LAW, GOVERNANCE, AND DEVELOPMENT RESEARCH

REAL LEGAL CERTAINTY AND ITS RELEVANCE

Essays in honour of Jan Michiel Otto

Edited by
ADRIAAN BEDNER and BARBARA OOMEN

LEIDEN PUBLICATIONS

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Contents

Abbreviations

AMAN	Alliance of Indigenous Communities Indonesia
BEE	Black Economic Empowerment
CAO	Compliance Advisor Ombudsman
CDA	Constitution Drafting Assembly
CI	Conservation International
CLS	Council of Libya's Religious Scholars
CNF	Coalition of National Forces
CPC	Communist Party of China
CRS	PT Citra Riau Sarana
CSO	Civil society organisation
CSS	Council of Religious Senior Scholars
DEAP	Declaration on the Establishment of the Authority of the People
DPD	Assembly of Regional Representatives
DPR	Assembly of People's Representatives
EC	Expert Committee
ECDPM	European Centre for Development Policy Management
ECtHR	European Court of Human Rights
FAO	Food and Agricultural Organisation
FBL	Fishery Business License
FDLR	Forces democratiques de la liberation du Rwanda
FPIC	First, Prior and Informed Consent
FSC	Forest Stewardship Council
GA	General Assembly of the United Nations
GAD	General Administration Department
GDP	Gross Domestic Product
GFTU	Genocide Fugitive Tracking Unit
GNC	General National Congress
GoR	Government of Rwanda
HGU	Hak Guna Usaha
HoR	House of Representatives
ICD	Interim Constitutional Declaration
ICMM	International Council on Mining and Metals
ICTR	International Criminal Tribunal for Rwanda

IFC	International Finance Corporation
ILO	International Labour Organisation
IUCN	International Union for the Conservation of Nature and Natural Resources
IUPHHK-HTI	Industrial Plantation Forest
IWGIA	International Work Group for Indigenous Affairs
KKDCCR	Kutai Kartanegara District's Committee on Conflict Resolution
LIFG	Libyan Islamist Group
LUL	League of the Religious Scholars of Libya
MB	Muslim Brotherhood
MICT	International Residual Mechanism for Criminal Tribunals
MoU	Memorandum of Understanding
MTCS	Malaysian Timber Certification Scheme
NCIP	National Commission on Indigenous Peoples
NGO	Non-governmental organisations
NPC	National People's Congress
NPPA	National Public Prosecution Authority
NTC	National Transitional Council
PA	Political Agreement
PEFC	Programme for the Endorsement of Forest Certification
RCC	Revolutionary Command Council
RPA	Rwanda Patriotric Army
RPF	Rwandan Patriotic Front
RSPO	Roundtable on Sustainable Palm Oil
SSFRC	Small Scale Fisheries Registration Certificate
TAN	Transnational activist networks
TNC	The Nature Conservancy
ToC	Theory of Change
TORA	Land Subject to Agrarian Reform
TPAS	Dutch Timber Procurement Policy
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WWF	World Wildlife Fund
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSMIL	United Nations Support Mission in Libya

The Relevance of Real Legal Certainty – An Introduction

B. Oomen and A. Bedner

What are the chances that an Egyptian villager who is entitled to receive subsidised bread realises this right? What is the likelihood that an Indonesian city dweller who has lived for more than 40 years on a plot without disturbance obtains state recognition for her tenure? What are the prospects that a Libyan who lost his apartment under Gaddafi receives compensation? And what, to highlight another part of this puzzle, is needed to empower the Egyptian, the Indonesian, or the Libyan state institutions in such a manner that these chances increase? Which dynamics are at work in such cases?

These questions, we venture, constitute the red thread that runs through the academic work of Jan Michiel Otto, who founded the field of Law, Governance and Development at Leiden University, and held the chair in this field from 2000 onwards. They led him to coin the concept of 'real legal certainty' in his inaugural lecture in 2000 (Otto 2000b), and to expand on it in a volume on the implementation of the law in China (Otto 2002b). And although he never provided any further theoretical elaboration and seldom referred to the concept explicitly, it constitutes the backdrop to most of what he has since written. What is more, it is a concept with important potential in this day and age.

In Otto's definition, real legal certainty consists of five probabilities (Otto 2002b, 25). First, that there are clear, consistent, and accessible legal rules, issued or acknowledged by or on behalf of the state. Second, that the government institutions apply these rules consistently and themselves comply with them. Third, that most citizens, in principle,

conform to such rules. Fourth, that in the course of dispute settlement, independent and impartial judges apply such rules consistently. Fifth, that those judicial decisions are enforced. Such real legal certainty, Otto argues, is the objective of the implementation of law and one of the objectives of development. Not only is it an important precondition for achieving other development goals, such as eradicating poverty, promoting health, etc., but it is also a goal in itself. Assessing real legal certainty requires a particular methodology, with a focus not only on legal rules but also on institutions and the wider social context. Here, classic positivist legal research methods do not suffice, and there is a need for multi-disciplinary, socio-legal research.

Both this concept and this approach, it seems, are more relevant than ever. They form an important corrective to the surge in attention for legal certainty defined in a more narrow sense. Whereas there is increased scholarly attention on legal certainty, there has been little engagement with the term 'real'—the term in Otto's definition that looks upon the practical results of the operation of a legal system and the insights and interventions that improve them. The gap between the rules and acts produced by the legal system and what happens in practice is present everywhere, but it is particularly conspicuous in the developing world that constitutes the focus of Otto's work. However, no matter how obvious, many practitioners in law and development still fail to act upon it. That it has a useful signalling function for such practitioners is therefore beyond discussion.

The concept, however, can also strengthen current scholarship on analysing the role of law in development processes, widely defined. The objective of this introductory chapter is then to both illustrate the relevance of real legal certainty as an analytical concept and an approach in research, and to engage critically with it. This is done on the basis of the contributions to this volume, all written by (former) colleagues of professor Otto. It will proceed by comparing common understandings of legal certainty against the notion of real legal certainty. Subsequently, we will illustrate the relevance of twin aspects of Otto's concept of real legal certainty on the basis of both general literature and the case studies presented in this volume. On the one hand, there is the emphasis on the 'view from below,' the implementation of the law in the everyday life of citizens. On the other, there is the focus on truly equipping the State to provide the real legal certainty that citizens call for. After highlighting these aspects, we turn to a more critical engagement with Otto's understanding of real legal certainty. Most of all, there is the need to—in this day and age—consider actors other than the nation-state when it comes to realising real legal certainty. This entails the importance of recognising the effects of the resulting legal pluralism, and also of

discussing the role of legal ambiguity concerning social justice. All this, then, leads to a conclusion about the relevance of real legal certainty, realistically considered, in today's day and age.

Defining real legal certainty

Legal certainty is a recognised legal principle, with the need for foreseeability considered as a basic foundation: "The demand for certainty creates a pressure for clear and precise rules, so that everyone knows where they stand" (Bell 2008). This emphasis on legal certainty is traditionally associated with the European legal system (Maxeiner 2006). Here, its intellectual roots can be traced towards the Weberian typology of socio-legal systems, with its double distinction between formal and informal (substantive) law, and between rational and irrational systems. According to Weber (1978), a formal and rational legal system had only developed in the Western world as the result of political choices and the needs of capitalists. These days, however, legal certainty has come to be considered as a central principle in legal theory all over the world (Maxeiner 2008). The Secretary-General of the United Nations, for instance, considered it as one of the principles underpinning the Rule of Law, stating that: "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 also requires, as well, measures to ensure adherence to the principles of 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" (United Nations Security Council 2004, 6).

This statement shows how legal certainty is anchored in the broader notion of the rule of law. The widely shared belief—as conveyed in this statement—that the rule of law is an "unqualified human good" (Thompson 1975) has made this concept (and thereby legal certainty) central to efforts of building legal systems. This belief first emerged in international development co-operation in the late 1960s, when the so-called Law and Development movement in the US started to run programmes promoting 'legal liberalism.' However, the interventions of US lawyers and law professors in Latin America did not yield the quick fixes they had anticipated. In some cases, they even reduced the protection offered by the legal systems in the countries at the receiving

end. They emphasised the instrumental use of law to the detriment of the formalism present in these systems (Gardner 1980). Disillusionment with the operation of the US legal system itself made those driving the movement even more sceptical of its potential, and in the mid-1970s, the movement ran out of steam and funding (Tamanaha 1995; Davis and Trebilcock 2008).

