, and the second into the *jilakata* and the mayor (Choque and Ticona 1996: 75).

During the Republic, the core nucleus (*marka*) of the Machaca region was transformed into a mestizo population. However, until 1865 the number of Aymara *ayllus* from Jesús de Machaca remained at 12: Jilatiti, Ch'ama, Kuypa, Sullcatiti (Arriba and Abajo), Achuma, Parina, Yawariri, Titik'ana, Qhunqho, Qalla and Janq'ujaqi.

Following the military repression of 12 March 1921, the Aymara *ayllus* from Jesús de Machaca developed a fighting tradition, the repercussions of which had an impact in other towns and provinces of the country. The indigenous question was put on the political agenda forcing government officials and legislators to reconsider the serfdom situation and the abuses the native people were subjected to.

After the National Revolution in April 1952, one of the most prominent revolutionary processes in Latin America, and with the signing of the Decree of the Law of Agrarian Reform on 2 August 1953, the peasant union organization was institutionalized as a means of fighting for peasants' aspirations and legitimate demands. From 1952, with the Agrarian Reform in place, the *ayllus* was converted into a union organization and the so-called sub-centrals (more a unit of communitarian organization than of labour relations) were turned into communities.

Beginning in 1994, the constitutional reform on plurality and multiculturalism, and the approval and application of the law on popular participation (giving the initiative back to indigenous people and community organizations), resulted in recognition of the identity of indigenous people, who today have the status of Native Peoples. This legal recognition was granted in the Popular Participation Law No. 1551 of 1994. Article 3 named the Territorial Organizations of the Base, the peasant communities, as indigenous people; and neighbourhood councils are organized according to their habits and customs or statutory provisions. In this context, a turn to the *ayllu* organizational model has been brought about in the Andes.

2. Authority system in traditional justice (customary law)

Depending on the indigenous community, the positions of *mallku* and secretary-general can be held by only one person; he can act as a *mallku* when dealing with internal community affairs and as secretary-general when attending union meetings with other neighbouring communities.

The authorities are stratified as follows:

- *mallku* and secretary-general (two people)
- secretary – peasant sub-central (one person)
- secretary – cantonal sub-central (one person)
- justice secretary (one person).

Every community member has the right and duty to take on these positions of responsibility on a (yearly) rotational basis. From the moment a member of the community stops being a *llocalla* (minor) and marries, he or she has to go through each one of the steps – folkloric ringleader, *kamana*, school mayor, *preste, jilacata, jiliri*, all of which lead to the condition of *pasaru*, which is of great repute and respect in the entire community. Nevertheless, being the highest authority of the community demands commitment and service towards others and the position is not to be used for other purposes. It also means not expecting remuneration; instead being an authority in the community means spending money and getting poorer. When they are sworn in, the individuals look sad and worried, but it is a generational duty that each member of the community has to fulfil.

According to the investigation of the Centro de Investigaciones, the *kamana* is in charge of taking care of the crops, with authority to administer community justice in the case of agricultural issues, such as when animals trespass boundaries and damage crops – a very frequent problem. Other officers in charge of administering traditional community justice are the *pasarus* or former community authorities. Usually, the *mallkus* and/or secretary-generals are advised about all the resolutions to adopt, by their godfather, a respectable elder, a *pasaru* who has the experience and wisdom to advise his godson (PROA 1997: 34).

A type of political organization emerges from the *ayllus* authorities, also called *tamanis* or *jilakatas*. At a higher level, we find that the *mallkus* of *marka*, and at the *suyus* or nation level the *apu mallkus* and *apu thallas* (male/female), divided into *aransaya* and *urinsaya*, are prominent. The habits and customs have to take into account the male–female (*chacha-warmi*) relationship and the *suyus* or nation origin.

2.1. Types of conflict

In the Aymara and Quechua cultures, coming of age is considered to be achieved when the union equivalent to marriage is formalized in the indigenous community. “Nobody, neither man nor woman, acquires the

status of an adult individual and of being a full member of society if he or she has not been united with his/her partner by society, completing the unity of the social person Jaqui." (Andean Oral History Workshop (THOA) 1986: 28)

The most common conflicts have been classified according to where they occur: domestic issues within families and issues outside of the family with members of the community.

When it comes to experiences in customary law, 47 per cent of the members of the community and peasant leaders indicated having encountered virtually every kind of issue; 22.3 per cent mentioned quarrelling and fighting; 13.2 per cent experienced land-related issues; 5 per cent encroachment of property; and 3.7 per cent cattle robbery (PROA 1997: 34).

The most common conflict comes as a consequence of quarrels between married couples (insults and fighting), followed by home abandonment by one of the spouses and home abandonment by the children. A frequent issue within families is the breakdown of marriages, by mutual consent of the parties, and a frequent cause of conflict is abuse of the wife. In both cases, the communal authority does not usually intervene and the affected parties go directly to the ordinary justice authority.

In the Aymara communities (*ayllu* Sullka, *ayllu* Hiluta Chahuara, *ayllu* Yucasa) and in the Uru nation of Llapallalani (Comai Pachamama 2008: 192) the native authorities contribute to solving so-called public issues, which are cases like land boundaries, land distribution and conflicts between landholders. They do not intervene in conflicts they call private, within families. The case of a father recognizing his child is therefore considered private. Thus, in many instances, the recognition of children lacks concrete local solutions within native indigenous legal customs.

2.2. Issues outside of the home and family

When interviewed, 89.6 per cent of people mentioned misappropriation of houses or land as the main cause of conflict in the community; 84.4 per cent mentioned fighting at parties; 75.3 per cent mentioned personal insults; and 58.4 per cent mentioned robbery. Cheating, cattle stealing and breach of trust were named by approximately 20 per cent of the interviewees and the remaining faults or offences were mentioned during the interviews with the following percentages: swindling, 13 per cent; misappropriation of personal property, 11.6 per cent; rape, 9 per cent; murder, 5 per cent (PROA 1997: 56).

The experience of peasant leaders confirms these views. 38.6 per cent of interviewees consider the misappropriation of house or land as the main cause of conflict in the community, after fighting or quarrelling among family members. Robbery is mentioned by 12 per cent as one of the most frequent issues (PROA 1997: 59).

According to information gathered from focus groups, the degree of criminal culpability in different cases is different from ordinary justice, for instance, abortion and suicide are not regarded as very serious within the community. However, robbery is a crime classified as very serious. This is explained by the existence of a subsistence economy that, in order to reproduce itself, needs very strict control mechanisms (PROA 1997: 68).

The problem of accessing resources is also the central issue of inheritance in the high plateau area called *achacachi* in Omasuyos Province in the La Paz Department, where people speak Aymara. Research from the Taypi Ceqe team explains how, in a colloquial way, people use the words *surcofundio* or *minifundio* for small landholdings or "furrow landholdings" (an analogy for the small size of a single furrow), in reference to the scarcity of land to divide among the population of the area because the titles to property are, to a large degree, under the names of their ancestors, which makes the division of property and the access to land especially difficult for women (Taypi Ceqe 2008: 133).

From the cultural point of view, couples need to act as a couple, that is, following the *chacha-warmi* concept or the logic of male–female complementarity. Both men and women focus all their efforts in agricultural production and cattle-raising, and women have responsibility of taking care of children and feeding the entire family. We can explain the inheritance distribution and legal customs in Achacachi based on three conceptual variants: firstly, as a succession of one person to another to assume responsibilities, in particular, for family or communal protection; secondly, as the traditional passage of title upon death originating in the Roman system of succession; and thirdly, the transfer of material goods and of knowledge or the responsibilities of authority. The access to land inherited by a woman takes place when she gets married, which puts her at a disadvantage in several respects.

2.3. Conflict resolution and application of sanctions

Community traditional law includes three levels to resolve conflicts:

(1) inside the home environment and among relatives
(2) with the participation of some authorities
(3) with the participation of the entire community in an assembly.

According to an analysis of the minutes books of the Sullcatiti and K'honkho communities, the second level is the most common. Parties in a dispute go to the house of the *mallku* or secretary-general and present their case. Some symbols are used in this type of interview: the *tari* table and whips on the wall behind the traditional authority. The procedures in traditional community law are very formal. There is a minutes book, in which every case is registered meticulously along with its respective resolution and penalty as well as the penalty that would apply in case of recurrence.

In most cases, procedures last for days, economic costs are small (measured in fines because the intervention by the authority is free of charge) and a high percentage of the rulings or resolutions are observed, as we will see in detail below from the interview results.

According to interviews with the traditional authorities, sanctions that the community authorities implement for conflicts are mainly of three types: moral, material and monetary. 47.1 per cent of the sanctions have a monetary character, 29.7 per cent are moral in character and 15.2 per cent are of a material nature. Only eight per cent mentioned sanctions of another type, although they did not specify them (they could be referring to imprisonment, corporal punishment, penalties to one's honour, being expelled from the community or capital punishment) (PROA 1997: 61).

Monetary sanctions or fines are in the range of 10–50 Bolivianos (along with the resolution or ruling on the conflict; when dealing with a recurrence, fines range from 100 to 200, 500, 1000 or more than 2000 Bolivianos, based on the income of the family concerned (the minimum wage in Bolivia is 815 Bolivianos, approximately 89 Euro). However, only those that come with the resolution are effective; those indicated in case of recurrence seem to act more as a deterrent and threatening and, therefore, are not normally brought into effect.

According to information gathered from the focus groups and in research investigations by PROA, the moral sanctions consist of whipping the accused, requiring the payment of a symbolic fine, which is usually one or several bottles of liquor for the authorities, and drinking a toast to the reconciliation of the parties to the conflict.

The material sanctions relate to handing over livestock (sheep, llamas or cattle) for the benefit of the community (to the school usually), as well as to the affected individual and to his or her family.

The main objective of traditional community justice is not exactly to penalize the accused, but rather for his rehabilitation and reintegration into the community. Those immediately involved in misdemeanours or criminal offences in different areas are not viewed as or accused of being

criminals, because evil within the community is not an Aymara concept. They explain the situation using these types of terms or something similar: *jucharuwa purta* (I have come to be guilty), *chijiwa arkitu* (misfortune followed me), *supayawa pantxasiytu* (the devil made me make a mistake) (PROA 1997: 63).

As for compliance with rulings and decisions stemming from traditional justice, 92.2 per cent of the interviewees claim they comply, which leaves only 7.7 per cent of cases in which rulings are not complied with. Interviews with peasant leaders confirm the view of members of the community: 90.5 per cent of traditional community justice rulings are complied with (PROA 1997: 62).

The main reasons mentioned are as follows: out of habit, because it is quick, because it is cheap, because they already know the official judiciary ruling and out of fear or mistrust of the ordinary judiciary. A very important characteristic of applying customary law is that there is no delay between deeds and resolutions because the procedures are very swift.

Of those interviewed, 70 per cent of people mentioned that their problems were settled in a matter of days (an average of four to five days); 22 per cent mentioned they needed weeks to come to a resolution of their disputes (an average of a week and a half); and only 7 per cent mentioned months or years as the amount of time required for the resolution of their disputes (an average of three months) (PROA 1997: 65).

2.4. Normative equality between state and customary law?

In Article 190, the Bolivian Constitution stipulates: "native indigenous peasant nations and peoples will exercise their jurisdictional and competence functions through their authorities, and they will apply their own principles, cultural values, rules and procedures".

We specify below the sanctions applied in some cases according to the information gathered from the focus groups in the PROA research investigations:

> In case of robbery, the entire community mobilizes and goes to the head of the Mallku to find the delinquent. Once found, the "Pasarus" and the Mallku whip the thief, who has to restore everything he took and also pay a fine, in a week's time, consisting of a sheep or a cow, depending on the case, for the benefit of the community. He also has to pay a financial fine to the community authorities to pay for damages. As we can see, sanctions are not only of one type, and in this case there's a combination of a moral, material and monetary

> sanction. According to references made by people in the community, sanctions in robbery cases were previously more severe.
>
> In case of homicide, the author is captured, and tied up, made to circle the plaza. He gets whipped and has to pay a fine in kind, usually a bull. The individual has to give guarantees to the community and the traditional authorities from the guilty party as compensation to the victim's family demand a gift.
>
> The communal authority doesn't always intervene in these cases and many times they prefer to turn the cases over to the ordinary justice system. We have references in the past that, in other provincial communities in the La Paz Department, capital punishment was performed in homicide cases. In cases of rape, marriage and recognition of the child is demanded if the victim becomes pregnant. The compensation consists of one cow. If marriage is not carried out and there's a child, as a result of the rape, the grandparents from the mother's side take care of the child, for he or she will become a helping hand in caring for the crops and animals. As we see, rape is not considered to be a major crime, because a criminal intent on the part of the perpetrator isn't assumed, but rather a "mistake" or a "bad moment."
>
> (PROA 1997: 68)

The new Bolivian Constitution regulates the personal and material jurisdiction in Article 191. According to this article, members of indigenous communities are subject to their native indigenous jurisdiction, whether they act as plaintiffs or defendants, claimants or accusers, whether they are persons who are denounced or accused, or are appellants or respondents. The jurisdiction applies to legal relations and facts, which occur or whose effects are produced inside the jurisdiction of a native indigenous peasant town. The jurisdiction deals with native indigenous peasant issues in accordance with what has been established in the Law of Jurisdictional Delimitation.

The Law of Jurisdictional Delimitation No. 073 (*Ley de deslinde jurisdiccional*) in Article 9 repeats that members of indigenous communities are subject to their native indigenous jurisdiction. Desisting from any further specification, however, the regulation restricts the reach of indigenous jurisdiction to cases in which members of the indigenous communities are parties. According to Article 11 it is also required that the legal relations and facts originate or that their legal effects are produced within the jurisdiction of the native

indigenous peasant town (Article 11). The law provides a very restrictive interpretation of the Constitution that, in Article 191, mentions personal, material and territorial jurisdiction separately, without establishing a necessary correlation of the three for the application of the case.

Material jurisdiction is envisaged in Article 192 of the new Bolivian Constitution in the following terms:

> The indigenous native peasant jurisdiction will treat every type of legal relationship, as well as acts and deeds done inside the indigenous native peasant territorial environment, which infringe upon legal assets. The indigenous native peasant jurisdiction will make decisions, which are final. Its decisions would not be subject to being reviewed either by the ordinary jurisdiction or by agro-environmental courts, and it would execute its decisions in a direct way.

To explain this issue of material jurisdiction and to quantify the degree of conflict that a regulation of this nature might have, we are appealing to a delicate issue that can easily come up in certain territories, that is, the right of access to natural resources such as water resources. The national legislation, public administration and policies of the majority of Latin American countries tend to deny or ignore the existence or importance of customary normative frameworks regarding indigenous community rights and practices, and water management, even in those cases in which the regulations of local indigenous peasant communities are taken into account.

These are relevant issues, which is why experts on water and indigenous peoples recommend the necessity of registering customary rights.

The jurisprudence of the Bolivian Constitutional Tribunal (TCB) has, to date, been restrictive in its interpretation of the scope of material jurisdiction in indigenous courts. So, with regard to the INRA (Instituto Nacional de Reforma Agraria) law on agrarian matters, the TCB, through its ruling 1008/2004, denies competence in such matters "in the enforcement of the agrarian law and its regulations, in relation to the native and indigenous people, their habits and customs, and their customary indigenous law should be considered, provided they are not incompatible with the national juridical system" (Article 3, III).

The TCB Constitutional Decision 1008/2004 of 1 July 2004 established that the indigenous juridical system "is not applicable in resolving a potential conflict of proprietary right concerning land, as well as concerning personal property, furniture, machinery and livestock

introduced into an agrarian property with the aim of developing a productive activity".

However, we can deduce from the aforementioned ruling that the origin of this jurisprudential orientation is based on four types of situations:

a) lack of an explicitly expressed constitutional norm regarding the material competence of indigenous justice
b) the generic constitutional formulation that establishes the limits of the indigenous legal system in the "Constitution and the laws" or in the "national legal system"
c) lack of legislation regarding the limits of material jurisdiction
d) lack of a more detailed analysis of the case in the place where the deeds took place.

Also of note is the jurisprudence of the Constitutional Court regarding the competence of the indigenous legal system to resolve conflicts in which the sanction and/or consequence is the dismissal of public authorities, mainly municipal council members. The conclusion of the Constitutional Tribunal, TCB Constitutional Decision 1103/2004–R, 16 July 2004, is that in those cases the legal system of indigenous peoples "is not applicable in administrative matters, and in addition that form of justice should not contravene the Political Constitution and the laws". The basis of this therefore seems once more to be the generic formulation that establishes the limits of the indigenous legal system in "the Constitution and the law".

The Law of Jurisdictional Delimitation follows the restrictive interpretation of the jurisprudence of the former Bolivian Constitutional Tribunal, and clearly stipulates in Article 10 that indigenous jurisdiction cannot be applied to criminal matters, mentioning separately rape, homicide and assassination. Indigenous jurisdiction cannot be applied in cases of delicts against international law, against the state, terrorism, drug-trafficking, taxes, defrauding of customs, corruption and other cases where the state is a victim; this extends to civil matters when the state is a party or third party, and in property matters. The only exceptions are cases where the indigenous community already has the collective property or possession consolidated; these can be a matter for indigenous jurisdiction and internal distribution. In addition, there is a prohibition to apply this jurisdiction in following the disciplines: labour law, social security law, tax and administration, mines and hydrocarbons, information, international public and private law, agrarian matters law and forest law.

The Law of Jurisdictional Delimitation is a step back in Bolivian legislation regarding the limits of material jurisdiction. According to previously existing legislation, the indigenous legal system was able to resolve: (a) crimes such as stealing, robbery, cases of serious injuries, homicide or rape in the same sense as the Code of Criminal Procedure (Article 28) governs, in which the competence of the legal system of indigenous peoples is recognized in criminal matters without any kind of limitation as to the type of crime; (b) acts and deeds that violate legally protected interests in conflicts that are typically civil or agrarian, such as debts and trespassing; (c) with regard to domestic violence, Article 16 of Law No. 1674 (*Ley Contra la Violencia en la Familia o Doméstica*, December 15, 1995) recognizes the competence of the legal system of indigenous peoples concerning this type of conflict: "In the indigenous and peasant communities, the natural and communitarian authorities would be the ones that resolve controversies involving violence in the family, according to their habits and customs, unless it is contrary to the Political Constitution of the State and the spirit of the present law."

The normative equality of state and customary law as provided by Articles 190–192 of the new Constitution of 2009 was turned into subordination of customary law (indigenous, native peasant jurisdiction) by the enactment of the Law of Jurisdictional Delimitation. The legal situation today resembles the regulation of the Constitution of 1995 on this matter.

3. Constitutionalization and legislation of indigenous law

The direct constitutional antecedents of the indigenous incorporation into the political constitution of the state had been governed specifically by the field of private law. Article 171 (paragraph 3) of the 1995 Constitution stipulates:

> III. The natural authorities in the indigenous and peasant communities will be able to exercise administrative functions and implement their own rules as an alternative solution to conflicts, in accordance with their customs and procedures, as long as they are not contrary to this Constitution and the laws. The law will make these functions compatible with the responsibilities of the State Powers.

The constitutional text recognized that the natural authorities of indigenous and peasant communities can exercise administrative functions and implement their own rules as "an alternative solution to conflicts".

The constitutional interpretation was restricted and in terms of material jurisdiction so-called community law could not go beyond the limits of alternative justice, subsidiary to formal justice (i.e. it always has to be framed within the bounds of mediation, conciliation and arbitration). On the other hand, the constitutional precept established that this administration of justice and implementation of their own rules are recognized as long as "they are not contrary to the Constitution and the laws"; we should understand by this then that this recognition is restricted and that implementing customary law, being limited by a set of state laws, is reduced to conflicts for which there are no provisions in the ordinary legal system.

Lastly, the Constitution established that a law would make the administrative functions and implementation of rules of customary law "compatible" with the responsibilities of the state powers, which reaffirms, once again, that this recognition of traditional law is limited and conditional upon everything established by state laws. Therefore, it is in no way admitted that customary rules and practices of indigenous and peasant populations could be contrary to the state norms of public order.

3.1. Indigenous rights in the Bolivian Constitution

Article 2 of the new Bolivian Constitution refers to the exercise of free determination of native indigenous peasant nations and peoples. Using this article as a basis, we understand free determination as their right to autonomy, self-government, to their culture, to the recognition of their institutions and consolidation of their territories, according to this Constitution and the law.

Article 30 refers to the concept of nation and rights in the following terms:

> I. A native, indigenous peasant nation or people is any human, who collectively shares a cultural identity, language, historic tradition, institutions, territoriality, and cosmovision to those whose existence is prior to the Spanish colonial invasion.

The second paragraph refers to the collective rights of indigenous peoples as their right to cultural identity, religious belief, spiritualties, practices and costumes, and their own cosmovision; to free determination and territoriality; to their institutions being part of the general structure of the state; to the entitling of their lands and territory collectively; to the protection of their sacred places; to create and administer their own communication systems, media and network; having their

wisdom and traditional knowledge, their traditional medicine, languages, rituals, symbols and clothing valued, respected and promoted; to live in a healthy environment, with adequate management and better utilization of the ecosystems; to collective intellectual property of their wisdom, sciences and knowledge, as well as their being valued, used, promoted and developed; to an intra-cultural, intercultural and multilingual education throughout the entire educational system; to a universal free healthcare system that respects their cosmovision and traditional practices; to implement their political, legal and economic systems in accordance with their cosmovision.

In the specific case of the right to non-renewable natural resources consultation is required. For all the other cases they enjoy the right to be consulted by means of appropriate procedures, particularly through their institutions each time legislative or administrative measures that might affect them are envisaged. They have the right to partake of the benefits of the exploitation of natural resources in their territory. They have the right to an autonomous indigenous territorial administration, and the exclusive use and exploitation of renewable natural resources in their territory without prejudice to the lawfully acquired rights of third parties.

Political collective rights to participate in state bodies and institutions translate into participation quotas in the legislative assemblies. In that way the state guarantees, respects and protects the rights of native indigenous peasant nations and peoples enshrined in the Constitution and law.

Individual rights of the members of native indigenous peasant towns or communities are mentioned in the list regarding cultural identity; along with their Bolivian citizenry, any member who wishes can register for an identity card, a passport or any other identity paper that is legally valid.

3.2. Indigenous rights in the international treaties that Bolivia has ratified

Agreement 169 of the International Labour Organization of 1989 was ratified by Bolivia with Law 1257 of 11 July 1991. Article 8 of that law states that national legislation has to properly take into account the customs and customary law of indigenous peoples. Soon thereafter, in 1994, the political Constitution was reformed to recognize the multi-ethnic and multi-cultural character of the country and the right of indigenous peoples to administer justice on the basis of their customary law (Articles 1 and 171).

On 13 September the UN Declaration on the Rights of Indigenous Peoples was approved and was then ratified on 7 November 2007 as a law of the Republic by the Bolivian state. Article 3 of this Declaration stipulates the right to free determination of indigenous peoples. But what is the real significance of this free determination, in terms of their political, economic, cultural and social effects? For example, the formalized indigenous "territories" and those pending regularization contain important natural resources, renewable and non-renewable. The indigenous peoples have rights over the land, the forest and the mineral and hydrocarbon resources. Depending on the resource, the rights over indigenous land and the rights of the state overlap, and although each party's claim has varying degrees of pre-eminence, the established regulations do not always clearly identify whose claim takes precedence. Limits to this right of free determination are given in Article 46, where it is clearly established that no state, people, group or individual is granted the capacity to carry out any type of activity directed towards impinging upon the territorial integrity or political unity of sovereign or independent states.

Articles 7 and 8 of the UN Declaration of the Rights of Indigenous Peoples sufficiently guarantee the cultural rights of indigenous peoples and individuals, starting of course with the right to their own culture, versus any type of policy with genocide at its core, whatever it may be. Cultural self-determination is indeed strengthened.

3.3. Special legislation on indigenous law and the level of coordination

To explain the subject of different indigenous jurisdictions and the level of coordination, we have to gauge the degree of conflict that a regulation of this nature may generate, if the legal customs of the locality are not known. Remitting the delimitation of matters to a special Law of Jurisdictional Delimitation does not solve the problem.

Coordination calls for the creation of dialogue spaces in order to exchange experiences of the different mechanisms of conflict resolution within the different indigenous jurisdictions. According to Article 13 of the Law of Jurisdictional Delimitation, the coordination could be oral or written within different jurisdictions. There is an obligation for all jurisdictions to coordinate and cooperate, especially regarding the access of information.

In Article 193, the Bolivian Constitution stipulates that in order to see the decisions of indigenous native peasant jurisdiction obeyed, its authorities can ask for the support of the state. Judicial cooperation as

such should have been reflected in this Article, for the support runs only one way, from the state to the indigenous jurisdiction and not from the indigenous jurisdiction to ordinary courts, something that would be tantamount to the principle of complementarity and reciprocity of indigenous legal systems. In Article 193, every authority that supports the administration of justice is also referenced, from the national police, public prosecutor's office and penitentiary institutions and others which, due to legal disposition or by regulation, are assigned functions of the judicial police or who assist with the administration of justice.

Conflicts of competence arising between indigenous jurisdictions are not taken into account in the new Constitution, and this is a pending issue of great importance in Bolivia due to conflicts arising between different indigenous populations.

Article 202 of the new Constitution establishes the competences of the Constitutional Tribunal regarding indigenous jurisdiction. In case of conflict between the ordinary jurisdiction, the indigenous jurisdiction and the agrarian matters jurisdiction, the Constitutional Tribunal decides. If an indigenous authority elevates a consultation to the Tribunal, the answer of the Constitutional Tribunal regarding the consultation is mandatory to the indigenous Court (Article 202, 8). The Law of Jurisdictional Delimitation does not make any reference to this constitutional regulation.

4. The mandatory nature of the indigenous legal system

This topic raises fundamental questions regarding the interface of indigenous justice with the ordinary justice system. The mandatory character of indigenous jurisdiction finds its justification in a defining feature of any jurisdiction coercive.

This makes us consider indigenous justice on equal terms with the ordinary justice system and not as a subsidiary of it. On the other hand, it allows us to avoid two fundamental disadvantages: legal uncertainty, due to not knowing what rules are actually being applied in each case, and the hollowing out of indigenous law, stressing the subsidiary nature that is wrongly attributed to it.

The mandatory character has to be clearly guaranteed by the national legal system by virtue of legal pluralism. The final decision on its mandatory character, however, should be made by the indigenous communities themselves. This is not the solution of the new Bolivian Constitution; Article 191 stipulates that indigenous jurisdiction is mandatory only for members of indigenous communities.

In the first place, the question that rises is: Who is and how do you define a person as a member of a peasant community? There is a legal precedent (the case of birth certificates) by which indigenous organizations recognize and identify their members. In other Andean legislation, the main criterion is establishing their place of residence.

Technical teams in Ecuador, Peru and Venezuela have drafted legislation that implements indigenous jurisdiction (they are all pending, however). In Peru's General Law of Peasant Communities, No. 24656, the character of being a community of landholders was established in Article 5. Community landholders are those born in the community, community landholders' children and the people integrated into the community. In order to be qualified as a community landholder, the following conditions are to be fulfilled: (a) being a community member of legal age or have legal status; (b) having a stable residence in the community for at least five years; (c) not belonging to another community; (d) being registered in the community register; and (e) all else established in the community statutes. Those considered to be integrated into the community are: the male or female, of legal age, who asks to be admitted and has been accepted by the community. In either case, if he or she were a member of another community, he or she should resign from that other community beforehand.

The proposal for a Columbian "Law on Indigenous Jurisdiction", introduced by indigenous Senator Jesús Enrrique Piñacué in October 2003 contained the following mechanism for the assignment of a community or an individual to an indigenous people:

> the indigenous people's traditional authorities have the autonomous authority, from a prior meeting of the general assembly of each indigenous people, to allow the self-recognition of the indigenous communities, and because of that, are the only ones authorized to issue a certificate that a community or an individual belongs to an indigenous people[2]

In a 1998 draft Bill, it was envisaged that non-indigenous people were exempt from indigenous law, even when dwelling inside indigenous territory (Article 6). The Ecuadorian draft Bill explicitly includes non-indigenous people, but contains stipulations for handling those cases (Articles 13 and 14). Additionally, an individual who denies being a member of an indigenous community can turn to a human rights representative to settle the issue. Non-indigenous peasants have the option of taking their conflicts to indigenous authorities with prior approval.

In Venezuela, every individual inside indigenous territory is subject to the indigenous jurisdiction, and the indigenous authorities also have jurisdiction, if they choose to exercise it, over indigenous individuals outside indigenous territory. In a similar way, in the Peruvian draft Bill, any individual inside the territorial jurisdiction of peasant patrols or native or peasant communities, are subject to those authorities.

The cases of migrant indigenous individuals dwelling outside their territory and of non-indigenous people involved in a conflict inside a community are not easy to solve. This is why it has seemed convenient to establish limits to personal competence. A non-indigenous individual necessarily has to have some kind of connection to the community, whether this be familiar, social or cultural. That is important to ensure the individual had knowledge that he was violating community rules.

