◆ ACCESS TO JUSTICE IN AFRICA AND BEYOND ◆
Making the Rule of Law a Reality

Penal Reform International
and
the Bluhm Legal Clinic
of the
Northwestern University School of Law
Chicago, Illinois

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LEGAL PLURALISM: A NEW CHALLENGE FOR DEVELOPMENT AGENCIES

Markus Weilenmann[1]

Official state legal systems do not usually recognize folk law, or do so only with a passing nod, such as an exclusion clause. However, experiences with the modernization of state law in Africa have shown that a confrontational approach toward local legal concepts does not usually end in success.

While local folk institutions of dispute settlement have been either destroyed or incorporated into the official legal body in a way that diminishes their traditional force, official state law is beginning to suffer growing social, political, and cultural de-legitimization. One of the core problems is that Africa's bureaucracies are normally the offspring of former colonial powers. The pre-colonial orders left behind by various feudalistic societies do not fit well into the administrative logic of modern bureaucracies that aim to govern the indigenous culture by application of western law.

In agrarian societies, where daily living conditions are marked by traditional production systems (such as shifting cultivation, rain field cultivation, horticulture, pastoralism, and running irrigation systems), the rural population orients itself toward traditional kinship-based systems of relationships as well as traditional political structures and their corresponding normative orders. In the face of missing development progress, political leaders have to refer not only to the international standards of human rights, but also to domestic strategies of political legitimacy, recalling (and even improving) old traditional identities.[2] One of the consequences of this is a growing fragmentation of society, marked by competing legal powers and conflicting normative orders, expressed today in a framework of legal pluralism.

However, it is only recently that development agencies have become aware of the critical impact of legal pluralism on questions of social and legal cohesion in endangered nation states. With my contribution, I would like to discuss some

1. Dr. Markus Weilenmann, GTZ/Office for Conflict Research in Developing Countries, Zürich-Rüschlikon, Switzerland.

2. *See* Markus Weilenmann, *Reactive Ethnicity: Some Thoughts on Political Psychology Based on the Developments in Burundi, Rwanda and South-Kivu*, 10 J. PSYCH. IN AFRICA 1 (2000); *see also* Markus Weilenmann, *Orthodox Living Law? Virtual Project World? Conceptual Ideas for Gender-Sensitive Input into GTZ-supported Law Projects in Sub-Saharan Africa, in Gender and Macro Policy* 141–152 (GTZ ed., 1997).

typical difficulties that development agencies encounter when they try to bridge the gap between state and folk law. Then I will outline the general contours of the German development agency GTZ's approach to legal pluralism and discuss two illustrative gender cases.

I. The Notion of Law

Development agencies often refer to an authority-related notion of law that suggests that all legal concepts that do not belong to modern state administration (in most cases the Euro-American model) are either "no law" or just "informal law." When they do so, they evince a commitment to a preconceived hierarchical structure that does not question the authoritative notion of law.

This notion of law connects the existence of law to a western-like state-controlled organization of power. This implies certain characteristics, such as the existence of official forces empowered to impose sanctions, a hierarchy of courts and administrative units, the separation of powers, and a codified state constitution. Accordingly, outside of the centralized power of states there is only informality and, in the strict sense of the word, no law.

This conventional and limited notion of law struggles with the same problems as the failed colonial powers. First, the degree of consistency of formal order systems remains particularly variable in Africa, depending on the degree of codification of state law, the institutional level to which one refers within the complex structure of the modern nation state, and the variable tasks of the public sector. Legal pluralism is therefore also a common feature *within* the structures of official state law.[3]

Second, questions of informality are often merely questions of perspective. In societies in which the overwhelming majority of the population is illiterate, the laws on the books remain—like magical knowledge—the special domain of a small urban elite, usually fluent in the language of the former colonizers. Furthermore, oral traditions do not always imply informality. On the contrary, oral cultures may even achieve a very sophisticated level of formality. Therefore, for those living in the countryside who are often victims of weak communication structures, it is actually the laws on the books that may have the smell of informality.

Third, the official non-recognition of folk laws does not necessarily lead to their abolition, but only to institutional and social encapsulation of those groups that

3. *See* Franz von Benda-Beckmann, Legal Pluralism in Malawi (1970) (unpublished dissertation, Kiel University).

are identified with the values of modern state law. Furthermore, folk law is not only used and interpreted by some relatively remote villages in the countryside, but also by state courts and legal experts. The concern is to resist the transformation of folk law into "lawyers' law," where state courts and legal experts seize a monopoly over the interpretation of folk law.

Thus, there is much confusion on this issue. To bring order, donor agencies should enhance socially and culturally integrative institutions and strengthen the negotiation capacities of *all* relevant political and legal stakeholders instead of advocating for one particular normative order or technique.