In the early 1990s, after the fall of the Iron Curtain, the rule of law once more assumed centre-stage in building states—but now, in particular, also in building markets. Influenced by the work on the role of institutions in development by Douglass North, the World Bank made rule of law promotion a key component of its 'good governance' agenda. The fields for intervention were partly the same and partly different from those contained in legal liberalism. Generally speaking, the attention shifted from legal education to the judiciary and from private law in general to business law and human rights. Land law and land registration attracted particular focus, following the argument by Peruvian economist Hernando de Soto that the failure of capitalism in the developing world was due to the uncertainty in land tenure arrangements that prevented citizens from turning their property into capital. This argument was perhaps the most concrete translation of Douglass North's new institutionalism into actionable law development programmes.

Although many have raised questions about the effectiveness of rule of law development (Carothers 2011; Golub 2003) and land registration in particular (e.g., Otto 2009), this 'wave' has not passed. Rather, it has been combined with approaches promoting access to justice and legal empowerment and merged into programmes that also address global concerns about security and failed states (e.g., Krasner 2003). The rule of law as an ideal in international development co-operation still commands broad support, and within rule of law programmes, procedural aspects are still key.

This is partly due to the way in which development co-operation is organised, with separate sectors for rule of law development and human rights promotion. It is probably also due to the influence of theorists like Joseph Raz and Brian Tamanaha, who promote a so-called 'thin' conception of the rule of law. This conception is very close to Otto's real legal certainty. It includes clear, consistent, and accessible legal rules (i.e., formal legality). It involves government institutions applying these rules consistently and themselves complying with them (i.e., formal equality and government bound by law). Finally, it finds independent and impartial judges consistently applying such rules in the course of dispute settlement (i.e., independence of the judiciary). In fact, it seems that real legal certainty is almost synonymous with such a 'thin' conception of the rule of law, but a few points of contention remain.

First, the dimension in real legal certainty that most citizens in principle conform to such rules is debated. According to Tamanaha, there can only be rule of law if both government officials and "citizens are bound by and generally abide by the law" (Tamanaha 2011, 2; see also Krygier 2008, 13 ff.). However, this point is seldom made. For most of those writing about the rule of law, the point that citizens are bound by law is self-evident. That citizens abide by the law is something beyond the perspective of rule of law theorists for two reasons. First, because most of them (as legal or political philosophers or legal theoreticians) are more interested in the normative than in the empirical (Krygier 2008, 1). Second, because the whole concept of rule of law has emerged from a concern with limiting state power. Here, Otto's concept of legal certainty captures a point that is not traditionally contained in the rule of law concept, and that is key to his ideas about promoting human development.

The second point also relates to the empirical dimension of the rule of law: judicial decisions must be put into practice—not only decisions defeating the executive but all decisions, including those between citizens. Just as with the previous point, here Otto makes explicit something that is considered self-evident by most rule of law theorists. No doubt, his background as a development administration scholar and his experiences as a jurist have made him sensitive to the state's lack of capacity to enforce its decisions in dispute cases between citizens.

In short, the concept of real legal certainty as set out by Otto is largely a restatement of the procedural elements of the rule of law. However, he moves these elements away from the rule of law's primary objective of controlling the state and towards facilitating and controlling interactions between citizens. Moreover, by emphasising the empirical component in this venture, his concept cannot be used interchangeably with the rule of law and does denote a particular realm of action and research. One reason to re-evaluate and even reinstate Otto's concept of real legal certainty is the more general return of the notion of legal certainty narrowly defined in academia in the past years. Much of this recent literature focuses on legal certainty as a formal aspect of law, the certainty that law is and remains recognisable and predictable (Gamper 2016). This is in line with the case law of, for instance, the main European courts. The European Court of Justice, for instance, defined legal certainty as "a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly."[1] The European Court of Human Rights, in Strasbourg, emphasized that, "The law should be accessible to the persons concerned and formulated with sufficient precision to enable them—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances,

the consequences which a given action may entail."[2] In this recent literature, the attention on the more empirical understandings of legal certainty, and on citizen perspectives, remains far too scarce. Even the recent attempts in France to develop an Index of Legal Certainty did not take the subjective perspectives of law into account, and direly missed the input of sociologists.

Let us, therefore, turn to some examples of the insights that such an empirical perspective can yield, putting citizens at the heart of the inquiry. We do this by first concentrating upon the value of a 'view from below.' Subsequently, we discuss what such a perspective means for insights into strengthening institutions, and thus legal certainty.

Getting real: a view from below

The danger with 'real legal certainty' is that, just as with legal certainty proper, it turns into an inward-looking perspective. It becomes concerned only with state institutions and how they interpret and apply the law. Otto's work on land registration shows that he was acutely aware of the danger of such an interpretation of state-provided real legal certainty and hence his emphasis on 'real' instead of putative users of land rights (Otto 2009; Otto and Hoekema 2012). The chapter by McCarthy, Robinson, and Dhiaulhaq voices similar concerns. It introduces the term 'adverse formalisation' to denote the process of people, specifically smallholders, losing their land tenure. This loss occurs as a result of state efforts to realise the state's self-proclaimed rights to land through mapping and distributing concessions to large plantations. Drawing on examples from Indonesia's outer islands, they argue that scaling up the protection of rural smallholders through international certification (and other ways of regulating commodity chains) is unlikely to bring relief.

This point is elaborated in the chapter by Persoon and Minter. They examine the effects of one such mechanism (First, Prior and Informed Consent [FPIC] procedures) on the protection of hunter-gatherers against the loss of land and livelihood. FPIC serves to involve users in the decision-making process concerning the future use of their land and resources. FPIC now has a solid basis in international law and is promoted worldwide by major international development organisations, like the World Bank. However, in practice, FPIC turns out to be difficult to implement since the process can easily be manipulated, especially when vulnerable groups such as hunter-gatherers are involved.

McCarthy, Robinson, and Dhiaulhaq suggest that the most viable way to address adverse formalisation is to develop special policies to accommodate the needs of the poor and vulnerable without relying too

much on general mechanisms. On the one hand, this solution is very much in line with the emphasis Otto puts on context and the need to carefully assess a situation before committing to an intervention. But on the other hand, one wonders whether it is possible to capture such solutions in rules that answer the requirements of real legal certainty. We will get back to this point below.

Otto finds it important to focus on the bottom of the social pyramid and the problems and needs of those inhabiting the lower strata of society. This focus is manifest in his work, which started his career as a scholar. Otto began by studying local, Egyptian government institutions and the problems local villagers face in accessing the services these institutions are supposed to provide (Otto 1987). His conviction that it is at this local level that people stand to benefit the most from a predictable application of state rules also triggered his interest in decentralisation. He was aware of the pitfalls involved in decentralisation processes and convinced of the need for central state involvement in many fields. Nevertheless, Otto holds that in the end, decentralisation is indispensable in creating a situation where the state is sufficiently informed about the local conditions to be able to respond to local needs (Frerks and Otto 1996). Reflecting on his research in Egypt, Otto emphasises the village (rather than the district or province) as the key level meriting attention. This is where he locates the interface between state and citizen, and where the latter has the best chances of voicing her needs and wishes.

The chapter by Andrew Harding ties in this theme. According to Harding, today, the need for decentralisation has almost universal support. But "how far such a policy should go, with what resources, and what control mechanisms are appropriate in terms of central-local relations and accountability of local authorities" remains contested. In an overview of East and Southeast Asian countries, Harding demonstrates how decentralisation has promoted near universal democratic government in a wide variety of states—some of which are far from democratic at the central level.

Otto's attention on the bottom of the pyramid, his perspective on the law's 'user,' and the notion of 'law in action' later moved him to engage more actively with the concept of 'access to justice.' Similar to his approach concerning real legal certainty, he started by defining this concept. Access to justice "exists, if: people, notably poor and disadvantaged, suffering from injustices, have the ability to make their grievances be listened to, obtain proper treatment of their grievances by state or non-state institutions, leading to redress of those injustices on the basis of rules or principles of state law, religious law or customary law, in accordance with the rule of law" (Bedner and Vel 2010). Access to justice seems to be the entry point for those in need of an outcome based on real legal certainty.

Two points deserve attention here. First, in defining access to justice, Otto explicitly brings in religious and customary law and no longer requires that the state recognise such law. He thus seems to move away somewhat from a 'statist' perspective. However, by bringing in the requirement that such systems comply with the rule of law, a concept that is usually hard to reconcile with the flexibility of non-state procedures, this shift is not as significant as it may first seem. Secondly, this definition brings in a more substantive requirement. The demand of conformity with the rule of law at least suggests that customary and religious law must not violate fundamental rights (e.g., gender equality and other substantive norms). On the one hand, this is an improvement from a development perspective. But on the other hand, it brings in a whole lot of new issues that Otto avoided through his formal (or procedural) approach to real legal certainty.