It is essential to ascertain if competences of the authorities of indigenous peoples can extend outside the territory in which they live. It has been considered that ordinary justice deals with these cases because it is impossible to formulate a general rule under which every possible case is taken into account. However, it is also important to have their cultural practices and characteristics respected.

4.1. Material and human rights limits

The Bolivian Constitution proposes a limit to the exercise of indigenous jurisdiction. According to Article 190 par. II, the native indigenous peasant jurisdiction respects the right to life and the rights established in the present Constitution. Imposing normative limits to autonomous judiciaries raises serious difficulties. As a general rule, inside a state structure that purports to contain different rights without creating isolated reservations, it is impossible to do without the limits included in the normative regulation regarding human rights. Without that firewall, as it has been explicitly said before, risk of getting into the "anything goes" zone leaves it, arbitrarily, up to the subjugation of the individual's dignity.

The Constitution contains the list of human rights that have to be protected by our normative legal system. A glance at the constitutional text could lead us to think that "human rights" refers only to the most fundamental rights (right to life, personal freedom, physical integrity etc.). And indeed, the constitutional text establishes a division between fundamental rights, economic and social rights and political rights that indicates differences and levels that could lead to confusion. It also breaks the conceptual unity of human rights, since these are integrally conceived and, as we already know, are indivisible and

interdependent. From international doctrine and practices, however, we know that human rights also include socio-economic rights, political rights and collective rights (territory, one's own culture, management of natural resources). The defence of human dignity is that which is sought by the norms of human rights. That is why it is known that private rights are fundamental rights recognized by the system of the international protection of human rights.

Article 5 of the Law of Jurisdictional Delimitation stipulates a list of the limits of this jurisdiction. The participation of women has to be guaranteed by the justice administration and the decision of the indigenous communities. It is forbidden to expel elderly or disabled persons, or to sanction them with the loss of land possession just because they did not fulfil their duties in the community. It is also forbidden for all jurisdictions to apply violence against children and women. The lynch justice is not permitted and has to be prevented by the plurinational state.

4.2. Limitation of due process

The Plurinational Constitutional Tribunal is the highest court in Bolivia that controls constitutionality, and it ensures that the aforementioned limits are not violated, given that indigenous people are Bolivian citizens.

In case of appeal, Bolivia sees a role for the Constitutional Tribunal but just at a constitutional level. The specific Law of Jurisdictional Delimitation does not mention this possibility. In Ecuador, indigenous judges appointed by indigenous organizations have to participate in the appeal courts. In the Venezuelan draft, there is no appeal outside the indigenous authorities, excepting cases where a serious violation of human rights is alleged. In those cases, the parties can exercise their constitutional right to protection, but, as in the Ecuadorian case, a court composed of indigenous authorities and state judges has to review the case. The Peruvian Bill establishes that decisions reached by the community authorities are final (definitive).

The Bolivian Plurinational Constitutional Tribunal is elected by a direct vote by the population. Proposed Plurinational Constitutional Tribunal magistrates must be approved as qualified by a two-thirds vote of the Plurinational Legislative Assembly. Candidates are forbidden from campaigning and from affiliating with political parties. They have to fulfil the plurinational criteria. That means that at least two of the seven magistrates have to be authorities from the customary law (indigenous native peasant jurisdiction). In Article 13, the Law of the Plurinational

Constitutional Tribunal stipulates that personal self-identification as an indigenous native peasant person is required.

5. Conclusion

The normative equality between state and customary law named in Bolivia legal pluralism at the constitutional level is no longer a utopia. This is also reflected in the institutions of the judiciary. What still remain unsolved are the procedural mechanisms to coordinate the different hybrid normative systems.

Notes

1. Based on data from the National Institute of Statistics of Bolivia 2001.
2. http://alertanet.org/proyecto-colombia.htm (Nov 14, 2014).

6
South Africa: Legal Recognition of Traditional Courts – Legal Pluralism in Action

Christa Rautenbach

1. Introduction

South Africa has a mixed or pluralistic legal system. It comprises of a number of distinct legal traditions: transplanted European laws (the core being Roman-Dutch law, subsequently influenced by English common law), collectively known as the common law of South Africa,[1] as well as inherited indigenous laws, referred to as African customary law.[2] With the commencement of the Constitution of the Republic of South Africa 200 of 1993 (the interim Constitution) 1994 followed by the final Constitution of the Republic of South Africa (the Constitution) in 1996, two more pieces had been added to this puzzle, mixing the pot even further.[3] The Constitution is supreme law (Constitution: Section 2) and all other law and conduct, including the common law and customary law, are subject to it. Contemporary South African law is a fascinating blend of Western[4] and African[5] laws interspersed with constitutional ideals and principles. The relationship between these laws is likely to present a challenge to someone not accustomed to the South African legal system.[6]

The unique blend of Western and African laws is also detectable in South Africa's national justice system, which is comprised of a justice system based on Western values and principles of justice on the one hand and, on the other, a traditional system based on African values and principles.[7] The main goals of African justice have been described as the "search for truth, reconciliation, compensation and rehabilitation" while the goals of Western justice are seen as "procedural justice, retribution, incarceration, and revenge" (Holomisa 2011: 18). In spite

of the existence of fundamental differences between these two systems arising from their dissimilar values and principles, legal developments over the years inevitably led to cross-pollination and the formation of loose ties between the two systems.

The Constitution makes express provision for the retention of the roughly 1,500 traditional courts[8] in operation in South Africa (Bennett 2004: 141). Due to the fact that they differ quite considerably from community to community it is fairly dangerous to generalize about their exact nature and structure (Bennett 2004: 141) but events over the last few years provide a body of information from which certain conclusions may be drawn. In 1996, soon after the birth of the South African democracy, the South African Law Commission (SALC)[9] established a committee to perform a project (Project 90) entitled "The harmonisation of the common and customary law" (SALC 1996: 50–1). At first the committee focused only on the recognition of customary marriages and the application of customary law in the light of the new constitutional guarantees affording customary law an equal place in South Africa's legal system.[10] The project was not so much about bringing the common and customary law in line with each other but about giving customary law its equal place in the legal system and ensuring the compatibility of customary law with constitutional guarantees. In 1997 traditional courts were also placed on the agenda of the Commission (SALC 1997: 68). A discussion paper dealing with the main issues was published in 1999 (SALC May 1999) and, finally, a report was published in 2003 (SALRC 2003).[11] The report contained a draft Bill for the regulation of customary courts (renamed traditional courts in the final Bill), which was presented to the Minister for Justice and Constitutional Development in 2002 (SALRC 2003: Annexure A). The draft Bill was never introduced in parliament. In 2009 the Department of Justice and Constitutional Development (DJCD) issued a policy document entitled "Policy Framework on the Traditional Justice System under the Constitution" (the Policy Document) (DJCD 2009), which culminated in the final Bill. The Bill is currently being debated in parliament and it is envisaged that it will become law in the near future (see section 3.3 below).

The South African government's final decision is not to merge the two justice systems but to continue with the dual system that allows for separate justice systems applicable to different racial or cultural groups. The reasons for this decision are fairly obvious. For one, the advantages of the traditional justice systems outweigh the disadvantages. The advantages of traditional courts include the following (SALC May 1999: 1–3):

their accessibility, geographically and socially; their affordability (the low transport costs, the minimal court fees and the absence of expensive legal practitioners); their application of customary law, which is familiar to the traditional leader and the litigants; their application of simple and informal procedures; and their use of a familiar local language. The disadvantages include (SALC May 1999: 3–6): their exclusion of legal practitioners contra the constitutional guarantee that every accused has the right to "choose and be represented by a legal practitioner" (Constitution: Section 35(3)(f)); their application of the inquisitorial procedure resulting in a presumption of guilt, which is against the principle of the presumption of innocence (Constitution: Section 35(3)(h)); their exclusion of females as presiding officers and witnesses; and the lack of training in law of the presiding officers.

A second reason emanates from the Policy Document, viz. to maintain "peace and harmony in traditional communities" (DJCD 2009: 6). The government realizes that an estimated 14 million South Africans constitute the traditional communities that continue to adhere to customary law, and that the "institution of traditional leadership[12] plays a crucial role in promoting social cohesion, peace and harmony" in these communities (DJCD 2009: 6). Traditional leaders resolve disputes in their communities through the traditional court structures and the application of customary law values and principles. Government is also of the opinion that traditional courts help in addressing crime and that their existence empowers communities to resolve minor crimes and disputes, thus ameliorating the backlog being endured in the mainstream legal system.[13] In addition, it might destabilize many traditional communities if they were denied access to their familiar justice mechanisms. Himonga and Manjoo (2009: 159) describe this relationship between traditional authorities and the government as follows:

> The recognition by a democratic state, that chiefs are at the centre of local political, social and economic life, particularly in rural areas, has led to a relationship of dependence between the state and traditional institutions, with the state "encapsulating" chiefs through its legislation and resources, and at the same time, the state also borrowing some legitimacy from the chiefs.

Also, in accordance with local political developments and global trends, it is believed that cultural diversity must be celebrated and promoted. Past legislation was designed to keep South African society divided along racial lines, resulting in the unequal development of the nation's

various racial groups. The law was used to force racial separation in society, publicly and privately, and one might have an uneasy feeling that legal plurality, in which different justice systems are made to apply to different sets of people, is nothing more than a manifestation of the old apartheid system. However, the Constitution accepts diversity and recognizes that it may be necessary in promoting diversity to create express provisions for difference. This new approach towards difference or diversity is reflected in contemporary legislative and judicial policies (Rautenbach 2010a: 126–27, notes 47 and 48). As maintained by Gasa (2011: 23) it is an imperative for nation-building to restore those marginalized cultural practices.

Instead of asking if and how traditional courts should be regulated in South Africa, this contribution critiques the past and current legal frameworks for such regulation, especially those regarding the ties between the Western and the traditional court systems. The first part of this chapter is devoted to an overview of the most important historical legal developments regarding traditional courts (see section 2 below). In the second part the current legal framework of traditional courts is set out (see section 3 below). The third part focuses on recent developments relating to traditional courts (see section 4 below), before concluding with a few remarks in the nature of a summary (see section 5 below).

2. Historical context

In order to be able to write a logical and sound report on the prevailing traditional court system one must have an understanding its historical context. It is thus important to provide an overview of the most important events giving rise to the courts' current status, role and function.[14]

In pre-colonial times indigenous communities[15] had a simple system of justice relating to the customs and traditions of the various communities. In general this system comprised a hierarchical court structure consisting of the family at the lowest tier, followed by ward heads, then headmen, then chiefs and finally the king at the top of the hierarchy. A traditional leader (a chief or headman)[16] ruled his community with the implicit consent of the community that he ruled (Mqeke 2003: 30). The traditional justice system differed in many respects from the Western idea of democracy. One important difference was the absence of the principle of the separation of powers. A traditional leader performed executive, legislative and judicial duties in his individual capacity or together with other prominent people in the community.

This conflation of powers is currently the subject of debate pertaining to the role of traditional courts in South Africa (Himonga and Manjoo 2009: 167). Nowadays the Traditional Leadership and Governance Framework Act (41 of 2003) (the TLGFA), which commenced on 24 September 2004, spells out the governance role of traditional leaders, while their judicial and legislative functions are dealt with in separate statutes.

Historically a traditional court consisted of the traditional leader as presiding officer, assisted by his councillors. (The system was inclined to vary slightly from place to place.) The hearings were informal and usually held under a tree. No formal rules of evidence were observed, and any of the members of the community (usually restricted to males only) could cross-examine the accused person. The court was the court of first and final instance and the finding of the court was binding on the offender. The main purpose of the hearing was to correct the imbalance in the community caused by the offender, as against the main purpose of Western law, which focuses more on compensating the individual in civil cases and on retribution in criminal cases (Bogopa 2007: 146; Holomisa 2011: 18–9; Mqeke 2003: 29; Rautenbach 2005: 332).

During colonial times (1652–1915) successive governments[17] were confronted with the existence of indigenous communities whose customs and traditions, including their justice systems, were unfamiliar to the colonialists. At first the Dutch and British took no or little account of these "uncivilized" customs and traditions, and the communities were left to their own devices. After the second British occupation in 1806, the British followed a policy of non-interference with the customs and traditions of the indigenous communities, provided that these customs and traditions were not repugnant to public policy and the principles of natural justice. The policy was also necessitated as a result of a shortage of person-power, indirect rule through traditional authorities and a covert need to promote tribalism (Van Niekerk 2001: 25). Urbanization was on the increase and it was believed that a return to customary structures would ward off the challenges urbanization brought to the fore (Bennett 1991a: 62).

Over the years the situation changed somewhat and the British rulers began intervening in the justice systems of traditional communities in the various colonies.[18] In some areas traditional leaders were allowed to hear only minor offences and disputes. The more serious cases had to be referred to the ordinary courts.[19] In other areas special magistrates with powers to apply customary law were appointed and in some places customary law was applied in the ordinary magistrates' courts. In spite

of their lack of recognition the traditional courts remained popular and the preferred method of litigation. The community generally took their disputes to their own traditional leaders to be resolved, instead of using the ordinary courts, which were foreign to them (Mqeke 2003: 31–6). By 1910 customary law was recognized at various levels in all of the areas that were to constitute the four provinces of the Union of South Africa, but it differed quite considerably from the pre-colonial customary laws (Van Niekerk 2001: 24). Moreover, there was no consistency among the territorial laws regulating customary law, and the disparity among the various colonial laws led to the perpetration of great injustices (Van Niekerk 2001: 25).

In 1927 the various colonial laws were consolidated in the controversial Black Administration Act 38 of 1927 (the BAA),[20] which provided for a separate unified court system for African people and for limited recognition of customary law throughout South Africa. The reforms introduced by the Act were phenomenal and marked the beginning of closer ties between the traditional courts and the ordinary courts. One of the changes involved the introduction of commissioners' courts. These courts were courts of first instance established to hear all civil[21] and criminal[22] matters between African people. The commissioner's court also acted as a court of appeal from the judgement of a traditional court. In essence, this court was a creature of statute and its jurisdiction and powers were derived from legislation, while the jurisdiction and powers of a traditional court arose out of customary law. The law to be applied within the commissioners' courts fell within the discretion of the commissioner. He could choose to apply either the customary law or the common law in the proceedings before him (BAA: repealed Section 11(1); Van Niekerk 2001: 27).[23] An aggrieved litigant in a traditional court could appeal to another statutory court in the following hierarchal order: first the commissioner's court,[24] secondly the High Court and finally the Appellate Division (Olivier et al. 1992: 584).

The incorporation of traditional courts into the national justice system by the BAA was not accepted favourably by everybody. One of the main points of criticism was the judicial officer's apparent lack of judicial independence and insignificant knowledge of the customary law (Van Niekerk 2001: 27). As a result, the commissioner's courts were abolished in 1986, but the traditional courts were retained (see section 3.2 below). Instead of appealing to the commissioner's court, an aggrieved litigant in the traditional court could now appeal directly to the magistrates' court (BAA: Section 12(4); Van Niekerk 2001: 30).

On another front, the establishment of so-called "homelands" with various degrees of self-rule and independence during the 1960s and thereafter also resulted in changes to the traditional justice system.[25] The homelands had different degrees of power to regulate their own affairs, including traditional justice systems, resulting in the situation where there was a patchwork of laws in operation in the various territories (Bennett and Murray 2010: 26, 12–3).[26] The homelands ceased to exist on 27 April 1994. They were re-incorporated into South Africa and absorbed into the nine new provinces. In accordance with the transitional provisions in the interim[27] and final Constitutions, the traditional courts remain in operation until repealed by consecutive legislation. Item 16 (1) of Schedule 6 to the final Constitution explicitly provides as follows:

> Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to –
>
> (a) any amendment or repeal of that legislation; and
> (b) consistency with the new Constitution.

In similar fashion, Item 2 of Schedule 6 of the Constitution stipulates that:

> (1) All law that was in force when the new Constitution took effect, continues in force, subject to –
>
> (a) any amendment or repeal; and
> (b) consistency with the new Constitution.
>
> (2) Old order legislation that continues in force in terms of subitem (1) –
>
> (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
> (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

The effect of the transitional provisions in the two Constitutions is that legislation existing at their commencement would continue to apply in the geographic areas in which they applied before the two Constitutions took effect.[28] In some cases, especially with regard to the territorial laws that applied to traditional courts, the administration of the existing laws was assigned to the appropriate authorities on the appropriate levels of government, including those of the former homelands.[29]

As a result of the nature of South Africa's historical development and the pre-1994 legal framework for traditional courts, it should be evident that the contemporary framework, which is a continuation from the old, remains a challenging patchwork of laws, which confuse government, legal scholars and jurists.[30] Also, Item 16(6)(a) of Schedule 6 of the Constitution provides for the eventual rationalization of courts by stating:

> As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

Government took up the challenge to rationalize all courts, commencing with traditional courts (see the discussion at section 4 below).

3. Contemporary legal framework

3.1. Constitutional outline

As its point of departure the supreme Constitution confirms that judicial authority is vested, subject only to the Constitution and the law, in independent courts (Constitution: Section 165(1) and (2)). In addition, Section 166 of the Constitution provides for three types of courts, viz. the Constitutional Court,[31] ordinary courts[32] and special courts established by means of legislation.[33] Seeing that traditional courts are established in terms of the BAA, it has been argued that they are indeed special courts established by means of legislation (Koyana et al. 2010: 173). The Constitutional Court, in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (1996 (4) SA 744 (CC)), in dealing with the text of the new Constitution, took a similar stance and reiterated that the term "special courts" also provides for the indirect recognition of traditional courts. It held that Section 166(e) of the Constitution (at paragraph 199) –

> [...] refers to "any other court established or recognized by an Act of Parliament". This would cover approximately 1 500 traditional courts recognised in terms of the Black Administration Act 38 of 1927. The qualification "which may include any court of a status similar to either the High Courts or the magistrates' courts" can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list. This interpretation is supported by [section] 170, which says that "(m)agistrates' courts and all other courts may decide any matter determined by an Act of Parliament" – it does not say magistrates' courts or all other courts of a similar status. More directly, [...] sch. 6, s. 16(1) says that "(e)very court, including courts of traditional leaders [...] continues to function". In our view, therefore, [section] 166 does not preclude the establishment or continuation of traditional courts.

It appears, however, from the wording of clause 7 of the Bill that the government has a different viewpoint and does not regard traditional courts as courts in the normal sense. Clause 7 provides that:

> Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to –
>
> (a) prevent conflict;
> (b) maintain harmony; and
> (c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

The exclusion of traditional courts from the realm of courts would explain why they do not have to follow normal rules of procedure and evidence but it does not help much for their perceived subordinate status within the national justice system.

The implicit continuance of traditional courts is further reiterated by the recognition of traditional leadership in terms of Section 211 of the Constitution.[34] This provision stipulates as follows:

> (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs,

which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The recognition of traditional leadership in terms of subsection (1) recognizes traditional courts by implication, because traditional leadership includes the performance of judicial, legislative and executive functions (Kerr 1990: 25; *Bangindawo v. Head of the Nyanda Regional Authority* 1998 (3) SA 262 (Tk) at 272). Similarly, the expression "traditional authority" in subsection (2) implies that a traditional leader has "authority" over his community, which includes judicial authority. Subsection (3) does not distinguish between ordinary and traditional courts and provides one more tie between ordinary and traditional courts. It compels the courts, without distinguishing between them, to apply customary law subject to three qualifications: it must be applicable, compatible with the Constitution and may not be superseded by any legislation that specifically deals with customary law. If these qualifications have been met, the court's discretion falls away and it must apply customary law to the case before it (Bekker and Rautenbach 2010: 39–43).

The application of customary law in ordinary courts leads to a fascinating interaction between Western and African principles and values. For example, although the ordinary courts are compelled to apply the customary law when the qualifications have been met, they follow uniform court procedures, which are prescribed by legislation, while the procedure in the traditional courts is fairly informal and anything but uniform. The imperative to apply customary law in ordinary courts when applicable overwhelmingly favours customary law, which favour is marked by the absence of a reciprocal provision requiring the application of common law in traditional courts when applicable. One may very well argue that it is simply logical in an ordinary court to apply African values and principles to an African living under customary law, but what if someone from another race or cultural group appears in a traditional court? Is it not similarly logical that such persons would want the common law applied to them? However, traditional leaders generally do not have formal legal qualifications and are thus not necessarily equipped to adjudicate common law matters. It would be best to transfer a case involving common law issues to an ordinary court instead of dealing with it in a traditional court.

The SALRC's (SALRC 2003: 32) recommendation to allow for the opting out of the jurisdiction of a traditional court was not taken up in the Bill. The latter does, however, provide for the transfer of a case under certain circumstances, which include common law issues (Bill: clause 19).

Another example of the interplay between the two justice systems is the ordinary courts' power to develop customary law in accordance with constitutional values. This is done in terms of Section 39(2) of the Constitution, which stipulates:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

To date, quite a number of ordinary courts have used this power to develop the customary law in a number of decisions (Bekker and Rautenbach 2010: 41–3). If one considers the fact that a traditional court is also a "court, tribunal or forum", one should expect them, too, to have parallel developmental functions. Seeing that the findings of traditional courts are generally undocumented and unpublished, one is hesitant to speculate, without performing empirical research, on whether or not they are indeed already using their powers to develop the customary law applicable in a particular community.

In one instance, however, the facts of a case pointed towards a bottom-up approach regarding the developmental role of a traditional community. In *Shilubana v. Nwamitwa* (2009 (2) SA 66 (CC))[35] the Constitutional Court had to decide whether or not a traditional community could develop customary law to bring it into line with the norms and values of the Constitution. The facts of the case may be summarized as follows: When the Valoyi traditional leader died in 1968 without male offspring, the chieftainship devolved on his younger brother in spite of the fact that the deceased leader was survived by his daughter. During the younger brother's reign and with his participation, the Valoyi Royal Council unanimously resolved to confer the chieftainship on the daughter, in accord with the constitutional guarantee of gender-equality. After the death of the reigning brother in 2001, the majority of the community again proclaimed the daughter as their traditional leader but the eldest son of the deceased brother applied for an order in the High Court declaring that he, and not the daughter, was entitled to succeed to the chieftainship (*Nwamitwa v. Phillia* 2005 (3) SA 536 (T) at 545F-G). His application was successful and the High Court held that the Valoyi

Royal Council's conduct was a "drastic departure from custom and did not constitute development or evolution, and as such it was beyond the functions and powers of the royal family". The daughter appealed to the Supreme Court of Appeal, which confirmed the order of the court *a quo* (*Shilubana v. Nwamitwa* 2007 (2) SA 432 (SCA)). The daughter then approached the Constitutional Court (*Shilubana v. Nwamitwa* 2009 (2) SA 66 (CC)), which overturned the decision of the Supreme Court of Appeal, confirming the daughter as the new chief of the community. It held as follows (at paragraph 49):

> If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.

Although the case reached a conclusion in the Constitutional Court and not in a customary court, the facts of the case illustrate two important points. Firstly, the case exemplifies the important role of traditional communities and their traditional structures in developing customary laws in accordance with the Constitution. Secondly, it demonstrates the influence of the Constitution on the traditions and customs of traditional communities, resulting in the development of customary law at ground level.

3.2. Black Administration Act (the BAA) and other laws

As explained already, the current legal framework for traditional courts is in essence a relic of the previous dispensation in South Africa. The courts are established in rural areas, where they are presided over by traditional leaders under the BAA and piecemeal legislation from the former homelands.[36] The BAA makes provision for two kinds[37] of traditional courts depending on the nature of the facts before the court, viz. criminal or civil. Since this distinction is based on the common law distinction between criminal and civil cases,[38] it has been criticized in the legal literature as not representing the true position in customary law. Traditional leaders are required to classify a cause of action as either civil or criminal,

while their knowledge of common law is generally not good. They normally hear cases without consciously distinguishing between civil and criminal matters (Bennett 2004: 144–45). Nevertheless, the distinction is now widely entrenched in legislation and the same pattern is followed in the Bill (Bill: clauses 5 and 6).[39]

Although the structures established in terms of the BAA are referred to as criminal or civil courts for the sake of convenience, the Act does not create such courts but makes provision for the minister to confer civil or criminal jurisdiction on traditional leaders. Traditional courts established in terms of the BAA operate on a formal level and thus form part of state law, but there are also traditional court systems operating on an informal level and thus in the sphere of non-state law. These courts are not legally recognized but they are widely used as dispute resolution mechanisms in rural areas. In addition, alternative dispute resolution mechanisms have developed, complicating matters even further.

Post-Constitution legislation, such as the TLGFA, also confirms the role of traditional leaders in South Africa, including their role in respect of the administration of justice. Section 19 stipulates as follows:

> A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation.

And Section 20(1)(f) provides as follows:

> National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of [...] the administration of justice [...]

The discussion below is an overview of traditional courts in terms of the BAA, in other words, the current national legal framework. Except where necessary for the sake of clarification, the legislation of the provincial and former homelands are not considered. The position of the informal or unofficial traditional courts will also not be discussed in detail.

Formal criminal traditional courts

Africans are tried for offences committed in ordinary courts in the same way as any other individual in South Africa. However, in the case of

certain offences they may be tried in special traditional courts with criminal jurisdiction. These courts are indirectly recognized in terms of Section 20(1)(a) of the BAA, which confers on traditional leaders the power to try certain offences. The provision stipulates as follows:

The Minister[40] may –

(a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned –

  (i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and
  (ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister: Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman.

One point of contention is subsection (a), which limits the jurisdiction of a traditional leader: he may try only African (black people) people for offences committed in the area under his control (Koyana and Bekker 1998: 17). It may happen that a non-African lives in an area under the control of a traditional leader. If such a person commits an offence punishable in a traditional court he may, however, not be prosecuted in such a court. The exclusion of some racial groups from the jurisdiction of the traditional courts is difficult to defend in the context of the new constitutional dispensation, which guarantees equal treatment before the law (Constitution: Section 9; Rautenbach 2005: 333). In accordance with the proposal of the SALRC (SALRC 2003: 12), the Bill makes no reference to race, and it is envisaged that any person may be tried in a traditional court if the offence was committed within the court's area of jurisdiction. This development certainly has the potential to create future conflict between litigants and the traditional courts.

The fact that a traditional criminal court may try customary law offences, including certain common law and statutory offences,[41] provides another link between the two legal systems. Reservations have

been expressed about the ability of the traditional courts to try minor common law and statutory offences but the advantages by far outweigh the disadvantages (SALC May 1999: 23–4). For instance, it is argued that such a practice will relieve the congestion at ordinary courts, especially at the magistrates' courts, and that it will provide easier and cheaper access for accused persons and witnesses to justice (SALRC 2003: 15).

Another point of controversy is the fact that a legal practitioner may not appear on behalf of the parties in the court (Government Gazette No. R2082 of 29 December 1967: regulation 5). It has been argued that the exclusion of legal practitioners from the court is contrary to Section 35(3) of the Constitution, which provides as follows (SALC May 1999: 3, 36–9; Himonga and Manjoo 2009: 180):[42]

> Every accused person has a right to a fair trial, which includes the right – [. . .]
>
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly [. . .].

The constitutionality of the exclusion of legal practitioners was evaluated in the High Court in *Bangindawo v. Head of the Nyanda Regional Authority* (1998 (3) SA 262 (Tk)),[43] where the court came to the conclusion that although regional authority courts are akin to traditional courts they are not immune to the provisions of the interim Constitution.[44] Seeing that all laws, including pre-Constitution laws, have to meet constitutional standards, the court found that there was no justifiable reason for the prohibition against legal representation and the rule had to be struck down for both criminal and civil proceedings in regional authority courts (p. 277). A similar conclusion in the context of the new Constitution was reached in *Mhlekwa v. Head of the Western Tembuland Regional Authority* (2001 (1) SA 574 (Tk)).[45] The SALC evaluated both findings and came to the conclusion that they apply only to regional authority courts and not to other traditional civil and criminal jurisdiction courts established in terms of the BAA (SALC May 1999: 36). The disadvantages[46] of excluding legal practitioners from traditional courts outweigh the advantages. The SALC argued that the limitation is justifiable in terms of the Constitution

and recommended that it be retained in future legislation (SALC May 1999: 37–9).[47] In accord with the recommendations of the SALC the exclusion of legal representation is retained in the Bill. Clause 9(3)(a) of the Bill provides as follows: "No party to proceedings before a traditional court may be represented by a legal representative." However, the Bill makes provision for the representation of a party to the proceedings by the following categories of persons: his or her wife or husband, family member, neighbour or member of the community in terms of customary law (Bill: clause 9(3)(b)). It is thus not unimaginable that any one of these categories of people may happen to have a legal background, which could place the party that he or she represents in a more favourable position than the counterparty (SALRC 2003: 24).