II. Anaytical Consequences of the Multiple Histories of Folk Law

In some developing countries, such as Burundi, Ethiopia, and Ghana, post-colonial state law also competes with pre-colonial state law. This has different analytical implications than if one refers to a nation-state such as in the Democratic Republic of Congo, whose legal roots are principally linked to the history of the colonial takeover of power. While in the first case the development of the rule of law is marked by competing powers and the access to qualifications of legitimate authority at *all levels* of society, in the latter case it has mainly to deal with problems of cultural heterogeneity, such as the integration or disintegration of more or less isolated cultural units.

III. Toward the Disregard of Entrance Rules and Critical Interfaces

When entering into the field of alternative justice systems, development agencies often stress their mediation capacities as they know them from alternative dispute resolution (ADR) techniques. They tend to dichotomize state law and alternative justice systems by emphasizing the lower regulation density, lower degree of institutionalization, and capacity to compromise of alternative justice systems as compared to state law systems.

Official state laws, folk laws, religious laws, ADR-norms, and new patterns of local patchwork laws are not isolated entities that can be positioned against one another. Rather, together they constitute a complete net of interactive legal orders linked to a multitude of legal services, sometimes competing with each other, but still heavily influenced by the entrance rules of official state courts. And since the modern state administrations claim a monopoly through their control over criminal justice cases, alternative justice systems operate under the shadow of official state law and are more widely applied in civil law matters. It is also for this reason that alternative justice systems have a lower regulation density and well-developed capacities to compromise. However, to dichotomize alternative

justice systems and state law—and to privilege the former above the latter—is to risk delegitimizing an already weakened nation state.

IV. GTZ:[4] A Threefold Approach

Although many projects engage with alternative justice systems and promote the rule of law, development agencies are seldom aware of the problems of competing legal powers, quasi-state status, and legal pluralism that may deepen the growing fragmentation of nation states. The German government development agency GTZ has engaged in matters of legal pluralism since the early 1990s, and opted for a threefold approach.

First, one has to educate the relevant executive officials, such as country directors, program officers, and the like. Since the questions of legal pluralism outlined above are strongly linked to good governance issues, GTZ finances a training program for its own staff that includes substantial debate on the cultural and legal preconditions of the formation of a modern nation state. The courses, carried out in developing countries, refer explicitly to the political and legal history of the respective country of intervention. The trainers are also equipped to supervise ongoing processes of delegitimization within development projects or programs.

Second, the planning officers at the headquarters initialize pilot projects or programs on legal pluralism. One such project, initiated in Ghana, focused on the critical role of women; the project was titled "Promotion of Women in Pluralistic Legal Systems."

Third, GTZ looks for interesting and innovative local initiatives that fit well with these new problems of understanding fragmented societies and competing legal powers. One such initiative is run by HUNDEE, an NGO situated in Oromya, Ethiopia. HUNDEE organized a project focusing on the reduction of all forms of violence against women, such as female genital mutilation (FGM), forced marriages, and domestic violence. Under HUNDEE,

> . . . the choice of working from within the culture arose from 1) an appreciation of the inadequacies of the modern legal system in protecting women from various forms of violence and abuse and 2) an acknowledgement of the fact that culture and tradition embrace mechanisms for the protection of women and girls from gender-based violence.[5]

4. Gesellschaft Technische Zusammenarbeit ("GTZ") (German Technical Corporation).

5. J. Osterhaus, Ansätze zur Stärkung von Frauen in pluralen Rechtssystemen 4 (2001).

Both approaches—the sector pilot project in Ghana as well as the HUNDEE project in Ethiopia—are striking because both unmask the bias-loaded relationship between persons identified with the ideology of the legal decision-makers and persons identified with grass-root ideologies. Both also facilitated coordinated networking between the different political and legal actors at all levels of society.

In Ghana, for instance, it became apparent that neither the state agents nor the representatives of the various legal NGOs were familiar with the ways of thinking in rural areas and corresponding attitudes towards official channels of legal decision-making. Therefore, GTZ decided to conduct a participatory rural assessment (PRA) study with all political and legal decision-makers with an interest in the program.