In her thoughtful chapter on indeterminacy, uncertainty, and social order, Keebet von Benda-Beckmann raises some fundamental issues linked to the notion of real legal certainty. She points out that the highest degree of legal certainty may actually stifle social development and creativity, and that in fact legislators sometimes build in uncertainty on purpose. The danger is 'hyper-regulation,' a situation where the creation of a new piece of legislation creates new uncertainties instead of removing them. It should also be acknowledged that indeterminacy is a structural condition of social life. This condition may lead to uncertainty in social interactions, but such uncertainty need not generate feelings of insecurity. And finally, in conditions of legal pluralism—which are common almost everywhere—legal systems other than the state's may generate more certainty. An example from colonial and independent Indonesia demonstrates how state law may undermine legal certainty by replacing the local (oral) guarantees for proper land transactions with insecure registrations.

In sum, real legal certainty may offer an answer to some of the problems of development, but it is no silver bullet and should be approached with caution.

Supporting the state: institution building

Otto considers real legal certainty as a legal system's internal, developmental objective. Building especially on the work of Milton Esman, Otto constructed a modest theory of development that allowed him to work with this notion without becoming embroiled in the deep controversies that characterise the debate about this concept (Otto 2006). In his scheme, development denotes social change towards eight

objectives (security, prosperity, social justice, capacity, sustainability, health, authenticity, and personal freedom). These processes are sustained or impeded by governance processes, which have their own objectives: an effective and legitimate state, democracy, sound administration, and rule of law and real legal certainty. Typical for Otto's thought is that he treats governance in the same way as development, implying a normative aim within it. Real legal certainty and rule of law is the objective of the legal system; it not only serves as a means to other ends but is a goal in itself.

Just as in his other theoretical-conceptual work—with perhaps the exception of his access to justice definition—Otto at least implicitly takes the state as his point of departure. It is the state that should issue clear rules or at least acknowledge them, and apply them consistently. Much of the effort in real legal certainty thus consists of attention on institution-building within varying cultural contexts.

However, before we turn to institution-building, we must first briefly consider the idea of law as the key system of state government in achieving developmental goals. Presently, it seems that this notion still stands. But just as 'illiberal democracies' are defying the idea of modernisation theory that liberal democracies are an inevitable outcome of political change, so have developmental states long challenged the idea that real legal certainty is required for development—economic development in particular (Williams 2014). The challenge that the developmental state poses to real legal certainty as the best tool for government is now mirrored by the direction legal development is taking in China. In this book, Jianfu Chen's chapter discusses the situation where a state that made important steps towards real legal certainty decides to reverse them. After having built an impressive legal system virtually from scratch since 1978, China is now 'at a crossroads.' Chen leaves room for hope but is mostly pessimistic about the role of law in the near future, as the state seems to merge ever more closely with the Party. The development and application of Chinese law seem to be moving away even from the procedural requirements of the rule of law.

In most cases, the prospects are not as bleak as they presently are in China. Yet serious difficulties are involved in building the institutions needed for effective administration of law. In her chapter, Keebet von Benda-Beckmann points at the devastating effects of corruption on certainty, an issue Otto has been addressing in much of his work on good governance. True to his roots in development administration, Otto has sought inspiration from the 'institution building' school of thought to promote well-functioning state agencies. Departing once again from Milton Esman's ideas, he developed the institutions-citizens model. It maps the different internal and external factors that influence the implementation of government laws, policies, and services. The model

considers how these factors influence both the implementors (i.e., government institutions) and recipients (i.e., citizens) involved (Otto 1987; 1999). As discussed above, Otto specifically used this model as a lens to look at the local level of village institutions.

In his chapter, Rikardo Simarmata shows how difficult it is to build such institutions at the local level. He shows how decentralisation not only opens the way to more democracy (which Harding emphasised) but how it opens the way to self-interest influencing lawmaking. This self-interest may subvert the intention to legislate at a level where those who are regulated are properly represented.

In addition to all the 'common' problems involved in institution-building, a fundamental problem hinders it at the local level. It is the result of the tension between building a national state and allowing local differences. In their search for nation-building, modernisation (in whatever form), and economic development, national states wish (or need) to strike a balance between their own preference for a unified, certain legal system and local aspirations and realities. This is what Benjamin van Rooij calls the problem of 'spatial legal failure.' In his chapter, he argues that there is a 'spatial contradiction' between unified, modern state law and its institutions, and the 'the variation of local norms and justice.' This tension can never be fully resolved, only reduced by decentralisation, recognising customary law, etc.

Establishing special courts is a typical response to dealing with 'spatial legal failure' and promoting the legal unity that is part of real legal certainty. The theoretical advantages of such a strategy are obvious: the chances are higher of increased unity in legal decision-making, special court judges develop special expertise, and these judges also have an incentive for 'judicial activism' that stems from the risk of running out of business (Bedner 2015). It is this solution of a special court that Nick Huls invokes in his chapter on how to potentially address Rwandan genocide cases. According to Huls, the international standards for dealing with these cases have become so complex that they no longer can produce legal certainty. The Rwandan reality is too far removed from courts outside of Rwanda. Therefore, instead of dealing with these cases in a variety of courts across the globe, it would be better to make the Specialized Chamber for International Crimes of the High Court the appropriate legal arena for adjudicating Rwandan genocide cases. This approach may be preferential, despite producing 'mundane' institution-building problems, on which Otto has worked for so long.

Other actors: widening the scope

The concept of real legal certainty thus focuses on the role of the State, as does legal certainty in the narrower, legal sense. At the same time, state institutions do not resolve a vast majority of disputes worldwide. Similarly, the chances that citizens have access to the certainty at the core of Otto's definition depend on many non-State institutions. Let us consider some examples: the closest courts may be hundreds of miles away, causing people to take cases to the village chief or a religious leader instead. Even if people do manage to obtain a court order securing—for instance—their land rights, it could well be that a large logging company keeps them from securing those rights. The national constitution in a given country might well set out the right to equal treatment. But it is often only when an international or local NGO develops a project around the theme that this right starts to acquire meaning. In sum, the state is but one of the many actors influencing the chances of attaining legal certainty, as Otto defined it.

In this final section, we would, therefore, want to propose a more realistic understanding of real legal certainty, one that recognises this institutional pluralism and its normative consequences. This book contains four illustrations of such pluralism in this day and age. Janine Ubink, for instance, discusses the continued relevance, and even the return of traditional authorities and customary law in Africa. Next, Carolien Jacobs describes the interplay between international actors and civil society organisations in delivering key services and performing classic State functions in the Democratic Republic of Congo. Suliman Ibrahim offers a North African example, discussing the role of the Sharia in lawmaking in Libya. In turning towards Indonesia, Sulistyowati Irianto describes how most people do not even turn to State courts, and opt to solve inheritance cases within the family or take them to Islamic authorities.

All these contributions explicitly discuss the historical roots of such institutional pluralism and the changes that it has undergone over time. The end of colonialism was, in many of the country cases discussed, marked by a commitment to building the nation-state at the expense of local legal diversity and international involvement. The past three decades can, in many ways, be considered a 'revenge of history,' or a return to roots. In this time, religious, traditionalist, or ethno-nationalist institutions have sought, and been given, a place within many nations' institutional landscapes. On the other hand, the failure of the modernist state project also led to the international community taking over the delivery of many key services. For example, Jacobs describes NGOs that

work not only on themes like human rights and conflict prevention but also agricultural development, education, health, water, and sanitation.

It is important to set out, as is done in these contributions, the degree to which this involves a permanent interplay between the concerned actors and modernising and globalising forces. Ubink, to cite one example, describes how large mining companies play a role in strengthening the position of chiefs in South Africa. The strengthening of the sharia in Indonesia cannot only be understood as a bottom-up process but is also a result of international support and the rise of social media. The NGOs described by Jacobs work within a market-driven paradigm, with the emphasis of their efforts on clearly measurable output. In Libya, in Ibrahim's chapter, the United Nations Support Mission joined with local civil society in critically engaging with the plans to strengthen the place of the Sharia in the country's new constitution.