Traditional criminal courts are established by virtue of legislation but the procedures and evidence followed in the courts are in terms of the customary law of the particular area. The jurisdiction of the court is limited with regard to sentencing. Section 20(2) of the BAA stipulates that sentencing must be in accordance with customary law provided that they "may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment". The idea of imprisonment is unfamiliar in customary law. The main object of the sentence is to restore the balance in the community disturbed by the wrongful conduct of the offender. It is not uncommon that a case could end with a penalty as well as an award, because the common law distinction between criminal and civil matters does not exist in customary law. The end result should always satisfy the offender, the aggrieved party and the community (Rautenbach 2005: 332).

The procedures in the traditional court are relatively free from state interference but the ties between the ordinary and the traditional court system become evident when an individual is dissatisfied with the outcome of a case or fails to comply with the judgement of the traditional court.[48] In terms of Section 20(6) of the BAA an aggrieved person may appeal against his or her conviction or sentence to a magistrate's court in the area where the trial in question took place, from there to the High Court, and finally to the Supreme Court of Appeal or, if the facts involve a constitutional issue, to the Constitutional Court (Olivier et al. 1992: 584–89).

The magistrate's court can also be involved when the execution of the traditional court's judgement becomes problematic. In this regard, Section 20(5) of the BAA is relevant and stipulates –

(a) If a Black chief, headman or chief's deputy fails to recover from a person any fine imposed upon him [...], or any portion of such fine, he may arrest such person or cause him to be arrested by his messengers, and shall within 48 hours after his arrest bring or cause him to be brought before the magistrates' court which has jurisdiction in the district in which the trial took place.
(b) A magistrate before whom any person is brought under paragraph (a) may, upon being satisfied that the fine was duly and lawfully imposed and is still unpaid either wholly or in part, order such person to pay the fine or the unpaid portion thereof forthwith and, if such person fails to comply forthwith with such order, sentence him to imprisonment for a period not exceeding three months.
(c) The magistrate shall issue in respect of any person sentenced to imprisonment in terms of this subsection a warrant for his detention in a prison.

Subsection (5) provides an enforcement mechanism for the judgements of the traditional court and even goes so far as to allow for the imprisonment of the defaulter.

Although ordinary and traditional courts may have concurrent jurisdiction regarding certain offences, an offender may not be tried twice on the same facts. A person who has been convicted in a magistrate's court may offer a plea of *autrefois convict* (previously convicted) or *autrefois acquit* (previously acquitted) if prosecuted on the same facts in a traditional court, and conversely (Olivier et al. 1989: 589).

Section 12 of the BAA stands to be repealed when the Bill becomes law, but the position in terms of the Bill does not deviate drastically from the current position. The Bill generally confirms the continued existence of traditional criminal courts and provides a new national framework for criminal traditional courts (see section 4 below).

Formal civil traditional courts

As already explained there are, strictly speaking, no formal civil traditional courts, only traditional courts with civil jurisdiction. Section 12(1) of the BAA confers civil jurisdiction on traditional courts. It provides as follows:

The Minister may –

(a) authorize any Black chief or headman recognized or appointed [...] to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), authorize a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within such chief's area of jurisdiction: Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage.

As with a criminal traditional court, a civil traditional court is instituted by means of legislation and thus receives its recognition from the state. It may hear a civil claim only if four conditions are met. Firstly, the claim must have arisen out of customary law.[49] Secondly, all of the parties must be African and thirdly, the incident giving rise to the civil dispute must have occurred within the area of the court. Finally, the claim may not involve any question of nullity, divorce or separation arising out of a marriage. Koyana and Bekker (1998: 3) argue that the second condition constitutes an unfair limitation to the jurisdiction of traditional courts in respect of persons. As an example they refer to the possibility of a non-African trader impregnating an African woman, resulting in a customary law claim, but the perpetrator could not be tried in a traditional court because he is not an African. Likewise, if a non-African person lent money to an African to pay for his daughter's dowry, in the case of non-repayment he would not be able to sue the father in a traditional court (Koyana and Bekker 1998: 3). The Bill does not contain a similar qualification. The civil dispute must have occurred within the area of the court and must have arisen out of customary law (see section 4 below). Although the race of a person may not be a factor in future, it is doubtful that members of other racial groups not living under a system of customary law are going to subject themselves voluntarily to the authority of the traditional courts.

The procedure to be followed in the traditional court is the customary law procedure, provided that it is not repugnant to the Constitution or any legislation dealing with customary law (Koyana and Bekker 1998: 6–11; Olivier et al. 1989: 590–91; Bekker 2009: 265).[50]

Ancillary regulations pertaining to the practice and procedure to be followed in civil traditional courts were issued in 1967 (Government Notice R2082 in Extraordinary Government Gazette 1929 of 29 December 1967). The regulations confirm that the procedure in the court shall be in accordance with the customary law of a particular community and include additional safety measures to ensure fair trial

procedures. For example, regulation 4 prohibits a traditional leader from adjudicating a matter in which he has a personal or financial interest.[51]

Regulations 6 and 7 provide a link between traditional civil courts and ordinary courts, or more specifically magistrates' courts. They stipulate that a traditional leader must prepare a four-fold record of the civil proceedings immediately after his judgement has been given. One of the copies must be forwarded to the responsible magistrate's court. The magistrate's court must register the judgement of the traditional court within two months of the judgement. Non-registration will result in the lapse of the judgement concerned. If the traditional leader is illiterate he may personally or through someone else furnish the particulars verbally to a clerk at the magistrate's court, who shall complete the written record (Bekker 2009: 266).

Regulation 5 excludes legal representation. Parallel arguments for and against the exclusion of representation, as raised above,[52] are also relevant here. Their future exclusion from the traditional court proceedings, nevertheless, appears to be certain.[53]

Regulation 8 deals with the execution of a traditional civil court's judgement, which is essentially in accordance with customary law. It is possible for a creditor to apply to a magistrate's court for the enforcement of a registered judgement, if the execution must be effected on property outside the jurisdictional area of the traditional leader (Bekker 2009: 266).

As in the case of the criminal traditional courts, an aggrieved party may appeal the finding of the traditional civil court to a magistrate's court, then to the High Court and finally to the Supreme Court of Appeal or, in the case of a constitutional issue, to the Constitutional Court (Olivier et al. 1989: 590).

Section 12 of the BAA stands to be repealed when the Bill becomes law, but the civil jurisdiction of traditional leaders will continue in future, albeit with a few additional guarantees in accordance with the Constitution (see the discussion in section 4 below). The ancillary regulations, however, will continue to apply in the traditional courts until such time as replacement regulations are made (Bill: clause 23(6)).

Informal traditional courts and other justice structures[54]

Informal traditional courts operate on the level of non-state law and are manifestations of the phenomenon of deep legal pluralism.[55] Traditional leaders who have not been granted civil or criminal jurisdiction in terms of the BAA preside in these courts. They include the courts of the family councils, courts of ward heads, sub-headmen and so-called community courts[56] (Koyana et al. 2010: 176). In some traditional communities the

claims or complaints start at the level of the family council. If the matter is not resolved at this level, it is taken to the ward head or, depending on the circumstances, the sub-headman who, together with his advisors,[57] tries to dispose of the matter. The primary focus of the courts at this level is mediation and reconciliation between the people in their areas. If they cannot dispose of the matter, or if a party is not satisfied with their decisions, the matter is referred to the formal traditional court of the particular area. The existence and importance of these informal court structures have been recognized by the SALRC, which has proposed their official recognition in future (SALRC 2003: 6). However, the proposal has not been taken up in the Bill; neither does the Bill recognize the ties between the formal and the informal traditional courts. According to Himonga and Manjoo (2009: 173), the absence of a procedural link between the two structures is a matter of concern, especially from a gender perspective. They advance two reasons for their concern, viz.:

> Firstly, not all customary practices generated and applied by, for example, the semi-autonomous social field of the family are equitable and consistent with the constitutional principle of non-discrimination. Secondly, it would appear that there are instances in which the outcome of disputes in state courts is influenced by outcomes of dispute processing at the informal level to the disadvantage generally of women.

Although their arguments are valid, one should keep in mind that the Constitution endorses legal pluralism, a fact also recognized by Himonga and Manjoo (2009: 159). In the South African context there are enough examples illustrating the accommodating approach of the judiciary when it comes to issues of deep legal pluralism (Rautenbach 2010b: 143). Furthermore, the South African Bill of Rights (Constitution: Chapter 2) applies not only to law but also to conduct. Thus, all conduct, including instances of gender inequality in the informal courts, can be subjected to the human rights provisions in the Bill of Rights. The fact that no formal links exist between formal and informal traditional courts should not be a stumbling block for promoting gender equality.

As a result of migration and industrialization large numbers of people who lived in rural areas under the jurisdiction of traditional leaders have been drawn into urban areas, where the growth in population has led to a corresponding increase in the need to resolve disputes and to combat

crime. Many people perceive the Western court system to be a foreign, dominant system based on foreign, Western values and principles not suited to their needs (Schärf 2001: 42–52). The ever-increasing crime rate, high legal costs and the inability of the ordinary courts to deal with increasing legal and social problems has given rise to the establishment of informal forms of community courts in such contexts. These courts grew out of a realization that the existing judicial approaches had failed, at least in specific areas such as crime prevention, accessibility and legal costs. The community courts apply a mixture of customary law, common law and self-made law. In addition to fulfilling judicial functions, these structures also perform social functions such as providing welfare, childcare and support, burial support and savings clubs.[58] The SALC recommended that these structures be formally recognized, but suggested that they should not be called courts but community forums that provide "first-aid" justice for traditional communities. The Commission argued that the term "courts" confuses the issue because it pre-empts many questions, including those relating to jurisdiction, the training of personnel, the binding nature of decisions and the voluntariness of participation (SALC 1999: 63–4). Some commentators are of the opinion that these forums are so unstructured and undisciplined that it is hard to justify their existence (Koyana and Bekker 1998: 152). The SALC's proposal for recognition was eventually not taken up in the Bill, for no apparent reason.

3.3. Legal reform: Traditional Courts Bill (the Bill)

After comprehensive review and engagement in extensive processes of rationalization,[59] there is finally something on the table to take further, viz. the Bill, which is currently being debated in parliament. Himonga and Manjoo (2009: 163–71) discuss two factors, which, according to them, resulted in the "slow birth of a regulatory framework for traditional courts". Firstly, the fact that the reform processes were duplicated for no apparent reason between the SALRC (formerly the SALC) and the DJCD led to unnecessary delays and secondly, the process of public participation took a considerable amount of time to conclude. Be that as it may, the processes were completed in 2009, but the Bill still has to be transformed into law and there is no indication of when that is going to happen.

As already explained, the Bill replaces the provisions of the BAA dealing with formal traditional courts. The objects of the Bill, as set out in clause 2, are, first of all, to confirm the values of a traditional justice system (restorative justice and reconciliation) and, secondly, to align

traditional courts with the Constitution (clause 2(a) and (b)). Additional objects include the need to create a uniform legislative framework for traditional authority courts and to enhance the "effectiveness, efficiency and integrity of the traditional justice system" (clause 2(c) and (d)). In accordance with contemporary legislation and international instruments, the Bill also contains a provision dedicated to "guiding principles" (clause 3) which should apply in the application of the Bill. The overarching theme of the guiding principles is the promotion of African values based on restorative justice and reconciliation but within the framework of constitutional guarantees and freedoms. The critique of Himonga and Manjoo (2009: 171–4), who feel that the Bill is an empty promise despite these guarantees, has already been referred to.

Clause 4 of the Bill provides for the designation of traditional leaders as presiding officers of traditional courts for certain areas, and also requires the Director-General of Justice and Constitutional Development to keep a register of all the designated officers. The Director-General also has the power to revoke or suspend their designation under certain circumstances. A new addition to the current situation is the fact that it requires the designated officers to attend prescribed training programmes and courses. The effect of the attendance requirement is ambiguous. The mere attendance of a programme or course cannot guarantee the acquisition of the necessary skills required from a traditional leader presiding in a traditional court.

Clauses 5 and 6 respectively deal with the civil and criminal jurisdiction of traditional courts. Civil jurisdiction is granted only with regard to disputes arising out of customary law and certain disputes are excluded from the jurisdiction of the court, such as constitutional matters, divorce matters, the custody and guardianship of children, the interpretation of wills, claims above a certain amount which has yet to be determined and property issues (clause 5). Criminal jurisdiction is limited to only certain offences committed (as listed in the schedule to the Bill) in the jurisdictional area of the traditional court (clause 6) and limited to certain sanctions and orders in terms of clause 10. The procedure to be followed in the court is in terms of customary law (clause 9) but the Bill introduces the two principles of natural justice into the procedure, viz. *audi alteram partem* (hear both sides) and *nemo iudex in propria causa* (impartiality of the judge).

Clause 11 prescribed the procedures to be followed if someone fails to comply with the sanction of a traditional court. The sanction of a traditional court has the effect of a civil judgement of a magistrate's court and is enforceable by execution in that magistrate's court. The magistrate's

court remains thus the final forum of execution of the orders of the traditional courts.

The possibility of an appeal to a magistrate's court is retained in clause 13. This route is available to a convicted offender or an aggrieved party in a civil case. The magistrate's court may confirm the order of the traditional court, amend or replace it, or dismiss it. In addition, clause 14 makes provision for review proceedings to a magistrate's court on the following grounds: the traditional court acted *ultra vires*; without jurisdiction; with gross irregularities regarding the proceedings; or with personal interest, bias or malice. Weeks (2011: 35–7) is of the opinion that all judgements of the traditional courts should be appealable to the magistrates' courts but recommends that dedicated officers be installed to deal with customary law concerns. As with the training of traditional leaders, these officers must receive instruction on how to deal with customary law issues, especially with living customary law. In other words, the integration of ordinary and traditional courts must be based on a mutual understanding of both systems (Weeks 2011: 37).

The Bill has not received entirely favourable reviews. Although the intention of the Bill is to resolve existing problems with the traditional courts, to bring them in line with the Constitution, and to facilitate the links between them and ordinary courts, some scholars disagree that these objects have been realized. Weeks (2011: 5–8, 33) has at least five concerns regarding the Bill, viz.: the DJCD consultation-process did not include ordinary people, including women and the youth, in rural areas; the Bill does not recognize lower-level or unofficial traditional courts; the wide powers of the traditional courts pertaining to sanctions increases the scope for abuse, as does the exclusion of legal representation; people do not have an option to choose whether they want to fall under a particular traditional leader's authority or not, neither do they have the choice to opt out of the jurisdiction of the traditional court (see also Weeks 2011a: 35); and, finally, the Bill provides only lip service to gender equality and does not afford substantive equality to the female members of a traditional community.

The first bone of contention for Holomisa (2011: 18–20) is the fact that the Bill centralizes power in the traditional leaders while traditional justice systems are based on layered authority. Additionally, he is of the opinion that government should leave the traditional courts as they are, to evolve and adapt to changing circumstances in their own time in their own way. He also does not agree with the accusations of gender discrimination voiced by some. According to him these critics do not understand customary law or the functioning of the courts, and

he concludes with a sweeping statement by saying that the critics of the traditional system are not up to date with the changes in customary law, "[t]hey are content with rehashing colonial drivel, which presumes that African culture is inferior to western culture" (Holomisa 2011: 20).

Another scholar is particularly critical of the Bill and compares it with pre-constitutional legislation, which impaired the dignity of Africans (Gasa 2011: 24–5). His arguments echo other criticisms of the Bill's failure to recognize the multi-layered levels of traditional justice systems, including the important links between these layers.[60] He finds the affirmation of authority on the grounds of jurisdictional boundaries especially problematic and contrary to customary law values, and declares (Gasa 2011: 24–5):

> Some of the provisions of the TCB [Bill] will suffocate the dynamism of those communities defined as "traditional communities", and will impose cultural hegemony at the expense of peaceful coexistence. This may amount to cultural chauvinism.

The fact that such communities are not homogeneous, according to him, justifies the inclusion of a clause enabling people to opt out and choose their own forum for justice (Gasa 2011: 27).

4. Concluding remarks

This chapter illustrates that the contact between Western and African justice systems in South Africa has a long and troubled history. Consecutive governments have made legislation to regulate traditional courts, failed and then tried again. Despite suffering from the making of such legislative inroads, traditional justice systems have proven to be surprisingly resilient against Western influences. Nevertheless, the ties between the ordinary and the traditional judicial systems are unmistakably there, albeit on the lower level of magistrates' courts. Although empirical research needs to be done to determine the true position of traditional courts in rural areas, there seems to be a wide gap between law and practice.

After decades of confusion in relation to the traditional justice system, one would have hoped that the Bill would finally have brought clarity and the approval of all. However, judged from the divergent opinions of a number of African scholars intimately familiar with customary law and traditional courts, it appears as if the achievement of clarity and approval remains a forlorn ideal.

Notes

I am grateful to the National Research Foundation and the Alexander von Humboldt Foundation, which have been supporting my research endeavours financially. Nevertheless, I am solely responsible for my viewpoints and errors. Additionally, I appreciate the support I received from Matthias Kötter of the Wissenschaftszentrum Berlin für Sozialforschung in writing this chapter.

1. The English influence is most apparent in procedural aspects of the legal system and methods of adjudication (such as procedural law, company law and the law of evidence), and the Roman-Dutch influence most visible in its substantive law (such as the criminal law, law of contract, law of delict, law of persons, property law and family law).
2. A contemporary definition of "customary law" is contained in the Recognition of Customary Marriages Act 200 of 1998, namely: "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". From this definition it should be evident that customary law is neither uniform nor fixed. For a discussion of the problems created by the definition, see Bekker and Rautenbach (2010: 17–20).
3. Rautenbach (2009: 222) refers to this mix as *potjiekos* (typical South African pot food).
4. In this context, the term "Western law" refers to the common law of South Africa, which is a mix of European laws.
5. In this context, the term "African law" refers to the various indigenous laws of the African population living in South Africa.
6. For many years, the common law was the dominant legal system in South Africa. Customary law often had to take a back seat if its rules were deemed to be against common law values. Since 1994, however, customary law is regarded as a separate but equal legal system available to African people choosing it. The main catalyst for this development has been the two South African Constitutions, which placed customary law on an equal footing with common law. First Section 181 and Constitutional Principle XIII of Schedule 4 of the interim Constitution gave recognition to the institution of traditional leadership and customary law. Constitutional Principle XIII provided as follows: "Indigenous law [customary law], like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith." The interim Constitution was replaced by the final Constitution on 4 February 1997. Section 211 of this Constitution continued with the trend of giving formal recognition to customary law. For a discussion of this provision, see section 3.1 and for a general discussion of the application of customary law in South Africa, see Bekker and Rautenbach 2010: Ch.2).
7. According to clauses 2(a) and 3(f) of the Bill these values include restorative justice and reconciliation. For a discussion of the provisions of the Bill, see section 3.3.
8. There has been a debate in the literature about whether the traditional structures resembling courts should indeed be called courts or something else.

Additionally, the question of whether they should be termed "traditional" or "customary" has also been raised. In the Traditional Courts Bill (B15–2008) (the Bill), published in Government Gazette 30902 of 27 March 2008 they were called traditional court[s] and they are referred to as such in this chapter. See SALC May 1999: 11–5; SALC 2003: 4–5.

9. The South African Law Reform Commission (SALRC) was formerly known as the South African Law Commission (SALC) and was renamed on 17 January 2003.
10. Earlier investigations into aspects of customary law had already been undertaken but everything was placed on hold to wait for South Africa's new constitutional dispensation to take effect. In 1996 a new Project Committee was constituted. The first issue on its agenda was the recognition of customary marriages. This culminated in the Recognition of Customary Marriages Act 120 of 1998. See SALC 1998: 1–6.
11. The SALC and later the SALRC have issued four reports in total dealing with aspects of customary law, including various discussion documents. For more information, see the official website of the SALRC at http://www.justice.gov.za/salrc/index.htm.
12. Traditional leadership is defined in terms of Section 1 of the Traditional Leadership and Governance Framework Act 41 of 2003 (the TLGFA) as: the "the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practised by traditional communities". In addition, a customary institution or structure is defined in the same provision as "those institutions or structures established in terms of customary law".
13. This fact appears from the minutes of the parliamentary meeting between the DJCD and the Portfolio Committee on Justice and Constitutional Development on 1 September 2009. The proceedings are available at http://www.pmg.org.za.
14. For a more detailed account of historical events influencing the existence of traditional courts in South Africa, see Bennett 2004: 135–41; Bekker 2009: 262–63; DJCD 2009: 10–1; Himonga and Manjoo 2009: 161–62; and from earlier times Whitfield 1948: 1–39; Koyana 1980: 128–40; Khumalo 1984: 1–36.
15. A traditional community will qualify as such if it is subject to a system of traditional leadership in terms of that community's customs and if it observes a system of customary law. See ss. 1 and 2 of the TLGFA.
16. A traditional leader is someone who holds a leadership position in terms of customary law, and is nowadays recognized in terms of the TLGFA. It is usually the chief or headman of a particular community. See Section 1 of the TLGFA.
17. In 1652 the Dutch East India Company established a refreshment station in the Cape with permanent settlers. The British seized the Cape in 1795 and then briefly relinquished it back to the Dutch in 1803, before definitively conquering it in 1806. On 31 May 1910 the Union of South Africa came into being but it continued to be under British rule. South Africa's infamous apartheid policies began with the enactment of the Native Land Act of 1913 that barred African people from owning property outside designated areas. It continued after South Africa's independence in 1934 and intensified when the National Party came into power in 1948.

18. Before unification on 31 May 1910 South Africa was divided into various territories, viz. the British Colonies (the former Cape and Natal), the Boer Republics (the former Transvaal and Orange Free State) and the various indigenous Kingdoms (e.g. the Zulu and the Basotho Kingdoms). The Union of South Africa was founded as a dominion of the British Empire. It was governed under a form of constitutional monarchy, with the British monarch represented by a governor-general. The Union came to an end on 31 May 1961 when South Africa became known as the Republic of South Africa.
19. Ordinary in this context refers to the Western court system.
20. The Act came into operation on 1 September 1927. Although subject to severe criticism, the Act has been only partly repealed and the provisions regulating traditional courts are still in operation, although they stand to be repealed in the future. For a discussion of the relevant provisions of this Act, see section 3.2.
21. Civil jurisdiction was conferred in terms of Section 10 of the BAA. This provision was repealed on 1 August 1986 by Section 2 of the Special Courts for Blacks Abolition Act 34 of 1986. Since 1986 the civil jurisdiction of traditional courts has been regulated by Section 12 of the BAA. See the discussion in section 3.2.
22. Criminal jurisdiction was conferred in terms of Section 20 of the BAA. Although amended on a number of occasions, this provision is still in operation today. See the discussion in section 3.2.
23. Section 11 was repealed on 1 August 1986 by Section 2 of the Special Courts for Blacks Abolition Act 34 of 1986.
24. Although they could apply customary law, they had some of the characteristics of a Western court, with formal procedural rules and legally trained commissioners who were mostly non-Africans.
25. In accordance with South Africa's policy of separate development, the state created ten homelands (Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, Qwaqwa, Transkei and Venda) with the purpose of assigning every African to a homeland according to their ethnic identity. This was done in terms of the Promotion of Bantu Self-Government Act No. 46 of 1959 (repealed by the interim Constitution in 1994). In the course of time four of these homelands became independent with limited governance and legislative powers, viz. Bophuthatswana (1977), Ciskei (1981), Transkei (1976) and Venda (1979).
26. Examples include: Regional Authorities Courts Act, 1982 (Transkei); KwaNdebele Traditional Hearings of Civil and Criminal Cases by the Lingwenyama, Amakhosi, Amakhosana and Linduna Act 8 of 1984; KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990; Venda Traditional Leaders Administration Proclamation 29 of 1991; Bophuthatswana Traditional Courts Act 29 of 1979; Transkei Authorities Act 4 of 1965; Chiefs Courts Act 6 of 1983; Ciskei Administrative Authorities Act 37 of 1984; QwaQwa Administration Authorities Act 6 of 1983. All of these statutes stand to be repealed when the Traditional Courts Bill is transformed into a statute.
27. Section 229 stipulated as follows: "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue

in force in such area, subject to any repeal or amendment of such laws by a competent authority."

28. Although the court in *Mhlekwa v. Head of the Western Tembuland Regional Authority* (2001 (1) SA 574 (Tk)) found that regional authority courts may continue to exercise judicial authority under the Constitution, it held that several provisions of the Regional Authority Courts Act were inconsistent with the Constitution and that they should be struck down. Of particular interest are the differences the Court pointed out between the traditional court and the regional authority court which, according to the Court, shows more similarities to a magistrate's court (see pp. 628–29). As a result of the decision, all regional authority courts have since been called upon by the DJCD to stop operating altogether.
29. This was done in terms of Section 235(8) of the interim Constitution and Item 14 of Schedule 6 to the new Constitution, which allow for the assignment of legislation to the various provinces. In terms of these two provisions the laws dealing with traditional authorities in the former homelands were assigned to the various provinces into which they were incorporated. In some cases, for example in Bophuthatswana, the homeland was split up and incorporated into more than one province, leading to considerable confusion as to which laws apply where and when.
30. The SALRC published a discussion document on 29 February 2012 to introduce its statutory law revision project. The purpose of this project is to revise all of the legislation administered by the DJCD. Some of the legislation dealing with the national justice system is included in the review. See SALRC 2012.
31. Section 166(a). The Constitutional Court is the highest court when it comes to the interpretation, protection and enforcement of the Constitution. The legal foundation for the Constitutional Court consists of the Constitution (Chapter 8 and Item 16(2)(a) of Schedule 6), the Constitutional Court Complementary Act 13 of 1995 and the Rules of the Court promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003.
32. Section 166(b)–(d). Ordinary courts include the following: First the Supreme Court of Appeal regulated in terms of the Constitution (Chapter 8 and Item 16(2)(a) of Schedule 6) and the Supreme Court Act 59 of 1959. Secondly, High Courts regulated in terms of the Constitution (Chapter 8 and Item 16(2)(a) of Schedule 6) and the Supreme Court Act 59 of 1959 and, lastly, magistrates' courts regulated in terms of the Constitution (Chapter 8 and Item 16(2)(a) of Schedule 6) and the Magistrates' Courts Act 32 of 1944.
33. Section 166(e). Special courts are established in terms of legislation. They have been established mainly for the purposes of specialized litigation and include, *inter alia*, small claims courts in terms of the Small Claims Court Act 61 of 1984, children's courts in terms of the Children's Act 38 of 2005, equality courts in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, traditional courts in terms of the BAA 38 of 1927 and the Land Claims Court in terms of the Restitution of Land Rights Act 22 of 1994.
34. See Lehnert 2005: 243–47 for a more detailed discussion of Section 211.
35. For a discussion of the facts of the case, see Mmusinyane 2009: 135–61.

36. For a discussion of the court systems in some of the former homelands, see Koyana and Bekker 1998: 19–34.
37. Strictly speaking it is one and the same court that presides in cases based on different causes of action.
38. A civil case usually involves private disputes between individuals or organizations seemingly on an equal footing, while a criminal case deals with the unequal relationship between the state and individuals who have committed offences. In customary law the same strict divide does not exist.
39. The Bill has retained this distinction (Bill: clauses 6 and 7).
40. The responsible minister is the Minister of Justice and Constitutional Development.
41. The offences include all of the common law offences except those set out in the Third Schedule to the BAA, namely: arson; bigamy, *crimen injuria,* abortion, abduction, stock theft, sodomy, bestiality, any offence relating to the Prevention and Combating of Corrupt Activities Act 12 of 2004, breaking or entering any premises with intent to commit an offence, receiving any stolen property knowing that it has been stolen, fraud, forgery, illicit possession of or dealing in any precious metals or stones, drug offences, any offence relating to the coinage, perjury, witchcraft, faction fighting, man stealing, incest, extortion, defeating or obstructing the course of justice, and any conspiracy, incitement or attempt to commit any of the aforementioned offences.
42. The arguments of Beck and Mqeke were raised before the two Constitutions of South Africa came into operation, illustrating that the absence of legal representation was already a problem in earlier years. See also Bekker 2009: 265–67.
43. Two cases were brought before the Transkei High Court. The first case dealt with the conviction of Nyanisile Bangindawo and two others in terms of the Stock Theft Act 25 of 1977 (Tk) in the Nyanda Regional Authority Court established in terms of the Regional Authority Courts Act 13 of 1982 (Tk) and the Transkei Authorities Act 4 of 1965 (Tk). The second case was brought by Kutete Hlantlalala against the Western Tembuland Regional Authority, also established in terms of the Regional Authority Courts Act and the Transkei Authorities Act. The two applicants attacked the constitutionality of the two regional authority courts on a number of points, for example, that they denied litigants the right to legal representation. Although the court found the exclusion of legal representatives to be unconstitutional, it held that the framers of the interim Constitution had intended that the regional authority courts should continue to exist (at p. 270).
44. The case was considered when the interim Constitution was still in operation but remains relevant for a discussion of the provisions of the new Constitution.
45. The Western Tembuland Regional Authority issued warrants for the arrest for the two applicants who failed to appear on different occasions in the Western Tembuland Regional Authority and the chief's court at Qamata respectively. Both were found guilty on a charge of contempt of court by the Western Tembuland Regional Authority and sentenced to "pay two herds (sic) of cattle/R1 000 or to undergo two months imprisonment" (p. 582). The applicants subsequently applied for an order in the appeal court setting aside their

conviction and sentences and also attacked the constitutionality of certain of the provisions of the Regional Authority Courts Act 13 of 1982 (Tk) (p. 583). As a result of the similarities between the two cases, it was decided that they be heard together by a full bench of the court. Although the appeal court found irregularities in the criminal proceedings in respect of both parties and set both sentences aside, it continued to assess the constitutionality of the relevant provisions of the Regional Authority Courts Act excluding legal representation.