The knowledge collated then served as a common matrix of experiences for developing a joint project. During the planning workshops, however, it became clear that two different sorts of problems arising from plural legal conditions were often confused: the empirical question of the current state of legal pluralism, and the political question of how far non-state law should officially be "recognized."[6] Only after the PRA study brought this confusion to light was it possible to come up with a consistent understanding of the problem, referring in particular to the critical role of women, who

> . . . are frequently more closely bound to the family and/or kinsfolk than are men, a fact which is particularly important in terms of modernisation plans, because the extended family is generally deemed one of the most conservative groups in society.
>
> Poor women and those from rural areas do not belong to the high-status groups in society who go to court when a conflict arises. This does not, however, mean that they live in a legal vacuum. To regulate conflicts, they would be more likely to turn to customary law and/or religious authorities (land owner, village chief, king, mufti, missionary, magic man, healer, etc.), to whom they have always had access. Those who live in the countryside, in particular, tend to see the modern state through feudal glasses —or they act as if they did.
>
> So, at all levels of society, innumerable contradictions in thought and action arise, which cannot be resolved merely by adopting a new

6. *See* K. von Benda-Beckmann et al., *Disputing Water Rights: Scarcity of Water in Nepal Hill Irrigation, in* THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY IMPLICATIONS 224 (Edward H.P. Brans et al. eds., 1997).

> legal order and improving access to the formal system. Any attempt to introduce societal transformation by adopting a new legal order will also come up against a whole series of structural problems: social, cultural and geographical distance; costs of taking legal action prohibitive for the majority; problems of enforcement and problems of the post-court decision-making phase (say the difficulty of upholding a decision of the court in a rural area when the traditional hierarchy is against the decision).[7]

The project is therefore searching for new opportunities to bridge the gap between rural "local living law" and the formal state legal system. "Modern legal systems can be made more effective if the local legal reality is accorded greater recognition in modern law and in the application of that law. The challenge . . . is to test new project approaches in this vein and to publicize these within the scope of the legal policy debate."[8] The project has been running for two years.

HUNDEE has developed a particular approach to "civic education," which includes the following two steps:

1. Together with state officials such as representatives of the justice agencies and the public administration at the Kebele level,[9] the NGO selected 100 male and 100 female opinion leaders, including traditional authorities, lawyers of the Sharia-courts, policemen, local representatives of the women's office, representatives of the official state courts, and so on. With these parties, HUNDEE organized a series of two-day workshops to discuss gender relations and corresponding norms, values, and practices.

   Juliane Osterhaus [10] sees the role of the NGO as one of a facilitator offering opportunities to critically reflect on the relationship between state law and folk law. In her view, the discussion should focus on the various sources of legitimacy that justify the social discrimination of women, and then clarify which parts refer to original customary law(s) of Oromo culture, which parts are linked to the practice of official state law, and which parts are newer phenomena and refer more to all sorts of local patchwork laws. Through such discussions, it has become clear that many local practices today labeled as "tradition" are in fact relatively recent developments.

7. Markus Weilenmann et al, Vorprüfung zur Durchführung von Pilotprojek-ten in Ghana und der Elfenbeinküste. Pilot-programm: Förderung von Frauen in pluralistischen Rechtssystemen, Gutachten zuhanden der Deutschen (GTZ ed., 2000).

8. *Id.* at 8.

9. Kebele is the lowest administrative unit of Ethiopia, and includes about 30 villages.

10. Juliane Osterhaus is a GTZ-planning officer for gender and law at the GTZ-headquarter in Eschborn, Germany. For many years she has closely monitored the HUNDEE processes; thanks to her engaged work I can present this interesting case here.

Examples of these include bride robbery and exorbitant bride price payments.

2. In a second step in this project, men and women were brought together to discuss their different perspectives in a common workshop. The goals were to find consensus on those norms and practices that were worth protecting within Oromo culture and to decide on those elements that should be abolished or revised. Finally, these workshops elaborated new propositions for a reform of local legal practices. And since the opportunity was institutionalized in Oromo culture, and suited local legal norms to the new living conditions by several rites and other formalized techniques, it was possible "to make" new folk law (*seera tumaa*). To date, the local communities have decided jointly:

    1. To forbid forced marriages of young girls and women,

    2. To forbid bride robbery,

    3. To forbid FGM,

    4. To lay down a minimum age of 16 years for marriages of young girls, and

    5. To lay down a maximum bride price sum.

V. Conclusions

Of course, a local NGO such as HUNDEE cannot initiate wide-reaching social change, even if GTZ is now starting to scale up the project. It is more important to observe at this stage that the HUNDEE case offers new windows of opportunity for those who are interested in learning how to work on legal reform with traditional authorities and other local opinion leaders. If, however, the aim is to roll out such an approach at the national level (as I proposed for Ghana), there is a need in the countryside to initiate a multitude of local "laboratories" and to establish a well-coordinated project structure that is able to respond to the various local needs as well as feed the new insights into a state structure such as a Law Reform Commission. Such a structure is complex, time consuming, and cost intensive. But NGOs as facilitators may be able to assist in reform on such a wide scale. The time has come for them to try.