At the same time, the presence of, and the interplay between, all these actors results in a situation of legal pluralism. In considering real legal certainty, it is important to recognise the way in, and the degree to which, such pluralism exists and what its effects are. One effect of the resulting legal indeterminacy, or legal ambiguity, is that it enables those in power to choose the particular normative frameworks that best suit their interests. A realistic approach to real legal certainty recognises this. It builds strategies for strengthening legal certainty on this basis.

Conclusion

Professor Otto's understanding of real legal certainty provides a much needed corrective to the general attention for legal certainty in this day and age, as it emphasises relations between citizens, adds socio-legal insight, provides a 'view from below,' and thus leads to more realistic insights on how to build state institutions. The contributions in this book, all written by colleagues of Jan Michiel Otto, form a wide variety of examples of the concept's relevance. For one, they point out the relevance of 'getting real,' taking a view from below in understanding what constitutes legal certainty. The first four articles outline this view from below, with insights from John McCarthy et al., Gerard Persoon and Tessa Minter, Andrew Harding, and Keebet von Benda-Beckmann. Through this lens, and using socio-legal research methods, the challenges also become clearer, as is apparent in the contributions by Jianfu Chen, Rikardo Simarmata, Benjamin van Rooij, and Nick Huls. This introduction also calls for a realistic approach to real legal certainty, one that recognises the plurality of actors and the resulting interplay of norms in many given situations. In this manner, it is possible to do what

Jan Michiel Otto has done throughout his distinguished academic career: put socio-legal scholarship to the service of the Egyptian villager seeking access to food, the Indonesian wanting recognition of her land rights, and the Libyan who wants a roof above his head. It is in these situations, after all, that real legal certainty matters most.

Notes

1 See Kingdom of Belgium v Commission of the European Communities. ECLI:EU:C:2005:223.

2 See Rotaru v. Romania [GC], no. 28341/95 ECHR 2000-V and Maestri v. Italy [GC], no. 39748/98, ECHR 2004-I.

Getting Real: Considering Legal Certainty from Below

1 Addressing Adverse Formalisation: The Land Question in Outer Island Indonesia

J.F. McCarthy, K. Robinson, and A. Dhiaulhaq

Introduction

Land is central to the challenges of Indonesia's future development: plans for infrastructure development as well as agriculture and population redistribution encounter decades of unresolved problems of how to recognise and register land rights (McCarthy and Robinson 2016). Indonesia has what the FAO calls the 'state land problem': a condition where "states 'own' large tracts of un-demarcated land and thus risk dispossessing smallholders if they act on those rights" (Dwyer 2015, 917). The post-colonial Indonesian state assumed responsibility for the governance of local resources, shifting land governance away from subsistence farmers and smallholders in their communities to the national level (Bedner 2016). 'Nationalizing' or delocalising resource governance provided state-based actors with the power to reallocate land, even land currently under use, to commercial or state plantation, mining, or logging interests.

During the Suharto period, using the rubric of 'development' and under conditions of 'crony capitalism,' state decision-makers used coercion and subterfuge to facilitate licensed access for enterprises to use large tracts of land. This generated land conflicts and inequality, leaving a legacy of unresolved land governance issues. The post-authoritarian period (after the fall of Suharto in 1998) created democratic space for local actors to express grievances and address injustices. Nonetheless, there are on-

going problems of procedural and distributional justice and unresolved tensions between smallholder-friendly and corporate land use.

In the spirit of Jan Michael Otto's astute reflections regarding how statutory legal frameworks can both exclude the poor and provide protection (Otto and Hoekema 2012), this chapter considers efforts to protect subsistence and smallholder landowners from rapid land dispossession. We first consider processes of land tenure 'formalisation' used to facilitate modern capitalist development and smallholder dispossession. We develop a notion of 'adverse formalisation' to describe a process whereby state actions have deprived smallholders of customary land and livelihoods. Adverse formalisation writes "smallholders out of the legal picture" while giving investors access to new territory (Dwyer 2015, 918).

The chapter then considers processes that can potentially counter adverse formalisation. We consider processes of 'scaling up' into non-state, transnational, and private forms of regulation. We also consider 'scaling down' by securing the tenurial rights of marginal groups through locally grounded concepts of *adat* rights, or village autonomy, thus allowing for some degree of legal pluralism.

Governance of land rights

One of the modern state's key functions involves recognising property rights, providing property categories and framing entitlements, and protecting access and use (Bruce 2012; Lund 2011). These processes involve adjudicating, registering, and enforcing rights (Meinzen-Dick 2009), and sanctioning particular rights and claims through licensing and permits. Formalisation of rights almost inevitably involves contestation: simplifying tenurial relations and allocating rights to an 'owner' entails sanctioning particular rights and claims rather than merely putting a stamp on rights that unambiguously existed before the process (Dwyer 2015). Land rights systems can be located on a scale stretching from 'informal' customary, socially embedded, or vernacular property systems, to 'formal' state regulated rights. However, the concept of formality can be misleading. Customary or vernacular systems can be formal in that they derive decisions from general rules and norms (Bruce 2012). In this article, we consider formalisation as both a solution to contestations and ambiguities and a source of problems. Formalisation can work as the first line of defence against land grabbing, but also facilitate expropriation and dispossession. We begin by identifying three 'ideal-typical' formalisation projects—all of which occur in Indonesia—with distinctive objectives

and effects. Each project involves particular constellations of power and interests that support or resist them.

Certification/land titling

Advocates of formalising land boundaries, access conditions, and land ownership argue that it can remove insecurities and ambiguities. Land certification is seen as a means of allowing subjects to become fully fledged players in an integrated market economy, an economic growth strategy associated with establishing free land markets (Zoomers 2010). In this perspective, certification (or land titling) can provide a range of benefits, such as tenure security, credit access, and investment incentives. While titling can lead to debt and land alienation, it aims to guarantee the poor's tenure security by upgrading personal rights into legally protected rights (such as freehold). Advocates argue it can provide for the transfer of rights and promote efficient land use by allowing it to be sold or traded to more efficient users, thereby allowing investors to put it into 'higher value' uses. This approach has come to dominate land policies in recent decades (globally and in Indonesia). However, the capacity of state legal institutions to provide just and effective land governance is often overestimated (Otto and Hoekema 2012). We return to land titling in Indonesia below.

Licensing

Licensing is associated with the granting of concessions, a process that transfers formal land possession to investors, often despite the fact that it is already under customary (informal) ownership or use. During the New Order (1966-1998) the state utilised its eminent domain power (Davidson 2017) to alienate land on behalf of capitalist land-extensive enterprises (mines and plantations). The state justified its actions through its ideology of development (*pembangunan*). During this period, the military and police were responsible for intimidation, generating a pattern of persistent human rights abuses against local communities protesting their land's alienation (Human Rights Watch 2003). In Indonesia, licensing allowed for permanent alienation of subsistence and smallholder land. This occurred because, at the conclusion of the license, the territory returned to the state instead of the original owners.

It is important to note that there are several steps before concessions fully extinguish community rights. Concessions could include business licenses for forest product utilisation (Industrial Plantation Forest or IUPHHK-HTI) and plantations (*Hak Guna Usaha* or HGU). In areas with overlapping and complex property rights regimes, investors obtain

exploitation, location, plantation, and even formal concession licenses under problematic conditions. Under these conditions—according to the state's frameworks—the land is not 'clear and clean' of various irregularities (*'berstatus "Non CNC" atau masih dikategorikan bermasalah'*). The state often provides licenses and leaves investors with the responsibility of resolving problems on the ground. Thus, many companies operate in areas where various licenses continue to overlap with local land uses or claims. Formalisation processes in these cases tend to be problematic, contested, and only partially realised. Investors do not necessarily escape the uncertainty created by the overlapping state-issued licenses and local property rights. Hence, in many cases, land grabbing remains "virtual" (McCarthy, Vel, and Afiff 2012).

Mapping and registration

Local mapping and registration initiatives represent another mode of formalisation. These can include mapping rights holders and resource uses, registering land transactions, and maintaining land registers to track land tenure changes (Meinzen-Dick 2009). This approach allows non-state or local institutions to act as the primary authority allocating resource rights. Advocates often conceive of mapping as a tool to counter the problem of land grabbing (i.e., as a way of giving informal, socially embedded, or customary property systems a firmer legal and bureaucratic status) (e.g., Dwyer 2015, 907). In Indonesia, AMAN (Alliance of Indigenous Communities Indonesia or *Aliansa Masyarakat Adat Indonesia*) promotes this approach to recognising indigenous peoples' rights (see below).