46. The first reason advanced is that litigants in traditional courts are normally very poor, which may lead to hardship if the other party is wealthy (SALC 1999: 36; SALRC 2003: 22). This reason is not unique to litigation in terms of customary law. Similar situations may prevail in ordinary courts where the affluence of the parties may differ considerably. A second reason put forward is that the simplicity of customary law cases does not necessitate the making of complicated legal arguments by legal practitioners. In addition, it is argued that the parties are generally knowledgeable in customary law, a fact that makes legal representation redundant (SALC 1999: 36–7; SALRC 2003: 22–3). In the light of modern developments such as urbanization and the drift from extended families towards nuclear family structures, the truth of this statement might need a re-assessment. Other less convincing reasons for the retention of the rule include the fact that the lawyerly way of using legal jargon in the court might confuse the issues, might undermine the essence of the courts or might introduce a problem of language. See also Rautenbach 2005: 330.
47. The SALRC relied on Section 36(1) of the Constitution, which allows for limitations "justifiable in an open and democratic society based on human dignity, equality and freedom".
48. For a discussion of the procedure and evidence in the courts of traditional leaders, see Koyana et al. 2010: 177–80.
49. A claim involving common law must be referred to an ordinary court (Koyana et al. 2010: 175).
50. See in general Koyana and Bekker 1998: 6; Olivier et al. 1989: 591–92.
51. Weeks 2011: 3–4 discusses the example of the king of the amaTembu in the Eastern Cape, who abused his powers as a traditional leader.
52. See the discussion in section 3.2.
53. See clause 9(3)(a) of the Bill.
54. This section is based to a large extent on Rautenbach 2005: 328–29.
55. Legal pluralism may be interpreted in different ways. In a South African context, the argument of Van Niekerk 2001: 349–61 and Van Niekerk 2008: 208–20 is convincing. She argues that the narrow interpretation of legal pluralism in the context of family laws is the coexistence of officially recognized state laws, while deep legal pluralism can be regarded as the factual situation that reflects the realities of a society in which various legal systems are observed, some officially and others unofficially.
56. "Community courts" has become the contemporary term used to refer to informal justice structures such as street committees, people's courts, *makgotla* (the plural of *lekgotla,* which literally means meeting or court) and area committees. See Bennett 2004: 154–56.

57. The sub-headman is assisted by an informal group of advisers, which consists of his senior relatives and the heads of other family communities in the area.
58. For more information about community courts in South Africa, see Bennett 2004: 151–60; Bogopa 2007: 148–51; Schärf 2001: 39–70; Van Niekerk 1994: 19; Nel 2001: 87.
59. Although the traditional justice system has been on the agenda of the SALRC since 1996, the investigation gained momentum only in 1996 with the publication of a discussion paper. See SALC 1999. Their investigation was finalized in 2003 with the publication of a report, which contained a draft Bill. The report was eventually submitted to the Minister for Justice and Constitutional Development. For no apparent reason the draft Bill was never tabled in parliament. Instead the DJCD commenced with its own review process, leading up to the Bill, which was introduced in parliament in May 2008.
60. See also Weeks 2011: 33 for a similar viewpoint.

Part II

Non-State Justice Institution and the Law: Conceptual Approaches

7

Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation

Matthias Kötter

1. Non-state justice institutions and the rule of law

We look back upon more than two centuries of attempts to establish modern statehood and modern legal systems all over the world. Various forms of non-state justice institutions have existed all along this time, others have emerged only during this period, partly in opposition of the newly created state institutions, partly with the approval of the official state judiciaries and administrations, and not seldom even initiated by the governments. The invention of tradition (Hobsbawm and Ranger 1992) and the forming of traditional institutions as an intermediate level in between the state administration and society is a phenomenon to be found not only in African countries, but also in Latin America and South and Central Asia. Either way, non-state justice institutions are a phenomenon of modern statehood. Even the oldest institutions became "non-state" only when modern statehood came in and forced them to adapt to the institutional and normative impositions of modernity.

Non-state justice institutions are not a phenomenon of weak or fragile statehood as the cases described in this book suggest. They also exist under conditions of strong statehood as two more cases show: the right of religious communities in Germany to organize and regulate their own affairs and the right of US native tribes to self-governance on Indian country. Regardless of the specific context non-state justice institutions fulfil similar functions of ordering and decision-making, and can be regulated by the state as a variety of state legislations that interlink non-state justice institutions and the state judiciary that has emerged lately indicates.[1] They can be almost completely formalized by the state and

still remain autonomous to a certain degree, which means that the state and non-state divide of justice institutions persists. Under which conditions are such institutions considered to be non-state? How are they interrelated with the state law and judiciary? What expectations with regard to the rule of law and especially effective access to justice are related to them? From a state point of view the relevance of non-state institutions slightly differs between contexts of weak and strong statehood. We will see that it is rather the regulatory motive that depends on the degree of statehood and not so much the specific forming of the regulation.

1.1. Non-state justice institutions: A matter of fact . . .

The notion of non-state justice institutions relates to a variety of phenomena in different societies with various functions. It describes a multitude of arrangements that relate to a social practice distinct from official state policy and serve a wide spectrum of justice functions from arbitration to court-like decision-making to resolve disputes or to achieve a collective decision. They may be formed by traditional authority such as elders or other respected community members. In South Africa, for example, under the Constitution of 1996 customary courts have an eminent social and political function (Rautenbach 2015). They are granted with official approval as an elementary part of the state court system. And in all cases in which customary law is to be applied all courts are obliged to do so subject to the constitution and other applicable state laws. However, the traditional leaders that adjudicate in these courts are the guardians of the customs of their people, they are obliged to apply customary law and do not reflect provisions by the constitution or state court precedents in their decisions, even if they know them (Grenfell 2013: 142–44). Decisions of customary courts still comply with superordinate state laws as long as the laws do not conflict, and to resolve normative conflict the litigants in a customary court trial have the right to appeal to the state courts with the constitutional court as the highest stage.

Besides convention and local custom non-state justice institutions may also originate from religious authority like the Sharia courts active in several countries in South and East Asia and Africa. The federal Sharia courts in Ethiopia, for example, can be addressed by anyone in the case of a personal or family matter relating to Islam (Girmachew 2015). For their decisions, the Sharia courts apply Islamic law, but they are bound to apply the official Civil Procedure Code and other relevant statutory procedural rules, implying that state institutions exercise the

enforcement of the Sharia court's decisions. The Sharia courts' mandate to make a decision requires the litigants' consent; if consensus cannot be reached a state court will adjudicate the case. After a case is brought before a Sharia court and consented to by the litigants, however, it cannot under any circumstance be transferred back to the state judiciary. The Sharia court's jurisdiction is, in this case, exclusive and final.

Non-state justice institutions are "non-state" in the sense that they relate to a non-state normative mechanism. The variation of different manifestations is wide. In the majority of cases, non-state justice institutions are part of the historically passed institutional canon. They may have survived within the official governmental setting, because (1) they may deal with subjects of no general interest; historically, self-governance often results from regulatory indifference of the official government; or (2) the state may be too weak to suppress them; or (3) they may even be acknowledged by the state and integrated into state governance. Non-state justice institutions may also be newly created "traditional-style" state organs that relate to tradition for the reason of legitimacy (Penal Reform International 2000: 11; Connolly 2005: 242).

Non-state justice institutions can be obliged to adhere to the state law and they can even be formally incorporated into the state court system, as in the case of the Ethiopian *kebele* social courts. Social courts are court-like institutions within the local *kebele* (neighbourhood) administration[2] that provide decisions in cases of small claims and petty offences. They can apply *shimglina*, a traditional mechanism of arbitration and deliberative conflict resolution, which was formerly exercised by respected elders, and they also relate to the tradition of the local judge *abbat*, a respected elder who was accepted by popular consensus and who served as the arbiter of public affairs (Girmachew 2014). They are highly regulated by the laws of the regional states and integrated into the official court system and the stages of appeal. Their status has been like this since they were officially formalized in the time of the Derg regime in the 1980s. However, until today the social courts stand out from the official state institutions and are regarded as "non-state" by the people.[3]

Even though non-state justice institutions rely on tradition in their arbitration, they are far from nostalgic. Rather, the existing bodies can be powerful contemporary institutions that deal with everyday problems (Tamanaha 2015) – and they always have been. The interest socio-legal sciences have in non-state justice institutions is also far from new. Early legal anthropological research on customs and traditional laws in colonial Africa from the 1950s already focused on the proceedings and decisions of traditional judges and courts in order to describe unique

cultural phenomena (e.g. Gluckman 1955). This method still prevails in the empirical research on legal pluralism today (Moore 2001: 98; von Benda-Beckmann 2002: 37). Early works revealed how popular and well established the traditional courts were under colonial rule; they were sometimes even sanctioned by the colonial rulers and used for indirect rule (Tamanaha 2015). It is only recently, however, that the literature on law and development has turned to non-state justice institutions as a present form of conflict resolution and governance. This reflects non-state institutions as part of the state governance system and is taking place not only in respect of cases in Africa, but also of those in Latin America and South Asia.

A traditional forum for decision-making in Afghanistan and Pakistan is the *jirga*.[4] In large parts of the Federally Administered Tribal Areas (FATA) in the north of Pakistan, no state courts exist. Even though, according to the Constitution, a governor federally administers these areas, in fact they are self-regulated and self-governed by the local communities. If a member of a local community wants a third-party decision on a family issue, he or she has to address one of the local leaders of their sub-tribe to call a *jirga* (Röder and Shinwari 2015). This describes a traditional Pakhtun gathering of community elders; the word supposedly derives from an old Arabic expression meaning circle (Lentz 2000: 224). As a forum for local decision-making and conflict resolution the *jirga* deals with all kinds of issues including conflicts about land and property, inheritance, acts of violence and even homicide, as well as all other intra-tribal disputes. The *jirga* also serves as a link between the communities and the federal administration. Its composition and rules of procedure depend on local tradition; the size and structure also depend on the nature and gravity of the issue at hand (Connolly 2005: 263). The *jirga's* objective is to re-establish peace within the community. In their deliberations and decisions, the members of the *jirga* will draw on Pakhtun customary law (*pakhtunwali*), local custom (*riwaj*) and Sharia law. No Pakistan statutory law will be applied and litigants have no right to appeal to a state court. At least for some parts of the country the *jirga*'s scope for decision-making depends solely on tradition and is not limited by state law.

Non-state justice institutions are mostly highly effective and popular. The literature unanimously points to the practical needs of the rural populations who prefer the traditional structures and do not take cases to the state courts. Non-state courts provide easier access to a decision, the procedure takes place on site, is more or less free of cost, and the hearings are part of an informal procedure. The courts are run by

local people and in a language everyone speaks. And the decisions are made according to laws, with which everyone has been brought up and is living in accordance. Non-state procedure typically aims to restore the social harmony that was unbalanced by the conflict, and not to enforce an abstract rule of law (Penal Reform International 2000: 9; Connolly 2005: 241). The proceedings are not so much rule-oriented, but justice-oriented in the sense that they are in accordance with the local normative consensus.

Non-state justice institutions allow for a better "access to justice" in the sense of language and knowledge of the applicable law – one major benefit in respect to the rule of law. Furthermore, due to poor state capacity and a lack of justice infrastructure, non-state justice is often the only form of justice available to many people. For South Africa in 2000, it was estimated that an extra 3,000 courts would have been needed in order to provide access to the state judiciary on an adequate basis compared to customary courts – a number unrealistic under the current political conditions (Penal Reform International 2000: 7).

1.2. . . . and a matter of legislation

The attention non-state justice institutions have received in the field of law and development lately derives only partly from their practical value. Two parallel developments have to be considered. Firstly, a perception has grown that the transfer of Western-style judiciaries to post-conflict societies has more or less failed (Carothers 2006: 11). After two decades of spending billions of dollars on institution-building and promoting the rule of law, the outcome still seems meagre. Recent studies have shown that in many cases, the new courts and the laws they apply are not met with the necessary acceptance – especially in rural areas where tight traditional communities prevail (Tamanaha 2015). The relevant literature repeatedly mentions the figure of 80 per cent of cases still being dealt with by non-state justice institutions (Chirayath 2005: 3; Connolly 2005: 241; Tamanaha 2015). Even if this number does not rely on empirical evidence and seems to be a somewhat exaggerated estimation, it does express the general perception that, instead of being brought to the newly established state courts, conflicts are still first and foremost dealt with unofficially. Rather than to provide justice to the rural populations of developing countries, the promotion of the rule of law has exposed seemingly unresolvable gaps between the justice systems (Schuppert 2009: 211).

Secondly, in response to this "unresolvable gap", recent law and development efforts have focused on the strengthening of existing traditional

justice institutions accompanied by a conceptual concession. Critics of non-state institutions seem more and more willing to broaden their singularly state-centred understanding of the rule of law and acknowledge functional equivalences provided by non-state justice institutions. The rule of law is no longer seen as an exclusive provision of the modern Western-style constitutional state. Rather, it is functionally understood as a bundle of principles, which provide normative requirements for the wielding of governance power, especially legal bindings and the control by an independent judiciary. In this sense, Tamanaha (2015) has stated that "although non-state justice systems do not meet the requirements of the rule of law, they can and do satisfy rule of law functions", at least in the sense that they can "play an important role in connection with establishing and maintaining rule governed behaviour between citizens". They complement – and sometimes even substitute – the general infrastructure for conflict resolution, may allow for the restoration of the social peace and can even provide legal certainty.

This conceptual concession is reflected in the World Justice Project's Rule of Law Index – a recent approach to measuring the rule of law that until recently only focused on state structures. However, the authors announced, that starting from 2012, the index will include "informal systems of law" as one of its key factors that "concerns the role played in many countries by 'informal' systems of law – including traditional, tribal, and religious courts, as well as community based systems – in resolving disputes" (World Justice Project 2011: 13–4). Until now, respective data "could not have been accounted for [...] because of the complexities of these systems and the difficulties of measuring their fairness and effectiveness in a manner that is both systematic and comparable across countries" (ibid.). The authors clearly relate non-state justice institutions to the conditions of weak statehood in pointing out that "these systems often play a large role in cultures in which formal legal institutions fail to provide effective remedies for large segments of the population" (ibid.). Yet, non-state justice institutions also exist under conditions of strong statehood, as will be discussed in this chapter, although they have a slightly different function.

Another important part of recognizing the benefits of non-state justice institutions is to be prepared to accept their flaws (Tamanaha 2015). Non-state justice institutions usually function properly within a homogenous community where people were brought up with, and internalized, applicable norms. However, they may not function correctly in heterogeneous groups. Problems arise whenever a "third person" (i.e. a non-member) is involved in the conflict.[5] Non-state justice institutions

can effectively regulate social conflicts on the community level and they even provide rules for conflict resolution between various communities. However, they are not designed for resolving conflicts between the people and official state institutions. Non-state institutions may reach the limits of their potential to pacify and reintegrate when the harmony within a community is deeply disturbed. Serious crimes like murder could lead to such disturbances, and in various cases capital crime is excluded from the non-state justice institutions' jurisdiction. On the other hand, particularly serious crimes should possibly be tried and sentenced by a traditional court whose fundamental legitimacy allows it to restore social peace. For minor offenses the state judiciary may seem "good enough".

The most frequently mentioned objection concerns human rights. To ensure a decent standard of human rights protection and a fair trial in traditional procedures some kind of monitoring of, and interference in, non-state institutions may be required. According to this view, even though non-state institutions are supposed to provide a better "access to justice", in many cases they only provide "poor justice for the poor" (Stephens 2009: 151). This play on words expresses the whole ambivalence of non-state justice institutions, their benefits and flaws with respect to the rule of law that are described by Tamanaha in his introductory chapter (2015) and that raise the issue of the greater regulation of these institutions. State law may provide an adequate framework to embed the non-state institution into a formal legal regime aiming at guaranteeing the adherence to national and international human rights standards and due process. Different legal systems prefer different types of regulations that approve non-state justice institutions and grant autonomy to them, but at the same time bind them to the state justice system to varying degrees. The respective regulation can serve as a normative bridge between state law and the non-state legal system, thus avoiding normative collisions.

2. Various degrees of statehood and non-state justice institutions

Non-state justice institutions and their benefits are commonly associated with states "where the formal justice system is weak" (Connolly 2005: 243) or – as the 2010 Rule of Law Index puts it – these institutions "often play a large role in cultures in which formal legal institutions fail to provide effective remedies for large segments of the population" (World Justice Project 2011: 13–4). However, non-state justice

institutions are not a phenomenon to be found only under conditions of weak statehood. They certainly play a more prominent role in so-called weak or fragile countries where they have functioned as ordering and conflict-resolving institutions for longer than state institutions have existed and are a serious challenge for the building of new formal institutions. And they can be of various importances in different parts of a country as, for example, in South Africa, where in large parts there is a well-functioning judicial system, but in many rural areas customary courts hold an exclusive position.

Formal recognition of non-state justice institutions can be found in strong constitutional states of the West and North as well. An example to illustrate this is the right of religious communities in Germany to self-regulate and self-administer their own affairs. The German *Grundgesetz* – the formal constitution – grants substantial autonomy to religious communities to regulate and administer their own internal affairs subject to the "generally binding laws",[6] and they may also facilitate their own arbitration and decision-making forums. It does not infringe on European or constitutional provisions on equality and anti-discrimination when religious communities regulate their own affairs and, for example, tie certain rights to the status of membership. The religious communities' special jurisdiction means that reference to a state court is barred and may only occur after religious remedies have been exhausted.[7] Whenever the special jurisdiction of religious courts does not apply, the case may be taken to a state court, even in cases concerning the internal affairs of a religious community. The state courts have to consider the applicable laws of the religious community. However, religious communities can also use state law when regulating their own affairs, as usually occurs in cases of labour contracts. In this case, the German labour courts apply labour law, however, modified to suit specific religious regulations and always within the scope of constitutional freedom of religion. Both strands of legal processes – the church and the state courts – refer to the German Constitutional Court as a last resort to balance the religious communities' rights and other constitutional principles.[8]

The German religious communities' rights very much resemble the South African traditional communities' right to self-governance and to facilitate customary courts. While the application of South African customary Law depends on cultural and ethnic affiliation and mainly affects issues of family and communal life, German religious law applies specifically within the organizational sphere of religious communities and their members. Whereas in the case of the religious communities in

Germany, personal jurisdiction relates to specific issues of group members, and in the case of customary law in South Africa, it is applicable to the local legal issues of members of the African communities, in the case of the *jirga* in the Pakistani tribal areas, in contrast, jurisdiction covers all legal issues territorially related to the FATA. Thus we arrive at my second example of formal recognition of non-state justice institutions in strong constitutional states: the legal authority of the Native American tribes in the United States, which is also territorially based.

The Native American tribes' rights to self-governance and to adjudicate their own laws are derived from tribal sovereignty and strictly bound to Native American territory (Levy 2000: 306). Their jurisdiction comprises family matters and civil claims as well as the conviction of criminal offenders. Tribal sovereignty is understood to be subordinate to the sovereignty of the federal state. The "trust relationship" between the native tribes and the federal state confers the power and the duty to regulate tribal affairs and to protect the tribes and their property against encroachment by the states and their citizens to the government (Canby 2009: 2). Congress regulates and modifies the status of the tribes, and the Supreme Court has jurisdiction over Indian law (i.e. the body of law dealing with the status of the Native American tribes and their relationship to the federal government and over matters excluded from tribal jurisdiction). Since tribal sovereignty was brought up by the Supreme Court in the "Cherokee cases" in the first half of the 19th century it has been more and more restricted by legislature – criminal jurisdiction in serious issues of crime and punishment (General Crimes Act of 1817 and Major Crimes Act of 1885) and by judicature especially the jurisdiction for civil cases affecting non-members (Canby 2009: 168). Over time, territorial autonomy has been more and more approximated to a personal autonomy model. Still, in matters of self-governance the Native tribes are not accountable to the Federal Supreme Court. The Indian Civil Rights Act, passed by Congress in 1968, grants many constitutional protections to members of Indian communities under tribal authority and jurisdiction, and thus applies various constitutional limitations to tribal governments and courts. The Supreme Court[9] has limited the degree of federal interference into tribal self-governance with the result that enforcement of most of the rights incorporated into the Indian Civil Rights Act is left entirely to the tribal courts (Canby 2009).

We can find non-state justice institutions under various degrees of strong and weak statehood. Table 7.1 shows eight examples of non-state justice institutions from seven countries.

Table 7.1 Strength of statehood

State strength	**Weak← → Strong**						
Country	Sudan[10]	Pakistan[11]	Ethiopia	Bolivia	South Africa	USA	Germany
BTI[12]	3.5	4.5	5.8	7.8	8	–	–
ROL[13]	–	0.29	0.44	0.38	0.6	0.65	0.68
Non-state justice institution	Customary courts	*Jirga*	Social and Sharia courts	Customary courts	Customary courts	Indian courts	Religious law

The countries differ in terms of the strength of statehood, understood as the ability to enforce the law, other government regulations, and to hold a monopoly on the use of force. The three different indices use slightly different indicators, but together they allow countries to be positioned on a scale from "weak" to "strong" in terms of statehood. The leading indicator is "stateness" from the Bertelsmann Transformation Index (BTI); the figures from the Rule of Law Index (ROL) support the sequence. The table shows that non-state institutions can be found in conditions of particular weak statehood, like in Sudan, as well as under conditions of strong statehood, like in Germany or the United States. This suggests that there is in fact no relation between their occurrence and state performance.

The weak statehood performers on the left-hand side of the table are characterized by extremely weak rule-of-law enforcement and lack a monopoly on the use of force. As a government's disability to enforce the law extends to the regulation of non-state justice institutions, we can assume that these act mostly autonomously. Only regulations that contain neither behavioural rules that differ from effective informal conventions nor procedural limits for the justice forum may be effective at all. For instance, the Pakistani Frontier Crime Regulation does not impose any particular obligation on the members of Pakistani tribal areas.

On the other hand, in the case of the South Sudanese Local Government Act of 2009, very elaborate regulation was passed that provides detailed prescriptions regarding customary court organization and – like in South Africa – obliges the traditional authorities to adjudicate in accordance with the constitution. The 2012 Constitution of the Republic of South Sudan explicitly recognizes customary courts formed by local traditional authorities, particularly tribal chiefs. To be a chief is not to hold political power, but rather to have custody of tradition and

peace. Still, the chief is part of the local traditional authority. To run the court is one of his key functions. The chief can be addressed for conflict resolution by anyone at any time. The constitution provides that the courts shall apply customary law in accordance with the constitution and the laws concerning local matters like marriage, land, local quarrels and even criminal offences. The Local Government Act of 2009 in Art. 98 provides that the "Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgements in accordance with the customs, traditions, norms and ethics of the communities." The Act further provides detailed organizational rules for customary courts, for example, a system of classifications of different levels of courts, details of jurisdiction and appeals, and a set of trial principles. In fact, until today judicial control has not been established and even the legislation to inter-relate local traditional institutions and the state governance is still missing (Diehl et al. 2015). The Act is almost identical to the Chiefs Courts Ordinance introduced by the British in 1931. The chief courts administer the customary law (1) prevailing within the local limits of their jurisdiction and (2) when it is not contrary to justice, morality or public order.

Considering the strength of statehood in South Sudan today, the effective implementation of these regulations is rather unlikely. Even though the effectiveness of legislature on non-state justice institutions is not an issue that will be discussed in this chapter, the following two remarks should be made: the prescriptions for court organization as laid out in the Chiefs Courts Ordinance of 1931 have meanwhile very much formed the traditional system and are supposedly complied with by the customary courts. The system constructed by the state legislature, even if it is not complied with properly, may still be an example for the informal institutions and serve as a normative bridge between the highly approved and well-functioning non-state institutions and the newly established state judiciary. The emphasis is on integrating the state judiciary into the traditional court system rather than vice versa (Diehl et al. 2015). But the success of a particular regulation depends not only on state performance, but also on the regulatory motive and the design of the respective regulation (see section 3).

Between extremely weak and strong states we can find various states with a medium strength of statehood: (1) countries with a relevant internal variation of statehood strength, for example, Afghanistan where statehood is much stronger in the capital than in some of the peripheries; and (2) countries where the ability to enforce the law is generally low across all areas and which lack state infrastructure in the field

of justice and law enforcement. In Ethiopia, for example, multiple non-state institutions exist. Assefa (2011) counted up to 30 different non-state institutions in the region of Tigray alone. Several of these have been officially recognized by various legal regulations; some of them, like the *kebele* social courts, even to a great extent. In contrast, in the case of the Ethiopian Sharia courts, their strict obligation to the Civil Procedure Code is prescribed but cannot be enforced or controlled since the Sharia courts are not accountable to any other level of the state judiciary.

South Africa's Constitution reflects the idea of a strong state with a strong affiliation to the rule of law, including the necessary capacity for law enforcement. Yet, according to various indices, the average ability of the South African state to enforce the law is rather low. Areas with a strong common law tradition and with strong state courts, especially in the cities, are juxtaposed with vast parts of the country, mostly rural, that are more or less cut off from state judicial institutions. As mentioned previously, these areas are characterized by a significant lack of judicial capacity (i.e. the state cannot provide the number of courts required to resolve all the conflicts and to guarantee the general order). Customary courts stand in and take over the functions of official institutions in conflict resolution.

For the same functions, in Bolivia, customary courts have only recently found official recognition in the new Constitution of 2009 (Ossio 2014). The newly constituted "plurinational and communal law-based-and social-welfare-state" gives official recognition to various traditional non-state institutions. Besides the extensive practice of settling conflicts within the family and among relatives, the more formal and most common way of traditional conflict resolution draws on the participation of community authorities. The peasant communities have always maintained their customary law and courts with a jurisdiction encompassing all community affairs, but they are mainly concerned with public issues like conflicts over land. The procedure applied by customary courts is highly formalized and every case is strictly recorded. Its objective is to rehabilitate and reintegrate the accused. Sanctions are moral, material and monetary, and compliance with decisions is supposedly high. The customary courts avoid intervening in private conflicts within families, even in cases of divorce or abuse, and they do not take up severe crimes like robbery or homicide. Instead legal action would have to be taken at a state court, which often does not exist. The courts are bound to the constitution and have to consider human rights. However, their decisions are final and no appeal to the state judiciary is

provided. However, the right to appeal to the Plurinational Constitutional Tribunal remains as a last resort to decide on compliance with constitutional provisions.

The strong statehood performers on the right-hand side of the scale are characterized by a high capacity to enforce the law and other government regulations, and to hold a monopoly on the use of force. Here, legal regulations concerning jurisdiction, organization, procedure and decision-making of non-state courts can be effectively enforced by means of state force. In this context, non-state justice institutions do not exist autonomously, because the state authorities can interdict and abolish them at any time. In fact, in the context of "consolidated statehood" with a functioning legal order and enforcement institutions, it seems rather peculiar to maintain autonomous legal systems at all, since they may deviate from state law and thus contest the normative consistency of the formal legal order (Kötter et al. 2009: 13). One would expect that in order to avoid normative conflicts, strong states would try to keep their legal order free of non-state justice institutions and tolerate them only in compliance with the official law. Nevertheless, non-state justice institutions have always been tolerated to a certain degree for various reasons (see section 3.2).

Non-state justice institutions can exist and are recognized under any degree of statehood strength. If the right of self-regulation is personal or territorial, it does not seem to depend on the statehood strength. We can find personal jurisdiction in weak countries like South Sudan, in strong countries like South Africa, but also under the conditions of consolidated statehood in Germany. Territorial autonomy on the other hand can be found in Pakistan as well as in the United States. This leads to a more differentiated look at different models and especially the degree of incorporation and their regulatory motive.

3. Incorporating non-state justice institutions into the state law system

The regulation of the respective non-state justice institutions in Bolivia, Ethiopia and South Africa came into being in the mid-1990s with South Sudan following only recently. In all of these cases, the regulation dates back to the introduction of a new constitution. However, like the non-state institutions themselves, their regulation is not a new phenomenon, both in strong and in weak states. The South African Black Administration Act, for example, was introduced in 1927 and is still valid in parts of South Africa today. In Sudan, the Chiefs Courts

Ordinance was valid from 1931 until recently, and it served as a model for the 2009 legislation on customary courts. The formalization of Ethiopian social courts dates back to the 1980s. The Bolivian customary courts, like the Ethiopian Sharia courts, were generally tolerated for a long time before their official recognition. The debates about Native American law and the legal authority of the Native American tribal courts go as far back as the first half of the 19th century. In Pakistan, the Frontier Crimes Regulation Act, which regulates the status of the FATA, was passed in 1901. The regulations regarding non-state justice institutions show a distinct variety of different models.

Several studies of non-state justice institutions focus on one non-state system and the way it is recognized by the official judicial system of the country in which it exists. Comparative studies on different types of non-state justice institutions and models of their incorporation into the state legal order have only been produced very sporadically. The following discussion presents two of such approaches by Jacob T. Levy and Brynna Connolly. Levy's modes-oriented approach and Connolly's structural analysis have both delivered valuable insight into the regulation of non-state justice and the interface of state and non-state normative orders.[14]

3.1. Modes of incorporation: Varying degrees of autonomy

In his 2000 essay "Three Modes of Incorporating Indigenous Law", Levy distinguishes three legal ways to acknowledge non-state laws within the official legal order: (1) incorporation as common law, (2) incorporation as customary law and (3) self-government. With reference to a number of illustrative examples, he discusses their differences, virtues and detriments.

(1) The incorporation of indigenous laws into common law "recognises customary ways of using powers or establishing legal situations for which the dominant culture has a different set of procedures" (Levy 2000: 302). In this mode, the common law recognizes customary marriage or customary property conveyance not as acts or statuses of customary law, but rather as social situations that form acts and statuses of the common law. A customary marriage, for example, will be considered a legally relevant fact, bringing with it all the benefits and duties the state has attached to the act and status of marriage in common law. Common law incorporation grants general rights to indigenous people and makes them enforceable; however, it cannot take account of cultural particularities. Special rights that may be granted by customary law, but not by state law, for example polygamous marriage,

will not find recognition because the "common law logic has no space for exemptions from general regulations" (Levy 2000: 303).

(2) When indigenous law is incorporated as customary law, its status as a separate and not completely subordinate system of laws is confirmed. In customary incorporation, the state recognizes a body of laws that is based on customary rules and usages of the indigenous community without conceding sovereignty to that community (Levy 2000: 300). In this model, indigenous people have the right to be governed by their own traditional law and they can uphold or establish institutions to maintain their legal culture. However, the sovereign state in this case can set the limitations to the self-regulation autonomy of the indigenous people and it can always "claim the right to override customary law by explicit legislation" (Levy 2000: 300). Indigenous law can be incorporated as customary law by the state courts or by indigenous courts; in most cases, both will be true to some degree. The state law can provide detailed prescriptions for the application of customary law by the courts, like in South Sudan or in South Africa, where the customary laws have to be applied subject to the constitution and especially the Bill of Rights. Since customary law affiliation is personal and not territorial, the state law can provide a right to choose under which law residents live and settle their disputes, even on an issue-by-issue basis (Levy 2000: 322). Customary law incorporation can provide far-reaching cultural autonomy to indigenous people, but depending on statutory regulation, it can also be rather limited.

(3) The self-government model grants territorial sovereignty. In this model, indigenous peoples are, at least in principle, considered relatively sovereign states or nations, and their law is respected in a way analogous to the respect accorded to the laws of foreign states (Levy 2000: 305–06). According to Levy (2000: 306), it is "the only mode to recognise a lawmaker in addition to, or instead of, laws". Therefore, self-government leaves the least space for democratic and rule-of-law concerns as well as for liberal human rights constraints (Levy 2000: 323). As long as self-government is still thought of as a model of incorporation and does not imply secession, however, at least some rudimentary connections with the state system and the state legal order have to be preserved. These connections can produce intense restrictions to the degree of autonomy within self-government, as, for example, the self-regulation by the Native American tribes in the United States with its limitations concerning serious crimes and non-members shows. In this respect tribal sovereignty remains subordinate to the federal level. The trust responsibility obliges the federal government to protect tribal rights, but

it also authorizes the federal organs to regulate tribal affairs and thus restricts tribal self-regulation autonomy.

Levy's description of these three models of incorporation serves his purpose of discussing the coexistence and conjoining of state and indigenous legal orders, especially in respect of the granting of rights. Levy argues from the perspective of the state that responds to the existence of indigenous legal systems and indigenous communities' request for the recognition of their existence and their rights. He asks "how best to balance goals like respect for indigenous traditions, protection of the rights of indigenous persons, legal clarity and simplicity, and peaceful and co-operative coexistence with the wider society" (Levy 2000: 297). He argues that "the fact that one model accords greater status to indigenous law than another does not necessarily mean that indigenous people have more or preferable rights under that model" (Levy 2000: 298). Therefore, a closer look would have to be taken at how the model is formed in specific circumstances and what kinds of competence and restrictions it provides.

Levy neither asks about the functionality and legitimacy of the incorporation nor about the benefit of a specific state regulation that may serve as a collision regime to conjoin two forms of normativity and avoid normative conflicts. He also does not ask about the functional conditions of the incorporation, for example, with respect to the general condition of the law and the state's ability to enforce it. Further, he does not examine to what extent the non-enforcement of state laws that nominally restrict the non-state justice institutions may result in an increase of their autonomy. Levy, in the end, creates his schema of models of incorporation, in large part based on the extent of status and/or the degree of autonomy they grant to indigenous law. Levy assumes a low degree of autonomy in common law incorporation, where the indigenous peoples are treated equally like everyone else and no special rights apply. He sees the largest degree for autonomy in the model of self-governance and positions the customary law incorporation, with its multiple linkages between the state law and the non-state system, somewhere in between. Levy's concept of degrees of autonomy indicates a linear scale and does not take different forms of the inter-relation of the normative systems into account.

3.2. A recognition typology: Varying limitations of incorporation

In her 2005 "Proposal for a Recognition Typology", Connolly analyses legislative acts and distinguishes various types of regulations of

non-state justice institutions in order to categorize some of the potential postures of the state toward non-state institutions and consider some of the consequences. For this purpose, she examines a large number of example cases of weak justice systems from various countries, focusing on the state regulation of non-state systems. As expressions of different approaches of states toward non-state justice institutions, she distinguishes and evaluates four different types of recognition regimes that incorporate the non-state justice institutions into the state legal system in different ways (Connolly 2005: 247). These ways are: (1) abolition as a form of negative recognition, (2) complete incorporation, (3) limited incorporation and (4) no incorporation as form of unbound coexistence.

(1) In the model of abolition – also labelled "recognition by exclusion" – the state recognizes the non-state justice institution only by legislation or court judgement that explicitly delimits broad areas in which the non-state norms may not be applied any longer or expressly prohibits the institution in its entirety (Connolly 2005: 249). The two main rationales underlying this approach are firstly, "the perceived need for legal or political unity" and secondly, the perception that non-state institutions are "uncivilised" or "primitive". Connolly (2005: 259) names three major arguments against abolition. Firstly, abolition negates the positive effects of non-state institutions as sources of legitimacy and efficiency for conflict resolution and public order. This phenomenon seems to be particularly destructive when Western justice systems are imposed on communities using non-state justice institutions. Secondly, Connolly points out the moral and ethical concerns, particularly with respect to indigenous peoples who pre-existed Western-style judiciaries. Their pre-existence maintains a strong argument for their right to self-government. Thirdly, the fact that non-state institutions have a long tradition of being passed down from generation to generation makes it highly unlikely that a state justice system will be capable of completely and effectively replacing or abolishing them. And finally, Connolly points out that the model of abolition might overlap with the model of complete incorporation, in which a non-state institution loses its informal status by means of juridification.

(2) In the model of complete incorporation, the non-state institution is legally formalized by juridification and becomes an institution of the state legal system. The formal state court system may recognize and apply non-state norms like state laws in its decision-making. With reference to Levy, Connolly points out that "non-state legal norms may

thus be recognized as a matter of fact, with the formal state court taking judicial notice of those norms in the relevant case, or as a matter of law, with the state court applying non-state norms as rules of decision" (2005: 261). The state law system may formalize a non-state norm by legislative act and thus incorporate it into the body of the official state law, and it may also establish formal courts that adopt the functions formerly fulfilled by non-state courts. In all of these variations, norms of non-state origin become relevant in the context of the formal state judicial system. Complete incorporation links the non-state system to the state legal order and allows not only for limitation and control, but also for official legitimization of the non-state system, stages of appeal and for public enforcement. At the same time, the non-state institution loses its informality and its character as a "home-grown" institution through public appropriation. The further development of customary law by the general courts severs the relation with the traditional sources of knowledge and an artificial official customary law emerges.

(3) The model of limited incorporation "allows the informal mechanism to exist independently of the formal state structures while embedding them in low-surveillance and accountability mechanisms" – for example, by a process of appeal – and "allowing for cross referrals" (Connolly 2005: 248). In this model, the systems "may retain distinct jurisdictions, perhaps most commonly with the formal state courts retaining general jurisdiction while the [non-state institution] retains limited jurisdiction over cases arising in specific areas relating to the communities in which the [non-state institution] is active" (Connolly 2005: 247). This model was the basis for many of the colonial legal systems in Africa, where family law, land law and chieftaincy were ordered according to customary law. Pluralism was one way to block and control by dividing and conquering. Thus, self-regulation served as a key element of indirect rule. Recognition was accorded to tribal customs subject to the provision that the custom itself would not be repugnant to certain "widely applicable standards", which of course related to values of Western culture (Connolly 2005: 276). Limited incorporation forms a dualistic court system that allows for appeal to a state court for a final decision. This, combined with the fact that customary courts have to be officially authorized by the state, clearly shows the hierarchy in the two strands of the judiciary. Today, limited incorporation still remains the leading model for new regulations regarding the connection of the state law system and non-state laws.

(4) In Connolly's model of no incorporation "informal courts coexist with the formal state system but without incorporation of the

former structures into the latter" (2005: 248). Connolly distinguishes between two variations of this model. The first "effectively grants self-government rights among minority groups, as with Native American tribes in the United States". Here, "the group retains the right to determine their own status, and interpret, apply, and change their own laws" within an autonomous, self-governed territory. The second model "creates completely distinct legal systems within the state, with virtually no interrelation between the systems" (2005: 290). Connolly points out that from a moral and ethical point of view, no incorporation may be the most appropriate, or even the only acceptable model for indigenous groups within Western societies like the United States or Canada. However, as non-state systems generally raise questions of bias, particularly toward less powerful segments of society, the devolution of sovereignty may have to be restricted and bound to certain conditions.

Like Levy, Connolly's focus is on the regulatory side of the incorporation of non-state institutions. Apart from describing and typifying different models of incorporation, her regulation-oriented approach examines the recurring issues in terms of content and systematics of these regulations, for example, the assignment and limitation of jurisdiction, rules of procedure and the applicable standards of decision-making. Connolly further names the benefits and the inconsistencies that can arise from different types of incorporation. She reflects on the problem of normative collisions and on the potential of granting the right to switch jurisdictions in the case of appeal.

A closer look reveals that Connolly's sophisticated distinction of four different types of incorporation is only of constricted usefulness. As she points out herself, there are no empirical cases for the two borderline types of unlimited recognition of the sovereign non-state legal system and of complete abolition. Consequently, all her empirical cases represent various degrees of autonomy and incorporation. In the case of the American Native tribes, for example, tribal sovereignty can only be claimed in relation to the United States and the "trust relationship" between the federal state and the tribes indicates a type of limited incorporation. And "no incorporation" in the sense of Connolly's typology would be characterized by a total regulatory abstinence, but as she argues herself, this is a purely hypothetical case (Connolly 2005: 292). Moreover, the distinction between complete and limited incorporation leads to unresolvable difficulties. The South African Constitution, for example, extends the formal legal order to the traditional systems and in so doing "completely incorporates" them. However, the institutions still rely on the traditional sources of legitimacy, and the jurisdiction of

the courts is attributed on a personal basis, which in Connolly's typology characterizes "limited incorporation". Essentially, all of Connolly's cases lie somewhere in between complete autonomy and complete integration of the non-state system and therefore can be considered as variations of the "limited incorporation" type.

3.3. Degrees of autonomy and incorporation

Instead of distinguishing fixed types of incorporation, it seems more appropriate to use a scale where cases can be set along a flexible criterion. Since the empirical cases will always preserve at least a minimal amount of independence and connectivity, the two ends of the scale will be set in between Connolly's hypothetical borderline cases of complete autonomy and complete integration. The criterion will be the increasing or decreasing autonomy of the non-state justice system in its relation to the state legal system and the state judiciary. Regardless of whether autonomy is granted on a territorial base or issue-related for a particular group of people, the degree of autonomy can be characterized by the competence to have the final decision on certain subject matters of jurisdiction. Three steps on this scale are:

- *High autonomy:* The non-state institution has exclusive jurisdiction of certain subject matters and its decisions cannot be overruled by a state court of last resort, especially a constitutional court.
- *Medium autonomy:* The final revision of certain subject matters is exercised by a superior state court, especially a constitutional court, but is restricted to balancing the self-regulation autonomy of the non-state institution with other outstanding constitutional principles.
- *Low autonomy:* The non-state institution is granted jurisdiction on certain subject matters, but the final revision is exercised by a superior state court, especially a constitutional court, that has to apply state law.

We can attribute the eight cases of non-state justice institutions analysed here to these steps of varying degrees of autonomy. The cases of the *jirga* in Pakistani FATA, the customary courts in South Sudan, the Sharia courts in Ethiopia and the jurisdiction of Native American tribes in the United States can be attributed to high autonomy, because the jurisdiction of the non-state institution is exclusive of certain subject matters and decisions on such matters of exclusive jurisdiction cannot be overruled by a superior state court. In the South Sudan case, state law stipulates that stages of appeal to the state judiciary shall be

provided, but does not provide the required rules of procedure, so that in practice the customary justice remains exclusive. The cases of the customary courts in Bolivia and the religious communities in Germany can be attributed to medium autonomy because in both cases the constitutional court serves as a court of last resort to balance the autonomy status of the non-state institution with other constitutional principles. Finally, the case of the social courts in Ethiopia and the customary courts in South Africa can be attributed to low autonomy. In both cases traditional laws and procedure are applied, but subject to other applicable state law, which can be asserted by appellate state courts. Table 7.2 illustrates these considerations.

The differentiation of various degrees of autonomy only on the basis of the final decision on certain subject matters is a very unspecific approach to schematization. A contestable positioning of the cases on the scale would require a more sophisticated operationalization of the cases and their specifics. Relevant criteria for a closer differentiation of degrees of autonomy and limited incorporation would be: What relevance do the subject matters, on which the jurisdiction is exclusive, have for the community? Do the non-state institutions precede and decide according to non-state rule of procedure, or do they (have to) apply formal procedure according to state laws like, for example, the Sharia courts in Ethiopia? And how much does the practice of the non-state institution deviate from its prescribed competence?

Table 7.2 Degrees of autonomy of non-state justice institutions

Complete autonomy		
Various degrees of limited autonomy and incorporation	*High autonomy*	Pakistan: *Jirga* in FATA South Sudan: Customary courts Ethiopia: Sharia courts United States: Tribal jurisdiction
	Medium autonomy	Bolivia: Customary courts Germany: Religious communities
	Low autonomy	Ethiopia: Social courts South Africa: Customary courts
No autonomy (= complete incorporation)		

This leads to the question of how far state law regulation of non-state justice institutions can ever be effective, especially under conditions of weak statehood. The cases show that there is no linear relation between the degree of statehood and the choice of regulatory model. We can find a case with a high degree of autonomy in a strong state (Native American tribal jurisdiction) and another in a weak state (*jirga* in Pakistani FATA). The distribution of the cases and especially the proximity of the US case to the FATA case already suggest that the degree of statehood performance and ability of law enforcement may not be the crucial factor for states in their choice of incorporation model and the degree of autonomy they are willing to grant non-state systems. As mentioned before, we can assume a regulation with detailed prescriptions will not function properly in a weak state with low law enforcement ability, irrespective of which regulation model is used. The case of the South Sudanese customary courts and the procedural bindings in the case of the Ethiopian Sharia courts show very detailed prescriptions. The effectiveness of such regulation would have to be assessed on an empirical base. The reference parameter of such an assessment would be the objective pursued when incorporating the non-state institution into the state legal system.

3.4. Regulatory motives

We assume that regulations are set by the state institutions to serve a specific purpose. This intention specifies how the system is supposed to function properly. The "regulatory motive" can serve as the yardstick for the evaluation of its success. Even if legislation, as well as other state regulations, is usually based on a multiplicity of motives, we can distinguish some main regulatory motives. In this respect Donna Lee Van Cott presents three reasons for the increased confirmation and formal recognition of non-state institutions in the 1990s in her essay on "Dispensing Justice at the Margins of Formality" (2006: 264–66):

(1) *Cultural rights protection:* The first reason Van Cott names is the recognition and protection of collective rights of cultural and religious groups. The state responds to internal pressure built up by indigenous organizations to recognize their collective rights as peoples and their cultural laws, which are seen as an integral part of the demand for self-determination.
(2) *International obligations:* As a second reason, she names the fulfilment of international obligations for the treatment of such groups. Convention 169 of the International Labour Organization (ILO)

is an example of such an obligation. It requires that states allow indigenous communities to preserve their legal customs and institutions and that states adjust their national legislation to apply the norms of the convention. The state is bound in relation to the national community and thus provides an argument for internal pressure groups.

(3) *Extension of state authority:* The third reason Van Cott names for the recognition of indigenous laws by a state is the extension of the presence of state public law and authority throughout the territories, particularly in rural areas, and in respect to all groups of the population and even their internal affairs. By linking existing, effective, authoritative and highly legitimate informal justice institutions to the formal law, states intend to indirectly increase the effectiveness, authority and legitimacy of their justice system.

As to the recognition of the eight non-state justice systems described in this chapter, all three motives are relevant. The protection of cultural rights of minorities is mentioned as the motive to recognize non-state justice institutions in all of the cases. It is the main argument in German constitutional law argumentation regarding the self-regulation of religious communities. It also justifies the territorial sovereignty of the Native American tribes and the trust responsibility of the federal government as one core element of US American Indian law. It is also the main argument in South African diversity and human rights debates where diversity was completely suppressed under apartheid and is seen as a major political achievement today. The fulfilment of international obligations is explicitly mentioned only in the case of the Bolivian customary courts (Ossio 2015). Finally, the extension of state authority, the validity of public law and the capacity for ordering is mentioned as one main reason in the case of the *jirga* in Pakistani FATA, but also in the literature on South Sudan, South Africa and Bolivia.

None of the three motives, however, covers the fact that in more recent cases the intention was mainly to formalize and especially juridify non-state governance in order to structurally approximate it to the state law system and lay the foundation for the conjoining of non-state and state institutions. Therefore, it seems necessary to consider a fourth regulatory motive:

(4) *Juridification/rule of law:* A fourth reason relates to rule-of-law functions, especially improving access to justice and due process. State regulation goes back to the realization that obligatory constitutional

requirements will not be met without a closer binding and judicial monitoring.

The rule of law shall be ensured as a pre-condition of human rights protection. This relates to the rule-of-law debates sketched out in the first section of this chapter. It aims to provide access to justice and therefore to avoid, for one, the arbitrary exertion of the exceptional powers non-state judges possess, especially if they are in a position of traditional authority. Furthermore, it aims to avoid cruel punishment and arbitrary damnations executed in the name of custom and tradition (Weeks 2011a: 3). Regulations are meant to ensure the compatibility of acts and decisions of non-state institutions with what in colonial times were repugnantly called "widely applicable standards". Incorporating non-state forms of ordering and conflict-resolving into the official state order by building adequate structures to supervise and control them shall effectuate their compatibility with rule-of-law requirements in an institutional and in a normative sense. The main objective is to ensure the compatibility of non-state institutions with a decent standard of human rights protection and due process. For this purpose state law is considered a legal common basis for existing normative orders and a framework to manage the problems that result from legal pluralism.

There appears to be a relation between the regulatory motive and the degree of state performance in the respective country: unsurprisingly, strong states seem to recognize non-state justice institutions primarily in order to protect cultural rights – as the German and US cases show – whereas in weak states the extension of authority and rule of law take precedence. In the consolidated states of the global west and the north, the idea of extending state capacity is not of particular importance. Here, the non-state justice systems have the function of providing adequate space for self-regulation to distinct cultural and religious groups within society, as well as granting them cultural rights – which in fact corresponds with motive 1. Non-state justice institutions in strong states are thus embedded into the state legal order and strictly framed by its provisions. International obligations appear to have only a complementary argumentative function. This seems true, for example, in the case of Bolivia, where the fulfilment of international obligations from ILO Convention 169 was explicitly mentioned as one major reason for the official recognition of the customary court, but the recognition itself was primarily based on the government initiative in the new constitution of 2009. In states with a very low ability to enforce the law and poor

justice institutions, however, the non-state systems are likely to function as substitutes for state institutions, and governments are generally eager to share their legitimacy and power to ensure the general order. The cases of the *jirga* in FATA and the reasons given for the recognition of customary courts in South Sudan are examples of this motive.

Forming mechanisms to ensure rule-of-law functions is mentioned as the main motive for the juridification of non-state justice institutions in a number of recent cases. The respective cases are characterized by a weak to partly strong statehood performance. The primary strategy seems to be gaining control over the non-state system by incorporating it into the state legal order and judiciary. This is often based on the expectation that the non-state system, whose legitimacy rests on sources independent of the state, may contribute to an increased legitimacy of the regular judiciary. The case of customary courts in South Sudan or the Ethiopian social courts are an example of this. Sometimes recognition by the state may even increase the legitimacy of the non-state institution and thus improves its potential to provide order and stability. On the flip side, this recognition has the potential to lead to a perpetuation of constitutionally precarious conditions if a consolidation of arbitrary exertions of power occurs (Weeks 2011a/b).

An evaluation of the regulations of non-state justice institutions would have to start by taking these motives into account. In this respect, a self-government regime facilitated to protect cultural rights would be successful if the delimitation of the state and non-state systems succeeded and allowed for self-regulation in a manner that was supportive of the culture of the group. If it were facilitated solely to ensure that order and security be provided by the non-state system, however, its success would have to be evaluated taking this objective into account. Furthermore, if self-government was intended to intertwine two or more legal orders and to create common normative grounds, its success would have to be evaluated under several aspects. For one, its success would have to be based on the degree of self-regulation. Furthermore, the success of a regime of self-government would depend on the avoidance of detrimental legal effects that may derive from normative collisions as a consequence of normative plurality. In South Africa, one of the main objectives is the appropriation of supplementary capacity for conflict resolution to provide better access to justice. This implies the practical concerns of better accessibility and cultural adequacy, but also the exercise of court hearings and the delivery of decisions subject to the constitution, that is, due process and respect for human rights.

Where state ability to enforce the law is low, obedience to and enforcement of state law regulations can hardly be expected. How far this may still result in the legitimizing effects mentioned above is a question that requires further empirical research before being answered.[15] For now, in a final step, we want to turn to the design of regulations of non-state justice institutions and discuss two kinds of regulations used to link non-state institutions and state law.

4. Design of regulations

The design of regulations of non-state justice institutions in various legal systems show a number of typical regulatory issues that determine the conditions and limitations of recognizable decisions made by non-state institutions. These issues include rules about the status and relevance of the non-state system from a state legal point of view, organizational requirements, attribution and limitation of jurisdiction, and principles and rules the non-state institutions have to acknowledge in their decisions. Two main kinds of regulations used to link non-state institutions and state law can be distinguished and shall be discussed very briefly here. These are, firstly, specific prescriptions with regard to procedure and substantial standards that have to be obeyed by non-state institutions and secondly, organizational rules in which non-state institutions are embedded and which can provide procedural alternatives and remedies. The adequate stipulation of "collision rules" – in the sense of "meta-rules" as higher-order rules – can provide a basis for mediating between lower order rules and managing normative conflicts.[16]

4.1. Prescriptions

Prescriptive rules concerning the status, procedure and decision of the non-state justice institutions can be assigned to four different categories:

(1) *Formal rules of recognition:* One example is provisions like the Minister of Justice's authorization of a chief to run a customary court in South Africa according to Sections 12 and 20 of the Black Administration Act. Another example is of judges in the federal Sharia court in Ethiopia being appointed by the federal Judicial Administration Commission upon the recommendation of the Supreme Council of Islamic Affairs, as accorded in Article 17 of the Federal Courts of Sharia Consolidation Proclamation of 1999.

(2) *Jurisdiction:* Rules on the recognition of the territorial, material and personal jurisdiction of non-state institutions and also on their limitation. An example of this is Sections 12 and 20 of the Black Administration Act, according to which South African customary courts have jurisdiction in civil and criminal conflicts between members of the African community. Similarly, the US Major Crimes Act restricts criminal jurisdiction of tribal courts in cases of capital crimes.
(3) *Procedure:* Rules on procedure that non-state institutions are obliged to adhere to. An example of this is the obligation to keep records of hearings in South African constitutional courts or, even more comprehensively, the obligation for Ethiopian Sharia courts to apply the general Civil Procedure Code and other relevant procedural state rules in their proceedings according to Article 6(2) of the Federal Courts of Sharia Consolidation Proclamation.
(4) *Substantial rules and principles:* substantial legal rules which non-state institutions do not necessarily have to apply explicitly, but which their decisions have to comply with. An example of this is in Section 211(3) of the South African Constitution, according to which the "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". Another example can be found in Section 166 of the Transitional Constitution of the Republic of South Sudan of 2011 according to which a "traditional Authority shall function in accordance with this Constitution, the state constitutions and the law" and "the courts shall apply customary law subject to this Constitution and the law".

Since these legal prescriptions may interfere with the normative system applied by the non-state institution and therefore may not be complied with, they require some sort of institutional security. In any case, if the law enforcement ability is low, the pursued regulatory objective will hardly be achieved.

4.2. Organizational embedding

The non-state justice institution and the state judicial system can be intertwined in different ways. The most common mechanism is to provide stages of appeal that allow for an alteration of the path of legal action originally taken. In most of our cases, the litigants of a non-state court proceeding have the right to appeal to a state court. Systematically

speaking, the non-state institution can be considered a court of first instance then, whereas the state court would serve as an appellate body in the second instance. However, the jurisdiction and competence of the appellate court may differ relevantly. The prescribed standard of decision-making may also vary. Three ways to alter the path of legal action can be distinguished:

(1) *Choice of jurisdiction:* The litigants have the right to decide freely whether they want to take action at the non-state justice institution or at a general court. In this variant, none of the jurisdictions is exclusive and "forum shopping" is allowed. The legal standard may, however, remain the same in all the different possible courts with jurisdiction, like, for example, in South Africa where the courts must apply customary law whenever that law is applicable, no matter which court decides (Section 211(3) of the Constitution).
(2) *Crossing of jurisdictions:* Quite often, state law allows for the crossing of jurisdictions, however, only in one direction: the parties of a non-state court proceeding are granted the right to appeal to a state court. We have not heard of a single case that provides an appellate proceeding at a non-state justice institution after a state court has already made a decision. In South Africa, after the final decision of the customary courts, the litigant may appeal to a magistrates' court. Again, this does not necessarily imply a change of legal standard, as the South African example shows - here, the appellate court also has to decide with account to the applicable customary law.
(3) *Change of legal standard:* In some cases, however, the alteration of the justice system may be affected by the change of legal standard, for example, in the case of appeal following a decision of an Ethiopian social court. The respective proclamation in the Amhara region provides that the municipal court responsible for the appellate decision has to apply state laws, no matter what the standard of the decision at first instance was and no matter how far custom was considered.

The rules on the formal recognition of a non-state institution, as well as on the recognition of its territorial, material and personal jurisdiction, serve as means for organizational embedding. But while they regulate – that is, assign and restrict – the scope of the decision-making power of the non-state institution from a state-centred perspective, the provisions on their organizational embedding focus on the connections of the two systems and their potential for mutual completion. The conjoining of

the different paths of legal action aims at achieving common normative grounds for decisions on the formal basis of the general validity of the law and, substantially, on the basis of the respective constitution and its rules and principles. Integrative decisions may be reached on the level of the highest-ranking courts, especially the constitutional courts, which respect and apply the non-state law's specific modes of functioning, and at the same time adhere to constitutional provisions and other state-law prescriptions.

The South African Constitutional Court, for example, in the *Shilubana v. Nwamitwa* case (2009) held that the courts must recognize and give effect to developments within the community "to the extent consistent with adequately upholding the protection of rights". In this case, the community had drastically modified the traditional institution of male succession in chieftaincy in order to allow the daughter of a deceased chief to succeed him. Drawing on the constitutional provisions on gender equality, the constitutional court overturned the decisions of the Supreme Court of Appeal that had upheld the petition of the daughter's cousin, who was the next male descendent in line (Rautenbach 2015). Some kind of back coupling has to occur between the high courts and the lower ranking courts in order to preserve the consistency of the law as a general normative framework. This applies not only to non-state court judges and traditional leaders. Both state and non-state judicial institutions have a lack of knowledge regarding each other's laws and a lack of will to draw on each other's knowledge when necessary.