'Informalists' have argued for a combination of customary (or 'less formal') and state systems (a type of 'third way') as an alternative to titling individual rights. They envisage landholders potentially leveraging the state's coercive power—for example, through the judiciary—to enforce rights holders' land tenure regimes against counter-claimants, by using land registries and community land maps. In this way, advocates seek to harmonise the group's land tenure regime with the state's administered regime for outsider investors, providing some legal certainty for those marginalised under the existing state arrangements.

All of these formalisation projects highlight the tensions between the logic of customary systems of vernacular land tenure and the market-based system's economic imperatives. They could all lead to what we term 'adverse formalisation,' a term we extend from the concept of 'adverse possession.' 'Adverse possession' refers to the legal rule that, after a certain (statutory) period, an unauthorised occupier of a land parcel acquires the land title through their continuous possession, to

the exclusion of the original owner. Adverse formalisation occurs where rights formalisation (through a license or concession) extinguishes pre-existing rights, leading to the smallholder exclusion or their inclusion in land-based production systems on adverse terms. 'Adverse formalisation' is typically a process whereby land claimed by the state without previous demarcation (land typically possessed by local landholders) is formalised during the process of license- or concession-making. This type of state land formalisation is "pursued selectively and strategically" to the exclusion of other possible formalisations that might protect community property rights (Dwyer 2015, 915).

However, mapping and certification processes can also lead to adverse formalisation. For instance, mapping processes can also formalise rights in ways that exclude those previously using the land or those with some claim over it. The concern is that these groups, whose presence is deemed illegitimate according to criteria of social justice or ethnic belonging, may be excluded (Hall, Hirsch, and Li, 22). Similarly, normal certification processes can be exclusionary. For instance, certification in swidden areas may involve transforming insecure and contestable tenurial arrangements under community control into state-managed private property arrangements. This process can provide local elites with an opportunity to claim individual ownership of customary land or allow for land to be sold off to corporate investors (Li 2014).

'Adverse formalisation' may begin with a change in the de jure property rights established by a license and then extend from this act of legal expropriation to actual dispossession, changing occupation and land use on the ground (cf. Filer et al. 2017). The formalisation of rights (such as through a license or concession) extinguishes pre-existing rights, leading to the exclusion of smallholders from their livelihoods or their inclusion into the new land-based production systems on adverse terms. New forms of land-based production may involve inferior forms of labour relations, turning peasants into poorly paid plantation labourers or tenant farmers, with little control over their inputs or product. Contrary to the visions of 'trickle down' development, large-scale land acquisition for enterprises that need local land, but not labour—such as mines and plantations or mechanised agriculture—can increase rather than alleviate poverty (Li 2011).

Redistribution and equity

The nature of 'adverse formalisation' becomes stark when contrasted with land tenure reforms that primarily address equity and livelihoods. Agrarian reform in the classic sense of 'land to the tiller' involves systematically changing the distribution of land rights. It also involves

not only promoting access to land but also often to inputs (knowledge, credit, markets) required to increase productivity and enhance livelihoods (White, Borras, and Hall 2014).

This kind of radical land redistribution works in situations where political shifts, such as in Korea or Japan, open up space for freeing up large amounts of land for redistribution. Indonesia attempted land redistribution in the 1960s through 'tiller reform.' It was catastrophic. Pronounced social tensions culminated between 1965-1966 and half a million people were killed. In contemporary Indonesia, the memory of the 1960s means that people associate state-led agrarian reform of private land with communism and thus, it mostly remains a taboo topic. Hence land reform is understood in an attenuated form. In 2018, President Joko Widodo is pursuing a policy to distribute unused land and former plantation areas—state land that is not cultivated—and forest estate areas with community rights claims. Existing regulations also require plantation license holders to allocate 20 percent of the concession area to the surrounding community. This allocation is delayed because apparently, there are no effective legal instruments to compel companies to do it (Menterian Koordinator 2017). In the period up to December 2017, state agencies issued certificates to smallholders for over 199,000 hectares of ex-HGU land, 49 percent of the targeted 400,000 hectares. The state also managed to rezone 750,123 hectares of state forest zone (Land Subject to Agrarian Reform [*Tanah Objek Reforma Agraria* or TORA]), just 18.2 percent of the 4.1 million hectare target.

As an alternative to land redistribution on these lines, the Jokowi administration is pursuing a certification program. Van der Eng (2016) has shown that historically, certification has made slow progress in Indonesia. It has taken the state 50 years to register 48 percent of parcels, all within the 30 percent of the national land area that remains outside of the putative 'forestry estate.' Between 2010-2014, only 2 percent of parcels were certified. As van der Eng notes, at this rate, it would take another 25 years to complete the certification process. However, President Joko Widodo has set out to 'legalize' 4.5 million hectares of land over five years. During the initial three years of his presidency, the pace of certification has increased. As of December 2017, state agencies had certified an additional 1.9 million hectares, a significant increase against the target of 3.9 million hectares over five years. Even so, progress has been gradual, reportedly because "the process of checking and confirming the rightful owner of a plot of land has been slow and tedious" (La Batu and Dipa 2017).

We now turn to broader questions of distributional justice, principally how to stop (if not reverse) processes of adverse formalisation. In other words, alongside seeking to improve access for the poor after land

expropriation, the challenge is how to retain or defend existing access patterns. We consider current attempts to shift governance up from the local smallholder-company interface and insert it into non-state, transnational, and non-state or private forms of regulation. These attempts can be seen, for example, in the provision of FPIC, the use of RSPO, FSC, and IFC dispute resolution mechanisms, and the use of partnership schemes to achieve justice and settle disputes.

'Scaling up and out'

States have failed to adequately protect smallholder community rights and to address environmental and social problems posed by land use acquisition for land-based investment, such as in industrial plantation and mining sectors across the globe. This failure has led to global movements aspiring for 'alternative' mechanisms for scaling up land- and forest-governance beyond state jurisdictions. Efforts to certify globalised commodity chains have involved changing and rescaling governance down to local community levels, in a contemporary trend that places increasing importance on international, subnational, and extra-governmental processes, thus "creating new governance processes and spaces" (Cohen and McCarthy 2015, 5).

In response to activism, global campaigns, and market pressures, international human rights law developed voluntary guidelines and principles. These developments have led to commitments to private regulatory initiatives, which present new opportunities for transnational litigation. We thus see the rescaling of issues beyond the jurisdiction of the nation-state. This global process involves creating new governance processes and spaces to address adverse formalisation and uphold indigenous and local peoples' rights, including private certification processes (e.g., by the Forest Stewardship Council [FSC] and the Roundtable on Sustainable Palm Oil [RSPO]).

These instruments draw on global human rights discourse, including recognition of indigenous rights. They require shifting decision-making along with dispute- and conflict-resolution 'up' and 'out' from the state. They simultaneously require demanding more local participation and decision-making power in the investment processes, such as through the implementation of Free, Prior and Informed Consent (FPIC). FPIC is now inscribed in many international norms and industry standards for dealing with affected communities. Where secure rights are lacking or insufficiently enforced by the state, the FPIC requirement becomes the central safeguard for communities and provides NGOs and social movements with leverage to negotiate a redistribution of benefits and

burdens associated with these boom industries (McCarthy, Vel, and Afiff 2012). This requirement is a turn towards 'input legitimacy,' that is, the idea that legitimacy rests on a broader set of criteria that include decision-making processes themselves. For instance, company operations require at least some of the markings of procedural democracy and justice; they need to incorporate local concerns, facilitate buy-ins, and ensure participation and consent (Cohen and McCarthy 2015, 6). These requirements are referred to in the mining industry as the 'social license to mine.'

There is evidence that such private regulatory processes have led to improved outcomes on the ground. In many cases where the communities have been affected by adverse formalisation (especially where there is an overt conflict), the international (non-state) mechanisms have helped redress past wrongs. However, the outcomes are still lower than what people may have expected. In a conflict in Sambas (West Kalimantan) involving a palm plantation, a community unsuccessfully attempted (numerous times) to obtain redress at the district level. They then scaled up their actions by collaborating with local, national, and transnational activist networks (TAN) to bring pressure on the companies (Dhiaulhaq, McCarthy, and Yasmi 2017). With help from NGOs, the community filed a case before the Compliance Advisor/Ombudsman Office (CAO) of the International Finance Corporation (IFC) that had funded the company's operations. The controversy that emerged had wider ramifications. It led the World Bank Group to revisit its strategy for dealing with palm oil investments. The CAO also sent an investigative team to consult with the villagers and found that the palm oil investment did not meet the IFC's Performance Standards. The ombudsman facilitated negotiations between village representatives and the company in 2008, which resulted in a company-community agreement. The agreement stated that the community was allowing the company to continue using the community's land as a corporate palm oil estate so long as they paid compensation, helped the community to develop palm oil smallholder plots, and contributed to a community development fund (Dhiaulhaq, McCarthy, and Yasmi 2017).