Customary courts will have to consider the provisions of the constitution in their decision-making, which they cannot as long as they make their decisions solely within the standards of customary law. To have a customary court decide in accordance with provisions of state law, a rule of customary law will have to emerge that is identical to the state law provision and thus avoids contradictory decisions. But since customary law only emerges by repeated social practice over a long period of time, for a provision of the constitution to become part of customary law, a modification of the social practice and the legal discourse of the community have to occur (Teubner 1992: 1457). This could, for instance, take place in reaction to decisions made by state court judges on the standard of the customary law, especially if contradictory decisions of customary courts already exist. Or, as Bennett (1991b: 35) put it, "even if human rights are not formally implemented, they will inevitably, as the source of ideas on public policy, inform decision-making".[17]

At the same time, if customary court judges are to consider and apply state law and thus contribute to the proliferation of the state law in their legal context, it is necessary to accept that they will give different interpretations and will promote changes of state law provisions. It will be the function of appellate courts to smooth over the discrepancies in a way that allows mutual feedback.

Much more problematic than discrepancies and inconsistencies in the application of the law following the conjoining of judiciaries is the renouncement of such linkages between state and non-state judiciaries. Adjustment cannot be expected without institutional linkages. This is not very surprising considering extreme forms of self-governance and autonomy. For example, the Pakistani tribal areas would be a good case of a decoupling of normative systems; however, state capacity is far too poor to establish serious connections. But this problem also occurs in systems with multiple connections like in the case of the Ethiopian Sharia courts, where the connection to the state judiciary is irreversibly severed after both parties have explicitly agreed to take legal action at the Sharia court. The obligation to apply the general laws of procedure shall prevent a complete separation. But without any institutional security, for example the right of appeal to a state court, compliance with these rules will be difficult to control in a country with an extremely low ability of law enforcement. In South Africa, the choice of jurisdiction and stages of appeal to the state judiciary have a long tradition, but have been strongly contested lately in connection with the revision of respective legislation and drafting of a Traditional Courts Bill (Weeks 2011b; Rautenbach 2015). The representatives of traditional law argue for restricting the inherited and widely approved system of organizational embedding. This is due to their fear for legitimacy, should it be the case that the state courts could overrule their adjudications. In this situation, more and more people would take legal action to the state courts instead of first addressing the traditional courts.

5. Conclusion

The recent attention paid to non-state justice institutions in the literature on comparative constitutional law and law and development can be explained by the failure of institutional transfer in regard to the rule of law. It is accompanied by the conceptual concession that non-state institutions may serve rule-of-law functions. Non-state justice institutions do

not only exist in states with a low ability to enforce the state law, where they may complement or even substitute the functions of the state legal system. We can also find them in strong states. Thus, the strength of a state, understood as the degree to which it can enforce the law, does not determine which model is chosen to incorporate non-state law into the state legal system. Models with varying autonomy of the non-state system (in relation to the state legal system) can be found in various conditions of statehood: models such as extensive territorial autonomy, as well as highly integrated decision-making forums rooted in non-state mechanisms. However, we see a relationship between the degree of statehood performance and the pursued regulatory motive. While states with high law enforcement ability emphasize the granting and protection of cultural and religious rights, weak states focus on the extension of state authority, which may be achieved by incorporating the non-state system into the official state judiciary.

A number of recent regulations also intend to increase rule-of-law standards in non-state institutions' practice, particularly due process and the protection of human rights. The juridification of these systems – their binding to constitutional provisions and their organizational linkage to the state judiciary – helps achieve better access to justice, even in areas with low statehood performance. Under these conditions, it seems very unlikely that the practice of non-state institutions will be changed by making formal laws that require compliance from non-state judges. Other institutional securities would be necessary here. Institutional arrangements like the right to choose the path of legal action or stages of appeal could bring solutions to this problem, depending on their specific design. For the evaluation of their effectiveness, more empirical data must be collected.

Notes

An earlier version of this paper was presented at the ISA (International Social Studies Association) 53th Annual Convention 2012 in San Diego. I am grateful to the discussants at this meeting and especially to Jennifer Keister (Harvard Kennedy School) for valuable comments and critique.

1. For different approaches to differentiate various forms of non-state justice institutions, see Levy 2000; Chirayath et al. 2005: 3; Connolly 2005; Van Cott 2006; Stephens 2009; Bekker and Rautenbach 2010; Toomey 2010; United Nations 2013; Tamanaha 2015.
2. In the Tigray Region, the expression of *kebele* is only used for rural areas whereas the equivalent in urban areas is *tabia* (Assefa Fiseha 2011). As a part

of the *kebele* administration, the social courts are not formally incorporated into the judiciary, but are part of the executive branch (Prigge 2012).

3. Lee Van Cott (2006: 267) speaks of "informal justice institutions", but points out that from the perspective of indigenous peoples, "indigenous law is formal law – binding, authoritative, and deeply rooted in indigenous norms and cultures". However, as the term "indigenous law" would be used to express and affirm indigenous peoples' rights to self-determination, she prefers to describe it "from the indigenous point of view as a 'counter-formal' institution".
4. See Connolly (2005: 263) and Berger (2014) who describes the Bangladesh variant Shalish.
5. For the restriction of the jurisdiction of customary courts to conflicts among "the indigenous African peoples of South Africa", see Bekker and Rautenbach (2010: 17/21), and for the difficult handling of third person cases in US American Indian law, see Canby (2009: 148/168).
6. Article 140 of the German *Grundgesetz* (GG), the German constitution, incorporates several regulations of the former Weimar Constitution of 1919 (WRV), *inter alia* the cited right of self-regulation according to Article 137 III of WRV. The constitutional notion of "generally binding laws" that limit the autonomy for self-regulation has to be interpreted with regard to the freedom of religion in Article 4 of GG.
7. See Federal Supreme Court (BGH), 28.3.2003; Federal Constitutional Court, 9.12.2008.
8. Federal Constitutional Court, 4.6.1985.
9. US *Supreme Court in Santa Clara Pueblo v. Martinez*, 436 US 49 (1978).
10. The numbers relate to the whole of Sudan before the separation of South Sudan; specific numbers for the latter have not been assessed yet, but it may be assumed that they will be on a similar low level as the numbers used here.
11. The numbers relate to the whole of Pakistan; specific data for the FATA does not exist, but it may be assumed that the state strength value would be even lower.
12. Bertelsmann Transformation Index 2010: "Stateness" is a collective item combining the items "monopoly on the use of force" and "effective power to govern". The top performers are rated 10, http://www.bertelsmann-transformation-index.de/ fileadmin/pdf/Anlagen_BTI_2010/BTI_2010_Codebuch.pdf, http://www.bertelsmann-transformation-index.de/fileadmin/pdf/Anlagen_BTI_2010/ Detaillierte_Werte_BTI_2010.xls (date accessed 18 June 2014).
13. Rule of Law Index 2011: 6.1: "Government regulations are effectively enforced" (Top performer: Sweden 0.84), http://worldjusticeproject.org/rule-of-law-index-data.
14. See also Manfred O. Hinz (2008) who differentiates five different positions of African tradition in a given society whose focus is laid on a more abstract cultural level and on the legal level resembles Connolly's typology, and Myranda Forsyth (2007) who differentiates types of incorporation similar to Connolly's.
15. Even though the South African customary courts have been the subject of intense research for years, no empirical database exists that can show their

effect on the access to justice and on the proliferation of constitutional values in rural communities.

16. The notion of "Meta-Rules" is used by Sage and Woolcock (2013: 4, 9), whereas Berman (2008: 1196, 1235) speaks of "processes, institutions, and practices for managing hybridity".
17. On the concept of "Constitutional Repugnancy" in South Africa, see Bakker 2009.

8

From Normative Pluralism to a Pluralism of Norm Enforcement Regimes: A Governance Research Perspective

Gunnar Folke Schuppert

1. From legal pluralism to judicial pluralism

The existence of a phenomenon of legal pluralism is by now entirely beyond dispute; the literature related to this phenomenon having experienced something of a boom in the last 30 years, it can hardly be ignored. This indisputable finding allows one to make the following statement: "legal pluralism is a fact" (Griffiths 1986; Tamanaha 2008).

What has been somewhat more difficult to agree upon is a precise definition of legal pluralism; therefore, we will provide a juxtaposition of selected definitions to be found in the literature as a way of drawing some initial inferences to help set our course:

> [...] is an attribute of a *social field* and not of a "law" or of a "legal system". A descriptive theory of legal pluralism deals with the fact that within any given field, *law of various provenances* may be operative. It is when in a social field more than one source of 'law", more than one "legal order", is observable, that the order of that field can be said to exhibit legal pluralism.
>
> (Griffiths 1986)

> [...] generally defined as a situation in which two or more legal systems *coexist* in the same social field.
>
> (Engle Merry 1988: 870)

> [...] people feel ties to, and act based on affiliations with, *multiple communities* in addition to their territorial ones. Such communities may be ethnic, religious, or epistemic, transnational, subnational, or international, and the norms asserted by such communities frequently *challenge territorially based authority*.
>
> (Berman 2007: 1161)

If we ask what can be learned from this juxtaposition of three different definitions, three points emerge. Firstly, at least for the purposes of our further inquiries, we should not be speaking as much about legal pluralism as about normative pluralism; this is the case because we are not speaking about the coexistence of multiple state or semi-state legal systems, but rather about normative orders with different provenances: customary law, religious law, state law. Secondly, it is also clear that normative orders are – this will also become clear here – always orders belonging to specific communities – or as formulated from the governance perspective – to specific governance collectives. Governance collectives are also, as the sociology of law teaches us, always regulatory collectives: they set up rules for themselves in order to stabilize their internal order and at the same time to demarcate themselves from other collectives. The religious governance collective is the best example of this. Finally, a third inference that can be made from these definitions is that community-based orders also develop provisions and institutional mechanisms to enforce their normative order on the members of their community, because not to do so would risk jeopardizing their internal coherency and their demarcation from the external.

The chapters in this volume show that this is just how it works: the countries they describe not only have coexistent pluralities of normative orders, but also have a plurality of jurisdictional regimes and – what is particularly important – a plurality of jurisdictional cultures.

If things work this way, three implications follow in turn.

Firstly, it makes sense to ascertain the various advantages and disadvantages associated with different institutional solutions for the problem of enforcing norms. From the perspective of institutional theory, this means, for example, inquiring into the specific institutional competency of, say, customary courts versus state courts, and to also raise the question about the extent to which conflict resolution by means of forms of traditional justice may, for its part, contribute to the enforcement of rule-of-law" principles. These considerations can be found in Brian Z. Tamanaha's chapter in this volume (Tamanaha

2014), which, in our opinion, quite correctly asserts that it leads nowhere to make a dichotomous distinction between state justice and traditional justice; instead, it comes down to specific contributions of each to guarantee the organizing and conflict-resolving power of the law.

The second implication is that we must find solutions for how to define a constructive relationship between state and non-state justice institutions and implement it in legal practice. This constitutes the subject of Matthias Kötter's chapter in this volume, which discusses different models for incorporating customary courts into the state legal system and, using the example of South Africa, especially, emphasizes the central role of the "institutional" in both law enforcement regimes.

There is a third implication that seems especially important to us, namely that of the cultural embeddedness of the various regimes of norm enforcement. This is especially clear in the traditional justice systems, which are characterized by their strong rootedness in their respective communities, which brings us back again to Paul Schiff Berman's definition of legal pluralism. As with all non-state normative orders, community-based normative orders – governance collectives as regulatory collectives – are therefore also community oriented in the solutions they find for norm enforcement, as is clearly shown by the following list of the characteristics of traditional justice systems in the report of Penal Reform International (2000: 22):

Salient features of traditional justice systems:

- the problem is viewed as that of the whole community or group
- an emphasis on reconciliation and restoring social harmony
- traditional arbitrators are appointed from within the community on the basis of status or lineage
- a high degree of public participation
- customary law is merely one factor considered in reaching a compromise
- the rules of evidence and procedures are flexible
- there is no professional legal representation
- the process is voluntary and the decision is based on agreement
- an emphasis on restorative penalties
- enforcement of decisions secured through social pressure
- the decision is confirmed through rituals aiming at reintegration
- like cases need not be treated alike.

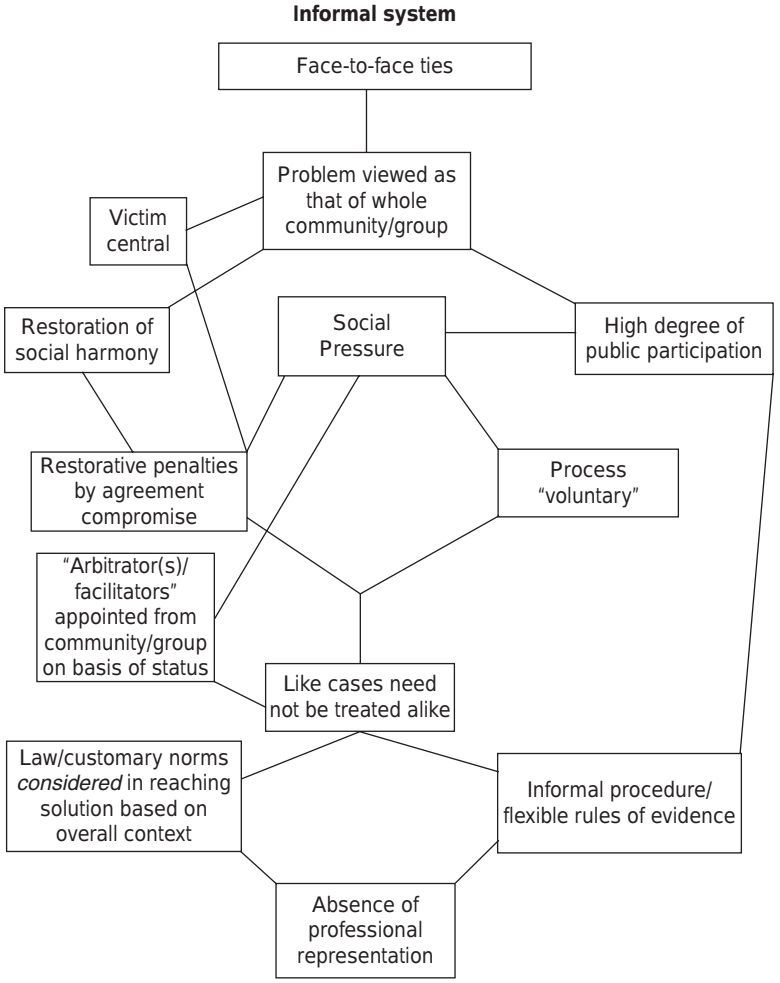

Figure 8.1 Informal system

These characteristics can be graphically illustrated in Figure 8.1 (Penal Reform Project 2000: 124).

One can contrast this illustration of the informal system to the formal system of state law, as illustrated in the following graphic representation (Panel Reform Project 2000: 123), and this will bring us to the conclusion of our introductory remarks (see Figure 8.2):

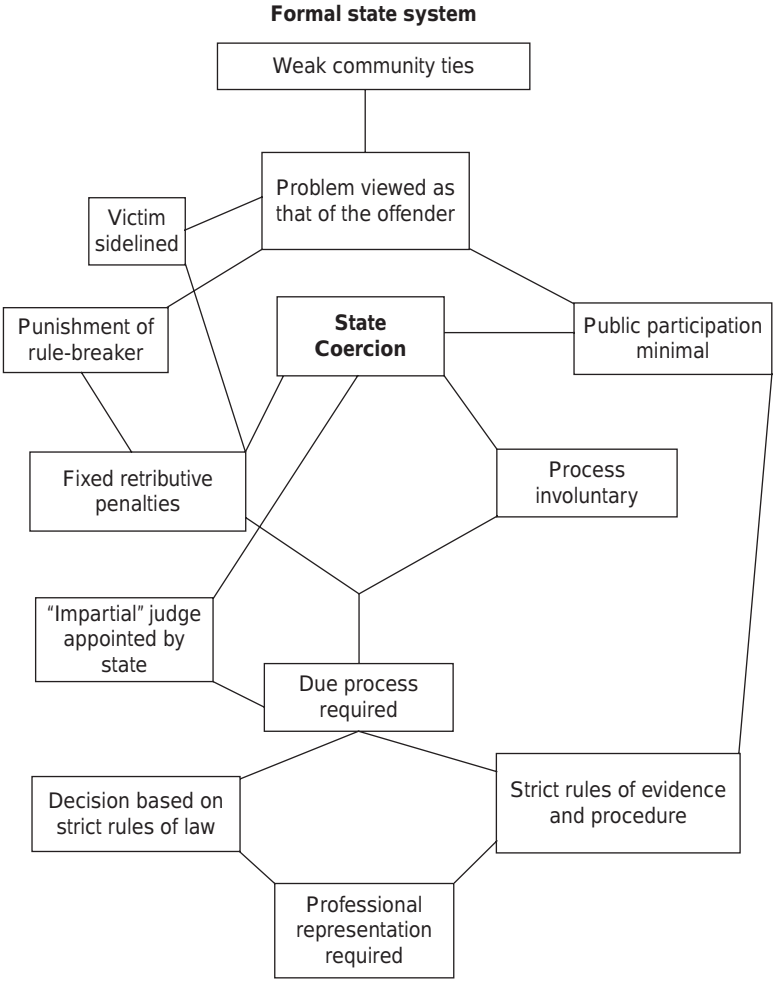

Figure 8.2 Formal state system

We aim in this chapter to tie the fact of the community relatedness of normative orders to inquiring about the different community-specific regimes of norm enforcement that have emerged from different communities of regulation and also to inquiring about the architectural and functional logic of their construction. Thus, we would like to significantly expand the perspective of consideration and – going beyond a comparison between state and non-state justice institutions – to more

closely examine various governance collectives from the standpoint of governance theory (Schuppert 2011a), guided by the leading question of how each of them constitute their governance of norm enforcement. But before we proceed to this, we would like to take a brief look at the enforcement dimension of all normative orders.

2. On the enforcement dimension of every normative order

2.1. Law enforcement as a necessary component of an effective legal order

To be effective every legal order depends upon a system of law enforcement. Karin Nehlsen-von Stryk formulated this principle with great clarity as follows:

> The efficacy and social relevance of a legal order is, in essence, determined by the extent to which it is in a position to guarantee its implementation. At the same time, the scope and the limits of permissible coercion are manifestations of the fundamental principles of a society.
>
> (Nehlsen-von Stryk 1993: 350–351)

Let us introduce another voice at this point that provides a compelling picture of the enforcement dimension of any normative order intended to be realized; we are referring to the remarks about the constitutional mandate for law enforcement in Markus Möstl's habilitation dissertation on "The state guarantee for public safety and order" (Möstl 2002: 65ff.):

> The mandate for law enforcement is intrinsic to the principle of the rule of law in multiple ways. For one thing, it derives from the fundamental constitutional function of protecting and assuring legal peace and security under the law: from a historical as well as a dogmatic perspective, the idea of satisfaction through a legal system is one of the most fundamental and inherent characteristics of the rule of law. Of course, the precondition that must be in place up front for legal peace and security under the law (legal security in the broadest sense) is that the state legal system intended to guarantee this peace and this security not only exist but also be effective in reality, which requires, in turn, that this legal system be adequately efficient and actually enforced. Therefore, the efficacy and enforcement of the law are a continual duty of the constitutional state.

People are in perfect agreement – so it seems – that if necessary, the law (as the paradigmatic example of a normative order) must be coercively enforced. This insight leads to the interesting circumstance that the law, which specifically seeks to obstruct the application of coercion and violence to enforce interests and supposed claims cannot, for its part, renounce coercion if it intends to credibly fulfil this particular core function. One might even speak of a law enforcement paradox in this regard, a situation that Christian Waldhoff (2008: 17) posed in the following way:

> The law functions in such a way that, in situations of conflict, decisions are made without the exercise of physical force, thereby preserving the peace. To this extent, the law can prove to be an instrument for non-violent conflict resolution. In extreme cases, however, the law itself has to make use of coercion and force in order to be able to fulfil its function: In order to domesticate power and violence, the law has to draw upon the threat of power, force and coercion.

2.2. On the organizational-institutional dimension of norm enforcement: Norm enforcement law and norm enforcement regime

The state legal system regulates quite precisely the conditions and manner under which coercive measures may be undertaken for enforcing the law. These regulations can be summarized in the term "law enforcement law" (Waldhoff 2009: paragraph 2). However, regulation not only involves normative statements about which enforcement measures are permissible and necessary under which conditions, but also covers enforcement procedures and the organization of enforcement. In this respect, one can speak of different models of law enforcement. We suggest, on the other hand, for a better sense of the blending of content, procedures and organization of law enforcement, to speak in terms of law enforcement regimes, with deliberate reference, in fact, to the notion of a governance regime as a task-related institutional arrangement, which is not necessarily composed solely of legal regulations, but may also include non-legally binding modes of management, such as social pressure or governance by reputation (in this regard, see Schuppert 2010: 93ff.) (regarding the term "governance regime", see Trute et al. 2008).

When we proceed in this way beyond the somewhat too narrow world of state law and call to mind the plurality of normative orders, then we can presume that we will also encounter a variety of different

law enforcement regimes. This is, in fact, the case. As shown by the subsequent review taken from a paper by Werner Gephart and Raja Sakrani (2012) in Figure 8.3, there are at least four different norm enforcement regimes that can be distinguished – ranging from church excommunication to mechanisms of social exclusion (p. 108).

In the following section, in response to this overview, we would like to undertake a survey of the different manifestations of norm enforcement regimes, a survey that deliberately skips over, for the sake of avoiding repetition, any mention of the customary courts that have already been thoroughly described in many of the chapters in this volume.

3. A survey of the diverse regimes of norm enforcement: From government mandated law enforcement to compliance management within a firm

3.1. Law enforcement as the responsibility of the state

We have already discussed that enforcement of the law can be understood as a continual requirement of a state under the rule of law. There is no question that criminal law is the ultimate weapon of law enforcement, so it would be natural therefore to view the state under the rule of law as being obligated to employ criminal law as a law enforcement instrument. Herbert Landau, a justice on the German Constitutional Court, framed this ramification in especially compelling terms in his essay with the programmatic title "The duty of the state under the rule of law to maintain a functional system of criminal law":

> Since every state must ensure the social-ethical minimum and, given the prevailing circumstances, this can only occur through criminal law, the goal of the criminal law system is to secure acceptance of these social-ethical standards. [...] However, at the same time, and weighted to the same degree, it is aimed at maintaining the subjective certainty on the part of those subject to the law that the members of the community will comply with this objective order. [...] Experience tells us that this can only take place through the threat and application of state coercion, which is thus situated at the heart of the methods of criminal law. There is a universally valid insight that it is only the state, with its ultimate instrument of power capable of administering public penalties that can serve the body politic to punish offences against this order. [...] Once one accepts this configuration of conditions, it inevitably leads to the conclusion that the topos of a functional system of criminal law necessarily

Dimensions of validity	Religion	Law	Custom*	Fashion**
Symbolic validity	Symbolic representations of ultimate reference	Difference between symbolic and actual validity	Differentiation between manners, behaviour and mores	Paradox of the *éternel dans le fugitive* (eternal in the fleeting); uniqueness and group affinity
Normative validity	Layers of obligation, obligations of the devotee, obligation of the laity	Arbitrary changeability, *force du droit* (force of law), consensual validity as a fictional validation	facticity	Plural validity of vestimentary codes
Organizationally structured sanctions for validation	Excommunication, confession, regulation through conscience, the threat of eternal damnation	Enforceability and enforcement personnel, selection from claims to validity	Social sanctions	Market v. institutional control and social exclusion mechanisms
Ritual consolidation	Hostility toward ritual versus ritualism	Ritual v. procedural legitimation	Customary practices	Rituals of selfpresentation and group affinity
Duration of validity	From the very beginning to eternity	From the illusion of eternal validity, from nature, through contingent validity	De facto duration	Illusion of eternal validity
Justification of validity	"Because it comes from a higher being and has existed ever since the beginning" legitimation by sacred origin	"Because it has been this way forever" or "because it can be changed"; from sacred reasons to arbitrary understanding as grounds for validity	"Because that's the way it's done"	"Because it's so beautiful," "Because other people are doing it this way"; paradoxes of validation

Figure 8.3 Gradients of validity and obligation for normative orders

*This is based on Weber's thoughts from Max Weber: *The Economy and Social Norms*. Cf. the evidence in the legal volume in *Economy and Society*, MWG I/22–3.

**See on the one hand the studies by Georg Simmels, such as Simmel: "On the Psychology of Fashion"; Simmel: Fashion; also Esposito's study: "Commitment to the Impermanent".

> involves – regardless of its specific disposition – a duty primarily reserved to the state [. . .].
>
> (Landau 2007: 126)

Whether or not one chooses to follow this doctrinal line of argument is an open question. In any case, the example of the criminal law system is especially apt for illustrating a specific type of norm enforcement regime, namely that of a state law enforcement monopoly, executed by the state through a professionalized, organizationally self-contained legal cadre (Rechtsstab), in the sense formulated by Max Weber. However, with the next point in our outline, we will already be leaving the world of the state sector to examine non-state normative orders and their particular jurisdictional culture.

3.2. Law enforcement in the realm of religious communitization

In the realm of religious communitization (for its diverse manifestations, see Martin Riesebrodt 2001: 101) we can differentiate – if we limit our attention here to Christianity – two layers of religion-based normative orders, the order of direct divine law (the paradigmatic example being the Ten Commandments as received by Moses) and canon law. There can be no doubt that these are true instances of law. The legal dualism of Roman and canon law in the sense of the coexistence of temporal, Roman civil law and Catholic canon law – as most legal historians agree – can actually be identified as an essential characteristic of European legal history. However, for our purposes, it is not this phenomenon of legal dualism per se that is of primary interest, but rather the organizational and institutional arrangements for law enforcement that one can regard as religion-specific (or even denomination-specific). Since this is a broad area, we will confine ourselves to two examples, and for the sake of parity, to one drawn from Catholicism and one from Protestantism.

Enforcement of norms through a "contracted" penance system: The priest as judge

The sacrament of confession, reaffirmed by the Council of Trent as central to its internal mission, to Christianization, and, above all, as an effective form of social discipline, is a truly interesting institution. The priestly role of confessor, especially of the king's confessor, can shift between that of counsellor, judge and prophet (see Nicole Reinhardt 2012). For our purposes, what is of special interest is the role of the priest as one who hears the confession as a judge and can respond

to the deviations from the religious normative order confessed as sins by imposing a predetermined, contractually graduated spectrum of penances. "The priest is [...] the judge, who", as Paolo Prodi expressed it in his *History of Justice* (2003),

> the one who must have the wisdom and the capacity to investigate the person who is before his court, he must be capable of inquiring about and evaluating the aggravating or mitigating circumstances of the sin as well as being able to draw out those sins that the sinner is hiding from himself. The absolution, the forgiveness for the sins, emerges from the penance that immediately follows the confession, and it constitutes a final verdict.
>
> (Prodi 2003: 90)

It is for this reason that the absolution from the sin is expressed in the language of a judicial judgement: "*ego te absolvo*" [...].

The community as goal and forum for Protestant church discipline

This example takes us way back, namely to the history of the Reformation, especially to the Swiss Reformers Calvin and Zwingli, both of whom regarded Christian discipline and community order as central concerns, which they attempted to enforce through a strict regime, especially in Zürich and Geneva. Hans-Jürgen Goertz has characterized the actors and the functional logic behind this normative enforcement regime as follows:

> Thus, in the Zürich dominion, there was a dense network of moral control in place. The extent to which this penetrated into all areas of the citizens' lives is illustrated by the Comprehensive Mandate issued in 1530 or 1532. It is indicative of the intention of the mandate that it punished most severely not civic vices but rather those transgressions directed against the Church, which, in the severest cases, were punished by excommunication. The individuals who were banned were compelled to leave the dominion. The person who was guilty of a moral lapse only was subjected to a fine but did not risk expulsion. A comprehensive "experiment in public education" was directed at preserving the purity of the community, with the purpose of fending off God's wrath toward the new reformed community. [...] Church discipline was certainly a fundamental internal concern of the Church, but it was overseen by a "Konsistorium" that was composed of elders who also served as counsellors to the city, as well as

> pastors. In Geneva the magistrate had a critical say in the selection of the presbytery and the appointment of preachers and in this way, assumed the duty of maintaining the purity of the Christian community [...] However, the impetus for Church discipline came directly from the Church, which sought to place civic authority in the service of the spiritual regime. Ultimately, both of these amounted to the same thing: from a Christian denominational perspective, the community was subject to religious, moral, and political or societal control.
>
> (Goertz 1990: 178)

Since the ultimate point of reference for this Calvinistic Church discipline was the purity of the community, penance also had to be openly communal; the sinful member of the community had to publically seek reconciliation "with the community, in order that God's wrath, which had been provoked by the transgression, would not affect and taint the community that had been sullied by the transgression of the individual" (Schilling 1994: 39).

The passage cited from Hans-Jürgen Goertz is also interesting for another reason: it calls attention to a certain measure of collaboration in setting norms by ecclesiastical and state institutions, so one can almost speak of an "regulatory interest alliance" (a term used in Zabel 2012: 38) of state and church.