In another case, in 2004, some 220 members of the Pangean customary community in Riau demanded that a palm oil company, PT Citra Riau Sarana (CRS), return 450 hectares of customary lands that the community had originally developed as rubber gardens (Afrizal and Anderson 2016; Afrizal 2015). The land had become part of the company's 12,299-hectare palm oil plantation in the late 1990s. The community claimed that the company had taken the land from them without free, prior, and informed consent. Wilmar, the current holding company, inherited this dispute when they purchased CRS in 2005. After five years

of community requests that Wilmar comply with the RSPO standard on FPIC (Afrizal 2015) and following an NGO-facilitated mediation process, the community and company eventually reached a resolution agreement in 2010. Wilmar replaced the disputed land with 225 hectares of palm oil plantation in another location to compensate the Pangean customary community for the loss of their customary land. With this agreement, Wilmar eventually obtained consent from the Pangean community to continue using the customary land for its corporate palm oil plantation (Afrizal and Anderson 2016).

These examples show how private, international land governance provides points of leverage: subaltern groups and social movements have new opportunities to forge supra-local alliances using international governance arrangements. But this transnationalisation also poses risks of 'adverse formalisation.' While the processes described above require community consent (as opposed to the top-down state processes that compulsorily remove people from their land), the transnationalism approach facilitates the purchase, exchange, or transfer of land to corporations for commercial (non-public) uses, although all parties involved must agree. This approach may gradually lead to new forms of 'governmentalizing land affairs.' These forms can include measures to shape local land negotiations, set the terms under which corporations gain access to land, determine how land is 'freed up,' and outline how smallholders might negotiate benefit-sharing arrangements—in other words, the terms of formalisation. They incline corporations, smallholders, and local governments to act in particular ways and to cumulatively support the alienation and formalisation of land for plantation and resource development. In the process, powerful actors may acknowledge individual land rights only to abrogate them (i.e., just-in-time formalisation) (Dwyer 2015).

The question remains whether such emerging, international, non-state norms governing land-based corporate practices can be an effective counter to adverse formalisation. The experience has been mixed (McCarthy, Vel, and Afiff 2012; Colchester 2016). Although these schemes seek to go beyond state law, they have to operate within national legal frameworks that still inadequately recognise indigenous or customary land rights (Colchester 2016). In other words, these private regulatory processes lack structural power (McCarthy, Vel, and Afiff 2012). Consequently, they cannot fully uphold or remedy rights violations. Moreover, regulations built upon international norms and law do not necessarily lead to domestic policy changes. In Indonesia, they have not yet shifted the social, political, economic, and legal mechanisms that shape outcomes. Voluntary regulatory mechanisms face the reality that state-based actors remain disinclined to implement existing state laws in

a thoroughgoing manner, let alone to support the normative concerns of developed world consumers embedded in voluntary standards. Ultimately, national legal reforms are critical to securing community rights and to improving the implementation of the international regulatory mechanisms. Certification systems provide some protection of rights and scope for redress of violations. However, critics suggest that to maximise the regulatory mechanisms' effectiveness, the mechanisms need to be more rigorously upheld, including penalising violations by corporate actors (Colchester 2016).

Here a principal limitation remains the lack of recognition of indigenous and local peoples' land rights. Their weak property rights as well as other power-related asymmetries (e.g., the lack of economic power and negotiation skills) place communities in a weak position vis-à-vis the state and corporate actors who control the land. The companies have a robust legal position under state law and considerable economic resources and power (Dhiaulhaq, McCarthy, and Yasmi 2017). Given such power asymmetries, companies are better prepared to negotiate over benefit sharing and communities tend to settle for what they can get (McCarthy, Vel, and Afiff 2012).

'Scaling down': relocating the governance of resources back 'down' to local communities

'Scaling down' involves construing community territory as a site for reconstructing justice and fair distribution in the local domain. The registration of group land rights has been supported internationally by advocates of land tenure reform as a way of managing or preventing encroachment by outsiders. Registration can entail recognising village management of group and individual rights, enacting programs to protect existing group land rights, and providing simple and quick land record registration procedures. One favoured model involves recognising the group's internal authority and demarcating group boundaries—typically with the support of State officials (Fitzpatrick 2005, 455). This model is reminiscent of the colonial arrangement in the Netherlands East Indies, where, in the process of creating a system of indirect rule, the colonial authorities recognised existing forms of self-government. This recognition enabled local communities to articulate their customary arrangements and to consolidate the external boundaries of customary land. They established community-level authorities over land disposal. Recognition involved kinship- or territory-based criteria for land ownership, restrictions on outsiders alienating land, and principles of returning land control to the community (Fitzpatrick 2005). The colonial

dispensation that emerged rested on a distinction between legal titles awarded by the colonial regime, and *adat* or customary regulations and dispute resolution processes (Bedner 2016). For the most part, *adat*-controlled lands outside of Java were outside the formalised state tenurial systems, which concentrated on urban and commercial areas. The concept of *adat* or customary rights developed in the colonial period was based on an assumption of autochthony as a basis of rights and essentialised difference. This dual system put a break on land dispossession by Dutch investors by allowing local communities to defend their local land rights.

A contemporary model of group rights, similar to the colonial arrangement, might provide a model that allows for communities to manage their collective rights based on their own rules. It may also protect group rights and land held as community commons. Communities may hold such land as protection against adverse formalisation (i.e., for land-based livelihoods). By avoiding formalising individual titles, this has the virtue of avoiding the forced transition from highly flexible, dynamic tenure systems to fixed systems of formalised rights.

Global social movements around indigenous rights have called for relocating the governance of resources 'down' to local communities. In Indonesia, this shift redefined the customary or indigenous (*masyarakat adat*) territory as a site for reconstructing justice and fair distribution. This redefinition involved consolidating (or in some cases, reconstituting) local land and place-based identities as a way of defining rights denied by the state. This consolidation was a way of articulating grievances against dispossession, a lack of consultation, and inadequate compensation for lost livelihoods. Indigenous identities can be a form of "strategic essentialisms" (Cohen and McCarthy 2015; using Spivak's term) and culturally constituted identities become fixed to specific territorial claims.

Adverse formalisation characterised the experience of thousands of communities living on subsistence agriculture, hunting and collecting, and smallholder production during the New Order regime. Community protests were common, but rarely achieved redress (Robinson 2018). Towards the end of the New Order, many of these demands coalesced in a national movement, which drew on the tropes of customary land ownership and community land stewardship, in which many of these groups expressed their rights against government-forced dispossession. In 1999, in the euphoria of Reformasi, the group AMAN was formed to advocate for firmer recognition of customary rights. Rather than adopting the (ill-defined) term *masyarakat hukum adat* used in the Constitution, they opted for a revised concept, *masyarakat adat*.

This term was defined by global discourses on indigeneity, in instruments such as the 1989 ILO Convention on Indigenous and Tribal Peoples and the 2007 UN Declaration on the Rights of Indigenous

Peoples. This concept had its origins in the political struggles of 'fourth world peoples' in settler colonies, where it was historically clear which people had been dispossessed by the colonisers. Indonesia has not ratified the ILO Convention, arguing that all Indonesians are 'indigenous.' The century-long mobility of people on the archipelago makes it difficult to distinguish who has rights (i.e., an indigenous concept of precedence), and the process is potentially exclusionary. In particular, when deciding who is 'indigenous' or '*masyarakat (hukum) adat*,' which historical point should be the point of reference?

Self-identification is a key concept in the global definitions of indigeneity. Apart from being a politically constituted category or term in political discourse, 'indigenous' identities draw on both global discourse and local rhetoric. Given the historical emergence of these claims in the anti-politics of the New Order, perhaps we can understand the concept of indigenous identity in contemporary Indonesia as an expression of an anti-free market/neo-liberal ideology. This concept may be similar in form to arguments emerging in Europe in 2018 against extreme forms of dispossession and inequality (Dardot and Laval 2015), as seen in the concept of 'commun.' This concept attempts to counter private property as an analytical category and form of practice. The 'common' reflects the kind of claims represented in claims of collective *adat*-based ownership rights.

In Indonesia, advocates of indigenous (*masyarakat adat*) rights celebrated a significant victory in 2012. AMAN successfully pursued a judicial review of Forestry Law No 41/1999. Indonesia's Constitutional Court ruled (Ruling 35/2012) that customary forest areas should be considered as forest under private titles. AMAN subsequently advocated for legislating formal recognition of indigenous group rights over the customary forest in an extensive area of Indonesia's forestry estate. However, communities still face the enormous administrative constraint of achieving legal recognition as 'an *adat* law community.' Moreover, the Ministry of Forestry and the Environment still retains spatial planning power over the areas, even if an *adat* status is recognised (Bedner 2016).

In line with the Constitutional Court's decision, three years into his presidency, Jokowi recognised nine newly designated "customary forests," or *hutan adat*, covering 33.4 square kilometres in Sumatra, Borneo, and Sulawesi. AMAN has reportedly "mapped out 19,000 square kilometres of land, home to 607 indigenous communities, which it says must be rezoned as customary forests" (Gokkon 2017). According to one report, the Environment and Forestry Minister plans to approve 43,800 square kilometres of land for community forestry schemes by 2019. At the same time, the administration is reportedly considering recognising 164 square kilometres of customary forests when President Jokowi stands

for re-election (Gokkon 2017). However, this would depend on district heads and legislatures issuing decrees that recognise the indigenous status of communities. Applications for *adat* status are difficult processes that require documents setting out the history of the community, *adat* institutions and regulations, and maps of the customary forests. Moreover, apparently, "the locations that the government has been targeting so far are not the ones with agrarian conflicts or where there are overlapping claims between local communities" (Gokkon 2017).

Formalist efforts to counter the alienation of local community lands assume the main threat of land grabbing comes from outside encroachment. The way to proceed is by formalising group rights before appropriation occurs. This approach resonates with the FAO principle that calls for systematic recognition and protection of rights that are not yet certified (FAO 2012). In Indonesia, other initiatives are pursuing group rights and, over time, a patchwork of legal initiatives has emerged.

For example, in 2001 the national government developed the Papua Special Autonomy Law (No. 21) as part of an effort to address separatist unrest in Papua. This law provides a mechanism for some form of recognition of indigenous rights (Savitri and Price 2016). Communities can apply for the recognition of community use rights or for individual ownership titles: the law does not specifically provide for community ownership rights. And despite recognition of *adat* in principle, processes to recognise communal use rights or individual titles get bogged down in procedural requirements. For the most part, Papuans tend to obtain recognition of their tenurial rights only at the point when a developer is alienating them. Consequently, as Savitri and Price (2016) argue, Papuan tenurial claims and development objectives remain subordinate to outside interests. While the law is yet to provide effective safeguards against the dispossession or erosion of land-based livelihoods, specific provincial legislation could offer a way to provide some recognition of collective rights.

From another angle, the New Village Law (Law 6/2014) offers villages that are recognised as '*adat* villages' the possibility to regulate and manage their *adat* territory. Under the *asal-usul* principle of the Village Law, villages have the right to manage their land affairs (*Desa mengatur dan mengurus tanah desa atau tanah ulayat adat desa*).[1] This management would potentially allow for a land tenure system that builds on de facto processes: the systems of tenure rights accepted by groups of people (i.e., a village or community) but not formally recognised by the state. Such systems are legitimate in the sense that they are justified and have on-going acceptance within a community, irrespective of state law. They include customary, statutory, or informal social practices, which enjoy social legitimacy. The Village Law initiative opens the prospect of bringing

these systems into conformity with the law. Here, 'custom' (*adat*) would not be based on some dusted-off version of '*adatrecht*' but could instead be broadly interpreted as based on actual land practices. This recognition would include those with customary or informal rights whom the state does not consider as *masyarakat hukum adat* but who do not yet have state-certified rights.

Ideally, this initiative would allow for the internal authority of the group, building local forms of governance. Over time, it might involve demarcating group boundaries (*batas desa*) and providing some form of title to the village lands. Internal property issues would be left for the community to manage. Policies would continue to encourage the gradual recording of individual rights, ensuring that group title registrations would not freeze individual tenure. If possible, effective safeguards would need to be provided against dispossession and internal manipulation. The advantage of this system would be that titles would not be tied to cultural identity (regarding *adat* or *suku*) but rather to village residence.

One potential issue is that there may not always be a functioning community institution overseeing land affairs. Furthermore, solutions need to address the presumed binary distinction between individual and collective rights. Customary systems, where much of the land is held as a 'commons' of the community, acknowledge individual rights (e.g., ownership of trees planted on collectively held land). These systems occasionally acknowledge residual rights in fallowing land, which oblige new users to seek consent for their use. Any move towards collective community- or village-based rights needs to address this complexity of bundled rights, recognising the different categories of rights embedded in a community title. It is also important to avoid the problems of freezing land tenure. The bundled rights allocated to communities may also need to include rights to alienate land.

Initiatives to recognise customary rights have struggled to find ways to protect local communities, especially the non-elite members, who may be vulnerable to internal manipulation from their leadership. Community members not only need protection from external encroachment; reluctant, predatory, and resistant actors emerge from within communities as well. Such protection may require the development of mandatory internal rules and procedures "to seek fair distribution of benefits and ameliorate discrimination against [the] less powerful" (Fitzpatrick 2005, 472). There are many legal methods of holding group representatives accountable (e.g., by holding elections or framing a binding group agreement through formal corporate ownership), thereby providing elements of liability and transparency (Fitzpatrick 2005). The question of accountable community leadership is especially critical in cases where regulations might allow

community leaders to make *adat* land available to investors, which opens the procedure to abuse.

Economically empowering communities before and after they gain recognition of their rights is crucial, in order to ensure that the community can maximise the advantages those recognitions will entail. As Fay and Denduangrudee (2016) note, local communities "will need to be well organized and understand the opportunities and constraints this collective rights process provides." This organisation and education may require support, funding, and advocacy from institutions, NGOs, and social movements, as well as governments.

In all of these considerations, there is the underlying question of how power and interests shape where titling and group rights are provided. For instance, in the Cambodian cases discussed by Dwyer (2015), in the face of vested interests gaining titles to land, communities pursued group rights on a small scale and only in areas where there was no land grabbing. In Indonesia, there is a similar risk: forms of counter-formalisation may require support and approval from local government officials and ministries (Bedner 2016; Fay and Denduangrudee 2016). Such processes are in danger of being manipulated by corporate and investor influence peddling. Such manipulation may also limit the scope for remediation in situations where permits have been issued and where adverse formalisation has already occurred. On this note, Polack, Cotula, and Côte (2013, 1) distinguish "accountability as rights" from "accountability as power." While the first involves a focus "on the substantive rights and transparency of process established by legal and regulatory frameworks," the second emphasises "the importance of citizen actions, power and politics in public accountability." Both are required for effective outcomes in protecting the land rights and livelihoods of the poor.

Conclusion

Can a distributional justice agenda (from above and below) address the adverse formalisation problem? There is increasing pressure on national governments and investors to meet human rights norms, alongside global movements for corporate accountability. In response, President Joko Widodo ran for the presidency with a commitment to reforming land affairs. The land question retains rhetorical and political significance. However, given the difficulties we have discussed, the redistributive agenda has shrunk: current initiatives focus on land under state control rather than the classical redistributive agenda of 'land to the tiller.' The unresolved problems of this program show the difficulties of pursuing even this limited agenda of state-led reform. Moreover, the

state reform program has yet to answer the question of how to address adverse formalisation. As this paper suggests, this remains the most acute problem, which goes to the heart of the development strategies being pursued by the Indonesian government.

Shifts in international governance have created new objects of regulation—such as certified palm oil and timber commodities—that also involve (potentially) seeking to reorganise labour and land use practices. In the scaling up process, both subaltern groups and social movements have new opportunities to forge alliances, using international governance arrangements to contest the localisation of the problem. The optimistic scenario is that the pressure on investors to commit to respecting community land rights and accommodating existing land uses will increase, and state management will gradually move towards meeting international standards (Afrizal and Anderson 2016) in the state's quest for international investment. However, this could also be read as a gradual shift towards new forms of a 'governmentalisation of land affairs.' In other words, we see the emergence of institutionalised techniques and procedures, a suite of measures and rationalities that shape local-level land negotiations. They set the terms under which corporations gain access to land, how land is 'freed up,' and how smallholders might negotiate benefit-sharing arrangements (i.e., new forms of formalisation). They dispose corporations, smallholders, and local government to act in particular ways, but ultimately and cumulatively support the alienation of land for resource development (mines and plantations).