The co-production of norm enforcement by state and church

We would like to take a closer look at this interesting phenomenon from the perspective of "linkages between state and non-state justice institutions" with the help of the historian Stefan Esders, who investigated this collaborative division of labour between state and church in law enforcement in a research project titled "Legal Certainty and Order as a Communal Task of Temporal and Church Institutions (from the 8th to the 11th Century)" (Esders 2013). He summarized the objectives of his research project in his grant application to the German Research Foundation as follows:

> The subproject seeks to inquire, for the period from the late 8th through the 11th century, into the role of the Church as a governance actor in the generation of legal certainty and order as well as into the significance of the Christian religion in creating a specific form of legal meaning in this regard. [...] Since the 8th century there has been a pattern where a growing set of violations that shook

> the foundations of security and order and that were previously not regarded specifically as religious transgressions (e.g. arson, robbery, counterfeiting, and treason) were no longer sanctioned only by temporal functionaries through fines and corporal punishment but were additionally punished by the Church through excommunication and penance. [...] Violations of the norms were thus also considered and punished as transgressions against [the] normative and spiritual order that unified the society. [...] The issue is [...], what intellectual and practical resources were developed by the Christian religion during this time period in order to formulate new notions of legitimacy against the backdrop of failing state guarantees, to establish different kinds of institutional mechanisms for realization of the law and to counteract the uncertainty of the times with independent templates for community.

3.3. Association law and its enforcement

This heading connects us to the theory, widely accepted in the social sciences, known as functional differentiation (Luhmann 1984, 1997), according to which we could imagine society as a functionally differentiated entity in which different systems maintain a more or less autonomous life. Examples of such differentiated functional systems would include the economy, science, the law, religion, as well as – somewhat more tangibly – the mass media, education, medicine, art and – last but not least – sports (Survey by Brodocz 2006).

We would like to take a brief look at two such functional systems and thereby return once more to our general question about what institutional arrangements we can find in them that are intended to guarantee compliance with their respective function-specific normative orders.

The professions

The professions, as we would designate the professional associations, borrowing from the Anglo-Saxon terminology, exemplify the functional differentiation of society; according to Manfred Mai, the prototypical profession has the following characteristics (2008: 15):

- a demanding, typically academic, training programme
- a close connection with clients marked by great personal trust
- wide-ranging autonomy in regulating its own professional affairs, such as quality control of services, licensing, training requirements and fee systems
- elevated social reputation

– a codified system of professional ethics with references to the common good
– broad quasi-monopolistic control over an area of critical social significance.

What is characteristic of differentiated subsystems – and this is especially the case for the professions – is the conditional relationship between autonomy and self-control. Based on the work of Michaela Pfadenhauer on the sociology of the professions, which in turn connects back to the great emphasis in Talcott Parsons' social theory on the place of the professions (see his early essay "The Professions and Social Structure" from 1939), the professions may be defined as "self-administering, in professional training and professional practice relatively autonomous, corporate entities marked by collegial internal controls" (2003: 40). As corporate actors of this kind, they are "politically collective actors" and operate a kind of professional politics shaped by their own logic of action. Professional politics lays claim to the most exclusive possible power of definition and interpretation with respect to professional standards, and at the same time, this demands a credible promise of self-control [as] compensation for the privileges of organizational autonomy that are granted. M. Pfadenhauer characterizes this association between claims to autonomy and control in the following way (2003: 61):

> The professions' demands for control are generally directed at access to the profession, at bodies of specialized knowledge, and at collegial self-control, and they are manifest in professional strategies and in professional politics. The demand for control is thus directed internally, in that members of the profession are obligated to maintain professional standards (of an academic, professional practice and ethical nature), and that compliance with these standards is enforced through formal and informal sanctions. In a certain way, the demand for control is also directed externally to defend against "juridification:" this is primarily focused on repudiating every form of outside control by the state.

In Germany the agencies for enforcement of norms in the realm of the professions are the legally established public boards to which members of the profession are obligated to belong. As the recourse of ultimate appeal, there are specialized professional courts, which in Germany – to return to the problem of linkage – are integrated for historical reasons to the government's legal system.

The enforcement of rules in athletic games – an object lesson on the subject of rule by association

Sports are a good example of a broadly autonomous subsystem with an effective norm enforcement regime (for a more detailed presentation, see Schimank 1988), which primarily employs the sanctions of short-term or long-term suspension. A functional prerequisite for this often-rigid norm enforcement regime is what is referred to as the single federation principle, which gives each athletic federation a de facto monopoly on regulation and sanctions. This principle implies that a single federation has exclusive responsibility for each field of sport and, in addition, that there can only be one federation for a particular territory (nation). The result of this principle is that national and international sports federations retain a position of de facto geographic monopoly (Vieweg 1990: 66):

> This facilitates the control of a sport that is run according to a uniform set of rules and helps to prevent conflicts over who is the competent authority that would result from competition. The "single federation principle" is contained in the statutes of the international sports associations that are globally active, and provides consistent norms for continental and regional sports federations.

At the apex of the athletic norm enforcement regime is a sports court, the Court of Arbitration for Sport (CAS), about whose construction we can find the following information in the paper by Nils Ipsen on "Private normative orders as transnational law?"(2009: 135):

> *The CAS is run by the* International Council of Arbitration for Sport (ICAS), a foundation under Swiss law, *founded in 1994. The ICAS is composed of 20 members that […] are selected as follows: four are chosen by the Association of International Sports Federations […], four by the Association of National Olympic Committees, four by the IOC; these twelve members go on to select four additional members with particular consideration for the interests of athletes; these sixteen members, in turn, select four independent members. The members should be highly qualified jurists with specialized knowledge about either sports law or international arbitration. […] One-third of the financing for the ICAS is provided by the IOC, the international sports federations, and the Association of National Olympic Committees, respectively. Additional financial support comes from several international umbrella organizations*. It is the job of the ICAS to manage and finance the CAS. *Of particular importance are the rights to change*

> *the statutes of the CAS,* to appoint judges*, and to create ad-hoc courts of arbitration. For this purpose* the ICAS prepares a closed list of potential arbitrators for the CAS every four years. *These arbitrators must also be qualified jurists with specialized knowledge of sports and/or international arbitration. The list of arbitrators must include at least 150 names of individuals, a fifth of whom are drawn from the same set of different areas as the members of the ICAS, and who are intended at the same time to reflect the various regions and legal traditions [. . .]. The arbitrators who are chosen must sign a declaration of independence.*

Since the international sports federations have heretofore enjoyed de facto autonomous power to set and enforce norms, we can in fact speak of them as constituting a non-state enforcement regime.

3.4. Parallel orders and their "parallel justice"

One can speak of parallel orders – so as to avoid the term "parallel society" that has been so overused in integration debates – when, alongside the dominant state order in the country of immigration, there are social, economic and institutional parallel structures, as a general rule established by immigrants (Fischer 2011). Such institutional parallel structures are also specific institutional arrangements for conflict resolution and norm enforcement without government involvement. So goes the argument succinctly made by the criminologist Christian Pfeiffer as follows (as quoted by Wagner 2011: 11): "It is typical of a parallel society that it also establishes its own system of justice." This statement, originated by Pfeiffer to describe the conflict resolution practices of Islamic immigrants, has been seconded by the dedicated, Berlin youth court judge Kirsten Heisig, recently deceased, with the following observation (also as cited by Wagner 2011: 11): "It gives me an uncomfortable feeling [. . .] because the law is relinquished and transferred to the street or *displaced to a parallel system*, where an imam or other exponent of the Koran gets to decide what should be done."

In what follows, we will use two examples to illustrate the modes of action and functional logic of two types of parallel institutions for conflict resolution and norm enforcement.

The example of Sharia courts in Great Britain

Since August 2007 there have been so-called Muslim tribunal courts in Great Britain that have decided more than a 100 cases, ranging from matters of divorce and inheritance to disputes between neighbours

according to Sharia law (for a detailed presentation, see Taher 2008). There are already five such Sharia courts in existence in London, Birmingham, Bradford, Manchester and Nuneaton, and two additional courts are planned in Glasgow and Edinburgh. The Muslim Arbitration Tribunal, which "operates" the Muslim tribunal courts, has been made possible as a result of a clause in the British Arbitration Act of 1996, which recognized these Sharia courts as arbitrational tribunals, so long as the parties in a legal dispute accept the authority of such a tribunal to adjudicate their case.

There are two interesting things about this case example. Firstly, we are clearly dealing here with a case of regulated self-regulation. The government framework is found in a British law, the 1996 Arbitration Act, which includes under its aegis not only the Islamic arbitration tribunals but also Jewish courts of arbitration known as the Beth Din (about whose functions and scope, see The Center for Social Cohesion 2009), and whose introductory provisions read as follows:

General principles

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly

   (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense
   (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest
   (c) in matters governed by this Part the court [i.e. the High Court or a country court, Part IV, Section 105, Paragraph 1] should not intervene except as provided by this Part".

(Arbitration Act 1996)

This results in an interplay between state jurisdiction and the Muslim Arbitration Tribunal, which functions according to its own procedure rules, a tribunal, that Abul Taher has described in the following manner (Taher 2008):

> Islamic law has been officially adopted in Britain, with sharia courts given powers to rule on Muslim civil cases. [...] Rulings issued by a network of five sharia courts are enforceable with the full power of the judicial system, through the county courts or High Court. Previously, the rulings of sharia courts in Britain could not be enforced,

> and depended on voluntary compliance among Muslims. [...] Sheikh Faiz-ul-Aqtab Siddiqi, whose Muslim Arbitration Tribunal runs the courts, said he had taken advantage of a clause in the Arbitration Act 1996. Under the act, the sharia courts are classified as arbitration tribunals. The rulings of arbitration tribunals are binding in law, provided that both parties in the dispute agree to give it the power to rule on their case. Siddiqi said: "We realised that under the Arbitration Act we can make rulings, which can be enforced by county and high courts. The act allows disputes to be resolved using alternatives like tribunals. This method is called alternative dispute resolution, which for Muslims is what the sharia courts are."

Secondly, the gain in ground for parallel conflict resolution institutions enabled by the 1996 Arbitration Act are now ingrained in the broad legal and religious policy debate that has included not only the Lord Chief Justice but especially Rowan Williams, when he was Archbishop of Canterbury. The Archbishop's lecture is a remarkable document: citing the literature of legal theory and legal philosophy, Rowan Williams puts himself on record against an outmoded state monopoly on jurisdiction, since this is irreconcilable with the realities of a pluralistic society; rather, it befits a "plural society of overlapping identities" to recognize "supplementary jurisdictions"; only through such recognition – the Archbishop argues – can existing "communities within the community" be led away from an otherwise necessary development of ghettoization (Text printout: 8):

> But if the reality of society is plural – as many political theorists have pointed out – this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalised or privatised to the extent that what is produced is a ghettoised pattern of social life, in which particular sorts of interest and of reasoning are tolerated as private matters but never granted legitimacy in public as part of a continuing debate about shared goods and priorities.

The Islamic arbitration process in Germany

As for the German example, it does not involve actions by state-accepted Sharia tribunals, but rather the arbitration of conflicts between members of the Islamic faith by a group of individuals – who may be attorneys, imams or family patriarchs – who can be subsumed under the functional designation of arbitrators or justices of the peace. Their activities were the subject of a book by Joachim Wagner published in 2011 titled

Judge without Law with the descriptive subtitle "Islamic parallel justice is endangering our constitutional state". Whether Wagner's thesis is actually valid is not our current subject; what is of greater interest here is how to explain the tendency observed by Wagner and others to supplant state justice with internal Islamic conflict resolution. The reasons Wagner presents are worthy of consideration and for this reason, deserve to be briefly summarized below.

To begin with, one of the more important aspects is the high value accorded to reparation – especially in the form of financial compensation – in Islamic law and Islamic culture. Such reparation is not generally transacted between the perpetrator and the victim – between individuals – but rather

> Reparation is a core tenet of Islamic penal law. For the scholar of Islamic law Mathias Rohe, reparation is an expression of a social order that is based on the economies of extended family associations [...] without social safeguards.
>
> (Rohe 2011: 139)

> In countries without a state order, the extended family had to assume the protective functions of the police and judicial system. In this process, blood revenge played a disciplinary role.
>
> (Wagner 2011: 14–24)

The major participants in conflict resolution, beyond the state, are thus the families, so we might designate this system as representing the de-individualization of conflict; Wagner thus restricts himself to speaking only about perpetrator families and victim families:

> After a crime the affected families decide, on a case to case basis, whether they will deal directly with each other or call in an arbitrator. The initiative typically begins from the perpetrator family, since it has an interest in keeping their son, brother or cousin exempt from punishment. In the case of direct contact, the father or oldest brother turns to his counterpart in the victim family.
>
> (Wagner 2011: 30–1)

Form these preliminary reflections, it will not be surprising that the notion of honour so often cited in the discussions about the existence and the evaluation of so-called parallel societies keeps coming back to associations with family: honour is family honour. Wagner also describes this phenomenon – with respect to blood revenge – in clear

terms: "The driving force for blood revenge is the violation of family honour, during pre-state times the honour of the extended family, above all. They operate under the principle of absolute solidarity and defence of honour." (Wagner 2011: 22). In Muslim nations "honour is at the top of the value scale of virtues, even above life and limb, freedom and fortune." (Wagner 2011: 23) This notion of honour has been preserved to the present day and is very much alive as the behavioural compass in the diaspora. It is the key to understanding the Muslim parallel society in Germany. Completely absent from the German value system, this notion of honour, its primacy above legally protected rights such as health or life, and the greater acceptance of violence in some parts of the parallel society, have the consequence that the Muslim population is severely afflicted by some areas of criminality (Wagner 2011: 22–3).

If these observations are correct, they lead to two important conclusions: for one thing, extended families may fit the definition of governance collectives, since they fulfil numerous governance functions; in addition, they are also norm enforcement entities, in which – particularly in the case of honour-based violence (a detailed description of this issue can be found in the second 2010 edition of the report by the Center for Social Cohesion), where male family members function as "guardians of honour". The report by the Center for Social Cohesion describes this function in the following terms:

> In the Kurdish community, male members of the family are usually seen as the guardian of cultural norms and values. If a woman contravenes those norms and values, the male guardian is often obliged to act to protect the community's belief system. Gona Saed, director of the Middle East Centre for Woman's Rights, an advocacy group in South London, says:
>
> It's a combination of nationalistic traditions, culture and religion. These all feed into this violence against women.
>
> (Center for Social Cohesion 2000: 29)

3.5. Norm enforcement through structures for institutionalized surveillance

Michael Power (1999) used the, by now classic, term "audit society" to describe the observation that we live in a society where everything, truly everything, is under observation, and indeed, not merely observed but also evaluated in the process of observation and entered onto a list by rank (for an overview with additional evidence, see Schuppert

2012: 89ff.). But if we are living in a world where everything is observed, measured and weighed, then we need monitoring to be organized such that there are specific monitoring procedures applied and the observational findings fed into a comparative and competitive political process in which these findings can perform significant control functions in the form of the magical formulas of best practice and benchmarking (see Löffler 1996). To this extent, it makes sense to speak about institutionalized surveillance and evaluation structures: such governance structures can be found – to cite only three examples – in quality controls for foods, the constant monitoring and evaluation of the economic performance of nations by the World Bank, and the institutionalized oversight of the policies of its member states by the reputation association – the Organisation for Economic Co-operation and Development (OECD) – perhaps the code word "Pisa" would suffice in this respect.

In the context of our discussion, however, another perspective comes to the fore, namely the perspective of norm enforcement. In fact, the observation and evaluation regimes (for a more detailed discussion, see Hornbostel 2007) that we have just described are none other than instruments for enforcing normative standards and – as we can particularly observe in the subsystem of science – they manifest a great measure of control. We would like to illustrate how such evaluation regimes function as norm enforcement regimes using two examples.

The peer review system

Under this heading, we shall take a look at a system of evaluation that is gaining ever greater importance in the scientific community, which functions entirely without laws, whose norms for guiding behaviour are entirely of an informal nature and whose functional logic may be characterized by the phrase "governance by reputation": publications in peer-reviewed journals convey reputation and, in turn, accumulated reputation is the requirement for appointment as a peer.

Regarding the function of the peer review process, a truly outstanding scholar of the science system – Friedhelm Neidhardt – has said something worth considering; he refers not only to the selection function that is familiar to all of us, but also to a construction function, for peer review represents an essential element for constituting a scientific community. He speaks about this function as follows:

> Peer review involves the attempt to form quality controls in science in a professional and constructive manner. Two functions of peer review play a part in this process: on the one hand, they

> involve selection functions, namely regarding the selection of persons, projects and texts for awarding scarce symbolic and material resources. [. . .] Alongside the selection function of peer review there are also construction functions. Peers intervene in the scientific process both prohibitively and productively, in order to enforce professional standards as they perceive them. It is only through peer review that scientific disciplines and research fields constitute themselves as scientific communities.
>
> As peer review increasingly takes on a constitutive role for the sciences, the question arises with greater insistence whether it can actually function adequately as a professional control mechanism. Under what conditions is its own quality sufficient for a proper scientific estimation and setting standards for the quality of individuals, projects and texts?
>
> (Neidhardt 2010: 282–283)

Among these operational conditions cited by Neidhardt, the one that pertains first and foremost is securing competent experts; even this most obvious requirement brings up the problems with respect to the functioning of the review system, since the pitfalls that can affect competency and bias tend to go hand in hand.

The principle of anonymity is specifically intended as a means of assuring distance. Renowned journals work using a double-blind process, where neither the author of the manuscript nor the expert reviewer are known to each other and neither of the reviewers knows the identity of the other.

This method has clearly proven itself effective for enforcing scientific quality norms and is thus being practised in an ever-growing number of areas.

Accreditation in higher education or control through organization and process

The all-pervasive accreditation system is of complex design; we would regard the best description to be the paper published in 2008 by Karin Bieback under the title "Certification and Accreditation: the collaboration of state and non-state actors in tiered test systems" (Bieback 2008). The title tells it all: we are dealing with a collaboration of non-state and state actors in a tiered regime of governance. The context of this system for enforcing norms of academic quality is the not unimportant effort to create a unified "European sphere of higher education", as part of the process of European integration. Its foundational pillars will include

not only comparable university diplomas but also the development of a transnational system of quality assurance through the establishment of comparable criteria and methods.

Regarding accreditation in the area of higher education, two types of accreditation can be distinguished: institutional accreditation and programme accreditation (see Röbbecke 2010). While institutional accreditation serves to "comprehensively test non-public universities for compliance with academic quality standards in teaching and research", programme accreditation deals with the evaluation of courses of study.

Such programme accreditation takes place in a tiered organizational regime. The actual accreditation takes place through so-called accreditation agencies, which for their part also require accreditation, which takes place through what is known as the Accreditation Council, whose construction Margrit Seckelmann describes as follows:

> The Accreditation Council headquartered in Bonn has the legal form of a federal [...] foundation under public law [...]. It has 18 members, each appointed for a four-year term. The Accreditation Council bases its work on its own "Rules for the Accreditation Council for Accreditation of Courses of Study and for the Accreditation System," concluded on 8 December 2009. According to these rules, accreditation is granted for seven years, after which the accredited course of study must apply for reaccreditation. The Accreditation Council also submits itself for evaluation at seven-year intervals.
>
> (Seckelmann 2011: 504)

Thus, the organizational effort expended for the enforcement of uniform quality norms is not negligible; however – as we learn from both examples – quality norms do not work by themselves; rather, their enforcement requires procedures specific to each area that are compatible with the functional logic of each subsystem.

We would like to conclude our *tour d'horizon* of various manifestations of norm enforcement regimes with a brief look at a modern form of norm enforcement, which may appear at first glance to fall entirely outside the examples previously cited, namely norm enforcement through compliance management.

3.6. Norm enforcement through compliance management

For some time, the politics of environmental protection has served as a laboratory for new instruments of control. The arsenal of tools specific to environmental law that stand at the centre of our interest include, in

addition to classical environmental regulatory law through proscription and prescription, the instruments of informal behaviour management – information, recommendations and warnings – and the instruments of economic behaviour management by means of economic stimuli (e.g. tax incentives) or the imposition of duties. The arsenal also includes – and this is what we are getting at – the installation of self-reflective institutions, among them the following:

- appointment of environmental protection officers within the firm
- compilation of waste management records and models
- creation of incident prevention models
- obligations regarding notifying the managing organization.

Among this set of tools, we have always had a particular interest in the self-reflective institution type, which functions as an instrument of what Matthias Schmidt-Preuß (1997) termed self-reflective control, a mode of control that he described as follows: "It is characterized by the fact that the state provides private economic operations with internal informational, learning and self-control processes – free inspection, as it were – that are expected to result in the desired contributions to the common good. Inductively, what is operating in this instance is self-determination, not subordination to outside authority." (Schmidt-Preuß 1997: 192) The reason that such methods for promoting the common good rely on self-reflective control is to avoid compelling private business behaviour in the interest of the common good from the outside or sanctioning bad behaviour, and instead to plant incentives for good behaviour in the organization itself, thereby undermining to a certain degree the boundaries between outside control and internal control.

This technique may, in fact, also prove useful in the area of norm enforcement, through a governance regime that has been discussed in the literature under the name "compliance management systems (CMS)". Examples specific to different areas include the compliance regimes in securities law and in banking and insurance law, which "generate on-going knowledge concerning potential risks" as self-reflective regulatory structures "for the prevention of legal violations and passes them along to company management and to the agencies responsible for control. They encourage compliance with the norm within the company, without otherwise altering the rationality of decision-making" (Broemel 2013: 63). In this respect, one could refer to the regulation of knowledge within the company as a factor in compliance with the norms.

The organizational instrument for this encouragement of decisions that comply with the law is the installing of a compliance officer within the company; in larger firms this is standard practice: the most spectacular case is the appointment of a former justice of the German Constitutional Court as compliance officer at Daimler-Benz (Mercedes). The way this instrument of the compliance officer functions is described by Robert Broemel – and his comments will also conclude our brief tour – as follows:

> Concerning measures to stop violations of the law, the compliance officer [...] cannot however take direct action, such as instruction; rather, the organizational procedures have the goal of encouraging the elimination of violations of the law through the firm's own internal unit responsible for this. The instrument of the compliance officer thus does not constitute an intrinsic directive authority but rather, the officer has the duty to document risk assessment, to inform the office within the company responsible for compliance, and to recommend countermeasures. The compliance officer also has the right of escalation, in other words, to contact the next higher authority within the corporate hierarchy. The enforcement of compliance measures within the firm thus takes place to a great degree through the regulation of information flow within the company, especially through the escalation right of the compliance officer, mirrored by the right of the oversight agency to collect information directly from the compliance officer.
>
> (Broemel 2013: 67)

As we conclude our *tour d'horizon* through the world of norm enforcement regimes we must now combine the insights we have made and formulate the conclusions that result from them.

4. A few critical concluding remarks

Our journey through the various norm enforcement regimes has clearly illustrated their complete diversity. If we do not want to limit ourselves to this finding of diversity, we should attempt to add a few systematizing thoughts.

4.1. A typology of norm enforcement regimes: A first approximation

One way to attempt a systematization would be to develop something along the lines of a typology of norm enforcement regimes; if the models

that we have mentioned pass in review once more, it seems to us that there are three categorizing criteria that come up for consideration, namely the nature of the regulatory collective, the degree of formality/informality of legal enforcement procedures and the kind of sanction instruments employed to assure compliance with the norm.

Let us begin with the regulatory collectives and each of their specific norm enforcement regimes:

(1) We would like to designate the first group of norm enforcement regimes as state based law enforcement regimes. Among these is the hard core, as it were, of the state system of justice, together with the professional courts integrated into government law or other means provided by the state, such as the enforcement of judgements issued by courts of arbitration.
(2) We would designate the second, especially broad group as community-based law enforcement regimes. These regimes involve norm enforcement regimes of a particular community that has its own normative order and has developed specific arrangements and procedures for its enforcement with respect to community members. Four regulatory communities of this kind appear to us to be of particular significance:

- Ethnic communities are clearly playing an ever more important role, a fact that emerges with particular force when previously multi-ethnic states break apart, as is often observed in failing states. There has been sufficient detailed consideration in this volume regarding traditional justice administered by ethnically based governance collectives so that nothing needs to be added about the subject at this point.
- The second group of cases is religious communities, which have developed entirely idiosyncratic, at times denomination-specific, norm enforcement mechanisms. It would be interesting in this respect to examine the three legalistic religions, Islam, Judaism and Christianity, but this is beyond the scope of the present discussion. It is striking, nevertheless, that not only in Islam but also in Judaism, those learned in the religious laws have an important role, not only in interpreting the law but also in law enforcement – as the example of Iran in particular reveals.
- The third group of cases is composed of the professional communities. The professions have developed their regulatory systems since time immemorial, not only in terms of ethical and quality standards, but also – and this has been of particular practical

significance – in order to keep unwelcome competition at bay. Therefore they have tended to monopolize the enactment and enforcement of norms specific to the profession: the classical organizational model in this respect would be the guilds.
- The scientific communities belong in this classification as the fourth group of cases. They were initially constituted – not unlike the professional communities – through joint normative standards and compliance with those standards.

(3) We would term the third group organization-based law enforcement regimes, and this involves organizations – whether they are private firms, public agencies or scientific organizations – that seek to enforce uniform behavioural and quality norms within the scope of their organizations. This group might include the large, systemically important banks or even an institution like the Social Science Research Center Berlin (WZB), which is, at the time of writing, undergoing an external audit regarding the quality of its risk management.
(4) The second criterion that serves as a basis for classification concerns the degree of formality versus informality of norm enforcement procedures. While state-based law enforcement regimes show a high degree of formality – one only needs to think of the German Code of Criminal Procedure – and the different variants of traditional justice do follow quite definite rules, they are not typically set down in written form and their application is flexible with respect to the particular case of conflict in question.
(5) The third important criterion is the manner and form of norm enforcement. While the state-based regimes work by means of classical compulsory enforcement, the community-based law enforcement regimes tend to rely more on the efficacy of indirect control, whether through reshaping the individual's understanding of the general norm, or by what is termed governance by reputation. Anyone familiar with the science system will voice no doubts regarding the efficacy of control through reputation.

4.2. On the significance of different cultures of jurisdiction

When we revisit the diversity of norm enforcement regimes, it will quickly be apparent that this diversity is not about technical legal differences but rather that we are dealing with different cultures of norm enforcement. The resolution of conflicts by a meeting of the elders of a tribe or by one's colleagues in a professional group is something

quite different from state criminal prosecution, and the character of a penance is of quite a different nature than that of state sentencing. For this reason, we spoke in another context about different conflict cultures (Schuppert 2008) and therefore propose, where it concerns the area of judicial pluralism we should distinguish between various cultures of jurisdiction. This is the only way that we can do justice to cultural embeddedness as it also involves the enforcement of norms, already addressed by Karin Nehlsen-von Stryk in the introductory citation to this paper.

If one views things in this way, it becomes understandable for the first time why – as Brian Tamanaha justly emphasizes – we cannot proceed by seeking to diametrically contrast state and non-state conflict resolution methods, or even to enforce one model at the cost of the other, but that each model has its own, specific institutional competence. Therefore, one would be tempted to undertake the methodological approach known as practical concordance used in efforts to reconcile conflicts between constitutional liberties, where one does not attempt to enforce one position at the cost of the other but – in our instance – to maximally realize the efficacy of both types of conflict resolution.

9

Legal Pluralism from the Perspective of International Law

Rüdiger Wolfrum

1. Introduction

Legal pluralism means, generally speaking, that several autonomous legal systems exist besides each other although they cover the same territory or the same groups of persons or both.[1] As such the phenomenon is not a particularly new one. What is new is that – for one or other reason – state constitutions or laws on the sub-constitutional level have established or accepted that certain groups or parts of society may enjoy a legal autonomy or, in other words, are governed by legal rules developed by and applicable to them but not to the rest of society. The objective of legal pluralism may be less embracing. It may only envisage that certain aspects of life are governed by legal rules not issued by the state concerned. Even this development is only new concerning the frequency of cases such system is being turned to. For example, the Edict of Potsdam of 29 October/8 November 1685 granted the French immigrants in Brandenburg far-reaching autonomy which resulted, de facto, in legal pluralism which was resented by some in the majority population.

Until recently there was a general understanding in most states that the normative order in a state should be uniform, which means to say that it should apply to all persons[2] living in that state alike or, to put it in different words, that only the state concerned should have the full power to enact legal norms and oversee their implementation.[3] It is somewhat forgotten that this system is the result of the development of territorial states which took place between the 16th and 19th centuries in Europe. Before this development was accomplished, the applicability of a legal norm to a particular person depended upon the ethnic affiliation of the person concerned. Only after the system of territorial

states had developed, and its internal organization had been consolidated, did the governments of these states insist on governing the affairs of the population in these states in all aspects. But even at the peak of the development of territorial states, some groups maintained a certain independence from full governmental control. In Europe these were, for example, monasteries and other institutions of the church.

At present the development in some states – South Sudan has been treated intensively in this book – seems to point towards the recognition of a more pluralistic legal order, although this development is by no means coherent. Other examples are found in several states in Latin America. However, the appreciation of the potential merits of legal pluralism differs significantly from state to state and region to region. It is seen in some states as the decisive integrative factor to consolidate and to preserve the unity of the state concerned.[4] In other instances such development is seen critically, namely as a possible root of the disintegration of that state.[5] The attitude towards legal pluralism changes evidently depending upon the shifting views concerning, on the one side, what makes the unity of a state – including its legal unity – desirable and on the merits of preserving or even fostering ethnic, religious, cultural or other identities.

Literature seems to concentrate on legal pluralism as far as ethnic, religious, cultural or other identities are concerned. Looking closer it becomes evident that even a state like Germany traditionally tolerates some legal pluralism exercised, for example, in professional chambers. The idea behind this is that such chambers should enjoy some autonomy – apart from historical reasons – so as to develop and implement their professional standards. However, their activities are state controlled through the general juridical system. This form of legal pluralism is not the issue of relevance here. Another topic appropriate to mention in this context (although this chapter will not concentrate on it) is the phenomenon of legal pluralism in some European countries. There, legal pluralism comes into play in respect of immigrants, in particular from Muslim countries. There seems to be a tendency in the Muslim community, for example in Germany, to entrust disputes among its members to mediators/arbitrators of their own who decide not on the basis of German law but on the basis of Sharia or on equity or custom. The German government seems to be inclined to put an end to this form of parallel justice system. Although this tendency and the developing policy against it would demand legal analysis, this chapter will focus on some prototypes of legal pluralism in Latin America, Asia and Africa. As such, legal pluralism is a phenomenon established or rather

tolerated to protect the identity and culture of particular groups such as indigenous people, minorities or religious and ethnic groups.[6] In this context, this chapter will deal with the question of whether international law gives any indication for or against legal pluralism. The chapter will further raise the question of legitimacy concerning the laws parallel to the legal system of the state. Both questions are interlinked. This will be followed by an analysis of the constitutional set up of several Muslim countries from the point of view of whether relying on Sharia as a source of law establishes legal pluralism.

2. Legal pluralism and international law in general

Traditional international law, which was devoted to coordinate activities among states, had in general little or no impact upon the national legal order of states. With the growing concern of international law on minorities, individuals or indigenous people, this situation has started to change significantly. This development was reinforced when it was accepted by the United Nations and within a majority of the community of states that instability within one state may destabilize a region and may lead to a threat to peace under Article 39 of the UN Charter. Such instability may result from several factors such as the widespread and systematic violation of human rights, social injustice, undemocratic government, disregard of the rule of law and other factors.

All efforts of the international community of states to improve the legal order within states to meet international standards of human rights and to provide for a responsible government, not only attempt to influence the national legal orders, but unavoidably try to harmonize them on the universal or regional level. This development is contrary to the traditional notion that, as far as national legal orders are concerned, constitutional plurality prevails. Such a plurality may be considered the consequence of the right to self-determination.

Certainly international law requires the protection of indigenous peoples or other minority groups against discrimination and marginalization. Attempts are also being made to protect their cultural identity, by safeguarding their language, their customs and beliefs. Of particular importance is the protection of their ancestral land and the relationship between these groups and their land.[7] However, at the same time care must be taken that such groups also have the chance to benefit, in general, from social and economic development of the state concerned. The protection of their cultural identity must not result in their marginalization.

The protection of cultural identity may be fostered most efficiently by accepting that indigenous people enjoy certain autonomy as far as the development of their traditional legal norms or customs as well as the implementation of such legal norms and customs is concerned. In this respect, international law, in particular human rights law, may constitute some limits. One example is the perception of torture. According to a modern understanding, traditional forms of criminal sanctions, which amount to torture, are not tolerable. It has to be added, though, that some indigenous groups consider the sanction of imprisonment as torture. This or equivalent cultural differences have to be taken into consideration when tailoring national rules involving indigenous peoples.

3. Objectives pursued through legal pluralism in selected national legal systems

3.1. Indigenous, ethnic and tribal groups

Comparative analysis

As indicated earlier, legal pluralism is seen as a means to accommodate the interests of indigenous people or particular ethnic groups in upholding their cultural identity. The degree of legal autonomy granted varies significantly; so does the state control of normative order of the relevant group as developed and applied. Such legal autonomy may be combined with territorial autonomy (e.g. Canada), but this is not necessarily the case.

The protection of indigenous people and ethnic groups was spread, advocated and promoted by NGOs, the International Labour Organization (ILO) and the International Committee on the Elimination of Racial Discrimination (CERD). Attempts of enforced assimilation of indigenous peoples or tribal groups have been given up formally; but they have not been given up in practice. Traditionally the policy of tolerance and non-discrimination dominated, although in reality there was frequently a policy of marginalization.

In Latin America the development to recognize and protect the cultural identity of indigenous peoples started in the late 1970s with the changes to the Constitution of Ecuador in 1978. Other Latin American countries followed. In some cases new constitutions have been issued since then or the existing ones were amended. This chapter briefly addresses the following constitutions particularly as to whether they provide for legal pluralism (the adoption of a new or the amendment

of the existing constitution is indicated in brackets): these are (Ecuador 1978 (2008); Guatemala 1985 (1993); Nicaragua, 1987 (1995); Brazil 1988 (1998); Paraguay 1992 (2001); Peru 1993 (2008); Bolivia 1994 (2008); Argentina 1994; Venezuela 1999 ; Mexico 2000 (2013)).

The constitutions from these selected Latin American countries can be grouped roughly into three categories, namely those that provide for legal pluralism to foster the cultural identity of indigenous peoples and those that do not go that far. The central test for establishing whether legal pluralism exists is the treatment of indigenous norms and customs in national courts.

For example, the new Constitution of Ecuador of 2008 grants indigenous communities, among others, legal autonomy within their ancestral land.[8] Article 62 of the Constitution of Paraguay of 2001 adopts the same approach – this constitution was probably the model for others.[9] The Constitution of Bolivia of 2008[10] and the one of Mexico of 2013[11] equally refer to a legal autonomy of indigenous peoples.

The Constitution of Guatemala, as amended in 1993, provides for a "traditional protection" of indigenous communities but not – at least not in the Constitution – for legal autonomy.[12] The Constitution of Argentina, although it refers to the cultural identity of indigenous peoples, entrusts the legislature with the promulgation of the necessary laws.

The Constitution of Nicaragua stands in between the two above groups since it endeavors to protect the identity of the Atlantic communities, although autonomy in legal and social matters is less pronounced.[13] Also the Constitution of Brazil, as amended in 1998, may be brought under this intermediate category. It protects the rights of Indians to their land[14] – a very important aspect for the protection of the identity of these groups – but does not go so far as to attribute legal autonomy to Indian groups. The same is true for the constitutions of Peru of 1993[15] and Venezuela of 1999.[16]

In considering the constitutions of Latin American states above, it is possible to conclude that the intensity of promoting indigenous identity correlates with the self-understanding of that state as one being built upon indigenous heritage. This is particularly expressed in the Constitution of Mexico, which is a unique situation. In contrast, the protection of indigenous peoples in Norway, Finland and Russia reflects predominantly the traditional approach towards minorities. The Norwegian Constitution recognizes the rights of the Sami people and the 2000 Finnish Constitution mentions the Sami as indigenous people and as holders of rights. Reference to indigenous peoples is also to be found

in the Constitution of the Russian Federation, in the Constitution of Indonesia, as well as in the Constitutional Act of New Zealand. Tribal people and their rights are referred to in several African constitutions. An elaborate system exists under the Constitution of South Africa. This list is meant to be indicative only. There are more states providing for the protection of indigenous people, ethnic or tribal groups. A prime example is Canada.

Let us now turn to South Africa. The Constitution of South Africa follows a different approach from the other examples mentioned so far. It is less concerned with the protection of particular tribal groups but more with the protection of African customary law. This means that under the South African Constitution legal pluralism is a dominant feature. According to Chapter 12 of the Constitution it protects and recognizes African customary law. It equally recognizes the institution, status and role of traditional leadership. The application of African customary law by the courts is accepted. African customary law is further protected within the Bill of Rights. Finally, it is accepted that African customary law may provide rights outside the Bill of Rights.

Legal pluralism is to be seen from the point of view of public international law

It has already been stated that public international law on the protection of indigenous peoples does not require endowing them with legal autonomy. When it is done, the legal consequences are to be considered. These are well taken care of in the Constitution of Ecuador. The enactment of autonomous rules by indigenous peoples and their implementation are – from the point of international law – to be considered acts of that state for which it bears international responsibility. Therefore it is not only appropriate but was actually mandatory that the Constitution of Ecuador provides that the laws and customs of indigenous peoples must be in conformity with the Constitution of Ecuador as well as international human rights treaties. There is – and it is well established – the potential risk that laws and customs of indigenous or other groups do not live up to the international standards on the protection of women. One could also have contemplated including a reference to international treaties on the protection of the environment, although many such international treaties provide for exceptions to protect indigenous hunting and gathering patterns. For example, the Inuit of Canada are partially exempt from limits imposed on whaling.

Another question raised above was the one concerning legitimacy of indigenous rules and customs. Since the constitutions referred to

mandate the respect for indigenous Rules and customs, they legitimise such rules, and since the implementation is controlled by the courts of that state, their legitimacy is upheld. In that respect the Constitution of Ecuador is quite clear and so is the Constitution of South Africa as well as the Constitution of the Sudan. The Constitution of Bolivia goes further than that by establishing a special court system, which exists parallel to the ordinary courts. This is a solution also found in some Muslim countries when it comes to the implementation of Sharia law.

3.2. The reference to Sharia law in the constitutions of various states/attribution of the authority to decide on the non-conformity of ordinary law with Sharia – examples for legal pluralism

In general

Modern Islamic states vary in the extent to which their constitution law today is based on Sharia or on revisions or rejections thereof. One may categorize such constitutions as follows: constitutions in which Islam is not constitutionally privileged, such as in Lebanon and Turkey; constitutions in which Islam is constitutionally acknowledged but with limited consequences, such as in Algeria, Jordan and Yemen; and those where the consequences on the organization and functioning of state power reflect a deep acknowledgement of Islam, such as in Bahrain, the Islamic Republic of Iran and Pakistan. In consequence, the role attributed to Sharia differs significantly. For example, in Turkey Sharia is not a source of legislation whereas in Iran, Pakistan and Saudi Arabia it is – generally speaking – a major or dominant source of legislation.[17] There is a middle group where Sharia is part of the substantive law in general but not the dominant source of legislation.[18] And there are states where Sharia is only used for dealing with the civil status of persons. In the following I will go further into the details and try to establish distinguishable groups.

Sharia as a dominant source of law

Several states or entities consider Sharia as a dominant general source of law. For example, Article 5(2) of the Constitution of Somaliland:

> The laws of the nation shall be grounded on and shall not be contrary to Islamic Sharia.

It also states in Article 128 that

> The Constitution shall be based on Islamic principles.

The Constitution of Puntland states in its Preamble that,

> the new Constitution of Puntland is based on the following: Islamic Sharia.

Apart from that, the Constitution of Puntland refers to the Sharia in several places, for example, in Article 32(3) where it states that

> [A]ll forms of personal liberty shall be in conformity with the Islamic Sharia law, moral dignity etc.

The Basic Law of Saudi Arabia states that the Qur'an is the constitution. Finally Article 4 of the Constitution of Iran provides:

> All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based upon Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the Juqaha of the Guardian Council are judges in this matter.

Different are the constitutions of Egypt and of Afghanistan. The former one promulgated that

> Islamic law (Shari'a) is the principle source of legislation, of Iraq – Islam is the official religion of the state and it is a fundamental source of legislation.[19]

Article 3 of the Constitution of Afghanistan reads:

> In Afghanistan, no law can be contrary to the beliefs and the provisions of the sacred religion of Islam.

In particular, the constitutional provision is noteworthy.

Different from the constitutional provisions it clearly establishes a hierarchical sequence in relation of "beliefs and provisions of the sacred religion of Islam" and ordinary law. However, the Constitution of Afghanistan does not seem to be fully coherent since Article 130 rules:

> The Courts in cases under their consideration shall apply the provisions of this Constitution and other laws.
>
> When there is no provision in the Constitution or laws with respect to a case under consideration, the Courts shall follow the Hanafi

> jurisprudence within the provisions set forth in this Constitution to render a decision that secures justice in the best possible way.

This article seems to indicate that the *Hanafi* jurisprudence is rather meant to fill the gaps left by the Constitution and/or ordinary laws.

The Constitution of the United Arab Emirates provides that the Islamic Sharia shall be the principle source of legislation in the Union (Article 7).

According to Article 227 of the Pakistan Constitution,

> [A]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunction.

Effect is given to this clause by involving an Islamic Council, to be returned to later. Apart from that, Sharia is referred to as a basis for judicial decisions (Article 203).

To sum up, the constitutions of Somaliland, Puntland and Saudi Arabia establish directly or implicitly that Sharia is superior to the ordinary law. The constitutions of Egypt, Pakistan, the United Arab Emirates, Malaysia and Iraq state that Sharia is a dominant source of law. Which, in effect, means that the law is to be developed from this source, be it by the legislator or possibly the courts. Finally, the constitution of Afghanistan takes an intermediate position.

It is very questionable whether these cases should be referred to as examples for legal pluralism. Legal pluralism refers to legal systems existing parallel to each other.[20] Here we find a hierarchical order. Those used to consider the state as the sole authority to issue generally binding legal norms upon all living in the territory concerned, may question the legitimacy of the predominant status of Sharia, but they miss the point. The Muslim states mentioned do not adhere to the separation of state and religion as Western European countries or other countries following the same system.

Sharia-based law as a parallel legal system

In several national legal systems Sharia-based norms exist parallel to the ones issued by the state concerned. Such legal systems exist in Muslim countries or in countries with Muslim communities (e.g. Nigeria, Ghana, India). Here the question arises as to how decisions enacted under the parallel legal system are harmonized with the existing

state law, in particular with the constitution and the international commitments entered into by that state.

Authority to decide on the conformity/non-conformity of ordinary law with the constitution

The problem of harmonizing different levels of norms does not only exist in respect of the parallel legal orders referred to here but also concerns hierarchical ones such as between ordinary law and the constitution.

There are different models of how to deal with an alleged non-conformity of ordinary law with the constitution. The issue raises the fundamental question of whether it is possible to legally restrict law-makers – parliament – and to submit it to judicial control.

The historical approach that parliament can do no wrong is – in its absolute version – no longer tenable, although the belief in parliamentary supremacy still has a strong influence on various approaches to this question.

Generally speaking, one may distinguish between a preventive solution where the constitutionality of laws is assessed before them entering into force and a repressive approach where such decision is made only after the law in question has been enacted. The former approach is adopted by the Constitution of Tunisia (for example Article 72), whereas the latter is adopted in the interim Constitution of the Sudan (Article 122(e)).

Both approaches have their merits and shortcomings. A preventive approach is felt to give legal certainty concerning the constitutionality of a law before it is finally enacted. However, this is not necessarily always the case. The unconstitutionality frequently becomes apparent only in a particular factual situation whereas the law as such seems to conform to the constitution. For example, laws may turn out as being discriminatory although neither discrimination was intended nor was it anticipated. However, a preventive approach certainly infringes less with the supremacy of parliament than any retroactive judgement that a law is unconstitutional rendered by a supreme or constitutional court.

A further feature in this issue is who and in which situation may invoke the unconstitutionality of an act. Can this be done *in abstracto* or only in a specific case? For example, the interim Constitution of the Sudan provides that certain institutions such as parts of parliament and state governments may argue a law is unconstitutional after it has been enacted and may raise this with the Constitutional Court (Article 122(1a)). According to Article 121 of the Afghan Constitution,

the Supreme Court also has the right to review the compatibility of laws, decrees, etc. with the Constitution. A similar competence is vested in the Iraqi Supreme Court by virtue of Article 93 of the Iraqi Constitution.

That individuals may invoke the unconstitutionality of a law directly with the supreme court or a constitutional court is the exception rather than the rule, for example, in Sudan (Article 122(1)(d)) and in Puntland (Article 75(4)(b)).

To conclude this issue, several Islamic constitutions provide for the possibility to challenge the constitutionality of laws before a supreme court or a constitutional court. An application may be launched mostly *in abstracto* by particular institutions. An individual complaint procedure vesting the individual with the function to protect the constitution against infringements from the law-maker is the exception. Fewer states seem to follow the French model of an advisory opinion by a constitutional council. As can be seen in Article 185 of the Constitution of Palestine, these two models on the examination of the constitutionality of laws may be combined.

Authority to decide on the conformity/non-conformity of ordinary law with the Sharia

The rules in the various constitutions are less explicit as far as conflicts between Islamic Sharia and secular laws are concerned. An exception to this is Article 75 of the transitional Constitution of Puntland's regional government. It entrusts the decision on conflicts of law between Islamic Sharia and secular laws as well as the constitutionality of laws to a constitutional court (Article 75(1) and (2)).

The Constitution of Pakistan may serve as a counter example. According to its Chapter 3A, a Federal Sharia Court, of which three of its eight members are *ulema* well versed in Islamic law, is established. Its function is:

> [E]ither of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet [...].

The particularity of this model is that if the court comes to the conclusion that the law in question is repugnant to the injunctions of Islam it is for the government in question to amend it. In that respect the competence of that court differs from an ordinary constitutional court.

4. Conclusion

Legal pluralism should be seen predominantly from a pragmatic point of view as a mechanism to accommodate the rights and interests of particular groups. Its merits depend upon whether the designed objective is achieved and to what extent it fits into the overall legal regime in the exercise of public authority.

States with a hierarchical system (dominance of the constitution, the European law or the Sharia) and the means to enforce the underlying hierarchy should not be considered to apply legal pluralism. The particularity of legal pluralism lies in the fact that several legal orders coexist with only limited mechanisms of coordination.

A state having established a legally pluralistic regime remains internationally responsible for all acts issued under the legal systems prevailing under its jurisdiction. Ecuador has developed such a system by linking the parallel legal regimes in its court system. South Africa has also established an appropriate system. There are further options one might consider, as can been seen in Pakistan. The system established by Bolivia raises some doubts, though.

Notes

1. On the content and development of that term exists considerable theoretical controversy. See among others S.E. Merry (1988: 869–96); G.R. Woodman (1999: 3–19); Arnaud, A.-J.; and M.J.F. Dulce (1998: 297). This chapter does not intend to engage in the academic discussion of the concept.
2. It goes without saying that the normative orders of states distinguish between citizens and aliens.
3. For example, the Constitution of India provides in Article 44: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." This is clearly directed against legal pluralism although this is de facto a dominant feature in the Indian legal system.
4. This is true for the current constitution of South Sudan or South Africa.
5. See, for example, Article 126 of the Constitution of Venezuela although this constitution acknowledges the particular rights of "native peoples" in their lands. Article 126 reads: "Native peoples, as cultures with ancestral roots, are part of the Nation, the State and the Venezuelan people, which is one, sovereign and indivisible. In accordance with this Constitution, they have the duty of safeguarding the integrity and sovereignty of the nation. The term people in this Constitution shall in no way be interpreted with the implication it is imputed in international law."
6. For deeper discussion about the protection of indigenous rights through legal pluralism, see for example Guzmán (2003).
7. Comprehensively on that Final Report, Sofia (2012), ILA Rights of Indigenous Peoples Committee, 26.

8. The relevant provisions of the Convention read:
   Article 56: Indigenous communities, peoples and nations, the Afro-Ecuadorian people, the backcountry people (montubios) of the inland coastal region, and communes are part of the single and indivisible Ecuadorian State.
   Article 57: Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights:
   1. To freely uphold, develop and strengthen their identity, feeling of belonging, ancestral traditions and forms of social organization.
   2. To not be the target of racism or any form of discrimination based on their origin or ethnic or cultural identity.
   3. To recognition, reparation and compensation for community groups affected by racism, xenophobia and other related forms of intolerance and discrimination.
   4. To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible. These lands shall be exempt from paying fees or taxes.
   5. To keep ownership of ancestral lands and territories and to obtain free awarding of these lands.
   6. To participate in the use, usufruct, administration and conservation of natural renewable resources located on their lands.
   7. To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken.
   8. To keep and promote their practices of managing biodiversity and their natural environment. The State shall establish and implement programs with the participation of the community to ensure the conservation and sustainable use of biodiversity.
   9. To keep and develop their own forms of peaceful coexistence and social organization and creating and exercising authority, in their legally recognized territories and ancestrally owned community lands.
   10. To create, develop, apply and practice their own legal system or common law, which cannot infringe constitutional rights, especially those of women, children and adolescents.
   11. To not be displaced from their ancestral lands.
   12. To uphold, protect and develop collective knowledge; their science, technologies and ancestral wisdom; the genetic resources that contain biological diversity and agricultural biodiversity; their medicine and traditional medical practices, with the inclusion of the right to restore, promote, and protect ritual and holy places, as well as plants, animals, minerals and ecosystems in their territories; and knowledge about the resources and properties of fauna and flora.

All forms of appropriation of their knowledge, innovations, and practices are forbidden.
13. To uphold, restore, protect, develop and preserve their cultural and historical heritage as an indivisible part of Ecuador's heritage. The State shall provide resources for this purpose.
14. To develop, strengthen, and upgrade the intercultural bilingual education system, on the basis of criteria of quality, from early stimulation to higher levels of education, in conformity with cultural diversity, for the care and preservation of identities, in keeping with their own teaching and learning methodologies.
A teaching career marked by dignity shall also be guaranteed. Administration of this system shall be collective and participatory, with rotation in time and space, based on community monitoring and accountability.
15. To build and uphold organizations that represent them, in a context of pluralism and cultural, political, and organizational diversity. The State shall recognize and promote all forms of expression and organization.
16. To participate by means of their representatives in the official organizations established by law to draw up public policies concerning them, as well as design and decide their priorities in the plans and projects of the State.
17. To be consulted before the adoption of a legislative measure that might affect any of their collective rights.
18. To uphold and develop contacts, ties and cooperation with other peoples, especially those that are divided by international borders.
19. To promote the use of garments, symbols and emblems that identify them.
20. To restrict military activities in their territories, in accordance with the law.
21. That the dignity and diversity of their cultures, traditions, histories, and ambitions be reflected in public education and in the media; the creation of their own media in their languages and access to the others without any discrimination.
The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The State shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law.
The State shall guarantee the enforcement of these collective rights without any discrimination, in conditions of equality and equity between men and women.
Article 58: To build up their identity, culture, traditions and rights, the collective rights of the Afro-Ecuadorian people are recognized, as set forth in the Constitution, the law, and human rights agreements, conventions, declarations and other international instruments.
Article 59: The collective rights of the coastal back-country people (montubios) are recognized to guarantee their process of integral, sustainable and durable human development, the policies and strategies for their progress and their forms of societal management, on the basis of knowledge about their reality and respect for their culture, identity, and own vision, in accordance with the law.

Article 60: Ancestral, indigenous, Afro-Ecuadorian and coastal backcountry (montubios) peoples can establish territorial districts for the preservation of their culture. The law shall regulate their establishment.
Communities (comunas) that have collective land ownership are recognized as an ancestral form of territorial organization.
SECTION TWO
Indigenous justice
Article 171: The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments.
The State shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction.

9. Article 63 About Ethnic Identity reads:
The right of Indian peoples to preserve and to develop their ethnic identity in their respective habitat is hereby recognized and guaranteed. They also have the right to freely apply their systems of political, socioeconomic, cultural, and religious organization, and to voluntarily observe customary practices in their domestic coexistence as long as they do not violate the fundamental rights established by this Constitution. Indian customary rights will be taken into account when deciding conflicts of jurisdiction.
10. Article 2: Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free determination, which consists of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the State, in accordance with this Constitution and the law.
Article 30:
I. A nation and rural native indigenous people consists of every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion.
II. In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights:
1. To be free.
2. To their cultural identity, religious belief, spirituality, practices and customs, and their own world view.
Article 179:
I. The judicial function is singular. Ordinary jurisdiction is exercised by the Supreme Court of Justice, the departmental courts of justice, the sentencing courts and the judges; the agro-environmental jurisdiction is exercised by the agroenvironmental Court and judges; and the rural native indigenous

jurisdiction is exercised by their own authorities. There shall be specialized jurisdictions regulated by the law.
II. Ordinary jurisdiction and rural native indigenous jurisdiction enjoy equal status.
III. Constitutional justice is imparted by the Pluri-National Constitutional Court.
IV. The Council of Judges is part of the Judicial Organ.
Article 190:
I. The nations and native indigenous rural peoples shall exercise their jurisdictional functions and competency through their authorities, and shall apply their own principles, cultural values, norms and procedures.
II. The rural native indigenous jurisdiction respects the right to life, the right to defence and other rights and guarantees established in this Constitution.
Article 191:
I. The rural native indigenous jurisdiction is based on the specific connection between the persons who are members of the respective nation or rural native indigenous people.
II. The rural native indigenous jurisdiction is exercised in the following areas of personal, material and territorial legal effect:
1. Members of the nation or rural native indigenous people are subject to this jurisdiction whether they act as plaintiffs or defendants, claimants or accusers, whether they are persons who are denounced or accused, or are appellants or respondents.
2. This jurisdiction hears rural native indigenous matters pursuant to that established in a Law of Jurisdictional Demarcation.
3. This jurisdiction applies to the relations and juridical acts that are carried out, or the effects of which are produced, within the jurisdiction of a rural native indigenous people.
Article 192:
I. Each public authority or person shall obey the decisions of the rural native indigenous jurisdiction.
II. To secure compliance with the decisions of the rural native indigenous jurisdiction, its authorities may request the support of the competent bodies of the State.
III. The State shall promote and strengthen rural native indigenous justice. The Law of Jurisdictional Demarcation shall determine the mechanisms of coordination and cooperation between rural native indigenous jurisdiction and ordinary jurisdiction and agro-environmental jurisdiction and all the recognized constitutional jurisdictions.

11. Political Constitution of the United Mexican States, October 8, 2013, Article 2.
12. Article 66 reads:
Protection of Ethnic Groups
Guatemala is made up of various ethnic groups among which are native groups of Mayan descent. The State recognizes, respects, and promotes their form of life, customs, traditions, forms of social organization, the wearing of Indian dress by men and women, their languages, and dialects. The Constitution also provides for the protection of indigenous landownership.

13. See Article 89, which reads:
    The communities of the Atlantic Coast are indivisible parts of the Nicaraguan people, and as such they enjoy the same rights and have the same obligations. The communities of the Atlantic Coast have the right to preserve and develop their cultural identities within the national unity, to provide themselves with their own forms of social organization, and to administer their local affairs according to their traditions. The State recognizes communal forms of land ownership of the communities of the Atlantic Coast. Equally it recognizes their enjoyment, use and benefit of the waters and forests of their communal lands.
14. Articles 231 and 232 provide:
    Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property.
    Paragraph 1. Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions.
    Paragraph 2. The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein.
    Paragraph 3. Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.
    Paragraph 4. The lands referred to in this article are inalienable and indisposable and the rights thereto are not subject to limitation.
    Paragraph 5. The removal of Indian groups from their lands is forbidden, except *ad referendum* of the National Congress, in case of a catastrophe or an epidemic which represents a risk to their population, or in the interest of the sovereignty of the country, after decision by the National Congress, it being guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases.
    Paragraph 6. Acts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law.
    Paragraph 7. The provisions of Article 174, paragraphs 3 and 4, shall not apply to Indian lands.
    Article 232: The Indians, their communities and organizations have standing under the law to sue to defend their rights and interests, the Public Prosecution intervening in all the procedural acts.

15. Article 89:
    The rural and native communities have legal existence and are artificial persons. They are autonomous in their organization, community work, and usage and free disposal of their lands, as well as in the economic and administrative aspects within the framework as provided by law. The ownership of their lands is imprescriptible, except in the case of abandonment described in the preceding article. The State respects the cultural identity of the rural and native communities.
16. See Article 121–26.
17. According to the Royal Decree of the King of Saudi Arabia of January 1992, Article 1, "The Kingdom of Saudi Arabia is an Arab and Islamic sovereign state, its religion is Islam, and its Constitution, the Holy Quran and the Prophet's sunnah." Article 7: "The Rule in the Kingdom depends on the Holy Quran and the Prophet's sunnah." Article 8: "The Rule in the Kingdom is based on justice, consultations and equality in accordance with the Islamic Sharia."
18. This categorization follows the one developed by N. Abiad (2008), *Sharia, Muslim states and International Human Rights Treaty Obligations: A Comparative Study*.
19. The present Constitution of Iraq states in Article (2)(I): Islam is the official religion of the state and is a foundation source of legislation: a) No law may be enacted that contradicts the established provisions of Islam.
20. See above on the definition of legal pluralism.

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Note: The letter 'n' following locators refers to notes.