In the meantime, after the New Order period, the oppositional politics of land reform shifted to the advocacy of customary or 'indigenous' rights. This coincided with an international policy agenda that involved recognising group rights. The hope is that by registering existing group rights and by offering them protection, reform initiatives will provide a means of supporting existing tenurial systems and preventing external encroachment. While we have seen that there are many positive possibilities associated with these approaches (not least under the new village law), there are acute challenges. There are those who consider recognising indigenous group rights as exclusionary and contrary to the spirit of inclusive citizenship and distributional justice. Furthermore, there are procedural difficulties. How to decide who can claim an indigenous status and under what conditions? How to prove that functioning customary or community institutions still exist? How to prevent elite capture? In response, legal drafters readily construct regulatory frameworks that also create administrative constraints on those seeking to achieve legal recognition for *adat* or village communities. District heads and legislatures empowered under decentralisation have discretionary power over these initiatives, but they are vulnerable to

influence peddling by corporations and investors. The fear is that such *adat* rights may only be recognised on a small scale, in remote places where land access is not contested.

Those pursuing land questions need to advocate for more just development models that do not give primacy to market forces, and that allow for the empowerment of subaltern groups (i.e., models that support smallholder inclusion). Current efforts to regulate and mitigate the most negative impacts of adverse formalisation, as discussed above, depend upon developing effective forms of accountability as power, not just rights. In the meantime, efforts to develop 'accountability as rights' have proceeded at a quick pace, with many new innovations. The concern is that such advances coincide with the consolidation of a development approach that focuses on making the most of the nation's competitive advantages, particularly around the availability of cheap land and labour, at the expense of the sustainability of smallholder agriculture (Millar 2015). Initiatives need to avoid transforming how land is conceived so as to support economic and social inclusion. They need to shift the conception of land away from being embedded in processes that only include local people on adverse terms, and towards re-embedding it in indigenous or local-level community social relations.

Notes

1 Thanks to Adriaan Bedner for making this point.

2 Can Free, Prior and Informed Consent (FPIC) Create Legal Certainty for Hunter-Gatherers?

G.A. Persoon and T. Minter

Introduction

Legal certainty (or legal security) is a principle that generates the legal order's systematisation and stability and guarantees human rights (i.e., human and social security) through lawmaking and justice. It is supposed to guarantee the effectiveness of the entire legal system's normative function, both through sound legal provisions and real and effective implementation of such provisions (Ivaylova 2017; Otto 2000b). The most vulnerable individuals and groups tend to enjoy the least legal certainty. Among these are indigenous peoples, who constitute a highly diverse group of approximately 400 million people worldwide. Despite their many differences, indigenous peoples share a history of oppression and domination by colonial and post-colonial governments as well as on-going socio-economic marginalisation, discrimination, and legal uncertainty (Lenzerini 2008). In their confrontation with more powerful players (usually governments and extractive industries) in the search for arable land, minerals, or other natural resources, indigenous peoples are often further marginalised precisely because of their lack of legal certainty.

Free, Prior and Informed Consent (FPIC) is presently the most powerful instrument in creating a certain degree of legal certainty for indigenous peoples. FPIC is an interesting legal phenomenon because it functions as a cross-cutting legal instrument that combines aspects of customary, national, and international rights. It is a requirement in

conventions, declarations, operational guidelines, policy statements, and trade-related procedures, for achieving higher levels of sustainability, social justice, and legal certainty.

FPIC also relates to ideas and ideals of reconciliation, and redress of historical events or conditions, which is a highly complicated issue within the field of social justice (see Lenzerini 2008). In the distant or more recent past, indigenous peoples have lost territories and resources. Other parties have used parts of their intangible culture and knowledge without their consent. In fact, the emergence of indigenous rights in the international context stems from a large number of blatant violations of indigenous rights, which attracted the media's attention. Globally, there are many known cases of eviction from home territories, incidents of bio-piracy, appropriation of cultural heritage, and appropriation of indigenous medical knowledge (for examples, see the IWGIA's annual *The Indigenous World*). Indigenous peoples and their advocates aim to garner reparations for these historical injustices with the newly available declarations and guidelines, including FPIC articles. They aim to reclaim lost territories and resources or reclaim control of how external actors use their indigenous knowledge and other expressions of intangible culture.

This contribution will first discuss the general implications of major legal texts including the FPIC. Next, we will focus on the implementation of FPIC in relation to one particular category of indigenous peoples, namely hunter-gatherer societies in Southeast Asia. These hunter-gatherers are among the most vulnerable groups of indigenous peoples because of a number of socio-cultural characteristics. This makes the implementation of FPIC even more complex and prone to manipulation and misuse, necessitating the highest levels of precaution and sincerity. Despite its wide acceptance, FPIC does not always yield the intended result. In many cases, its application is far from perfect. It often has unintended and negative impacts.

This leads us to look for an answer to the following question: As a legal instrument, does FPIC achieve its designed aim concerning hunter-gatherers?

Our discussion is based on a literature review and on our own experiences in different roles with FPIC. We have both undergone FPIC processes while conducting field research (with local and international MA and PhD students) among hunter-gatherers in Indonesia and the Philippines. As researchers, we have also been able to study the ways in which other parties obtain FPIC and provide evidence that they have actually obtained it. Examples include the procurement of sustainable timber and in mining and logging applications. We have also experienced the implementation of FPIC as consultants for donor and nature conservation agencies.

FPIC and indigenous peoples

Free, Prior and Informed Consent (FPIC) is the right of indigenous peoples and other local communities to give or withhold their consent to any project affecting their lands, livelihoods, and environment. This consent should be given or withheld freely, based on respectful consultation and the broad and equitable participation of the affected community. FPIC should be sought before project activities begin. It should be informed, meaning that the people involved must have access to comprehensive and impartial information on the planned activities, including the nature, purpose, scale, and location of the project, and its potential risks and impacts (Colchester et al. 2005, 6).

Before FPIC became a key element in the discussion about the rights of indigenous peoples, it had already been used in international conventions regulating hazardous chemicals and waste, and medical procedures. When regulating hazardous chemicals and waste, FPIC was constructed as a relationship between nation-states. They were supposed to inform one another about imports and exports of these substances, to make decisions about their movement more transparent. In the medical sector, informed consent is an element in the relationship between two individuals: the doctor and the patient. The aim is to inform the patient about potential harmful consequences of a particular treatment. Needless to say, these forms of informed consent have to be free from coercion (Firestone 2003).

In the context of indigenous peoples, FPIC is a relationship between an indigenous community and other parties (e.g., individuals, companies, researchers, governments) who plan to engage in activities in indigenous peoples' territories or to make use of indigenous knowledge, culture, or heritage. FPIC is just one particular right and should always be considered in the contexts of other rights, such as the right to self-determination, the right to culture, and the right to religion. FPIC can never be treated in isolation from these other rights.

The Convention on Biological Diversity (1992) was the first international document in which FPIC was included. This was achieved after strong lobbying activities in the 1980s when numerous dramatic cases of injustice against indigenous peoples were widely publicised. These included illegitimate encroachment in indigenous territories by logging and mining companies. It also included piracy of indigenous knowledge by pharmaceutical or plant-breeding companies. In both cases, companies acted without appropriate agreements with the land-owning communities or with the holders of such knowledge. These events led to a strong movement against the commodification and ownership (including patents) of life forms (Mead and Ratuva 2007).

FPIC is a key element that appears throughout the most important document for indigenous peoples' rights, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Over many years, FPIC has also become an important component in conventions, declarations, policy statements, and operational guidelines of the multilateral UN organisations (i.e., WIPO, UNDP, UNEP, UNESCO, ILO, and FAO)[1] and major donor agencies (e.g., the World Bank and the Asian Development Bank). The same holds for nature conservation organisations, like the World Wildlife Fund (WWF), the International Union for the Conservation of Nature and Natural Resources (IUCN), The Nature Conservancy (TNC), and Conservation International (CI). All of them have issued policy statements to ensure the inclusion of local indigenous communities in the decision-making process, both during planning stages and before final decisions are made.

Trade organisations and industries have also included FPIC in their policy statements and their sets of principles and criteria. This includes organisations promoting sustainable timber trade (Forest Stewardship Council [FSC] and the Programme for the Endorsement of Forest Certification [PEFC]) and palm oil (Roundtable on Sustainable Palm Oil [RSPO]). More recently, even the mining industry, which was extremely hesitant to include these kinds of social safeguards in their operations, is slowly taking steps to include FPIC procedures in its operational guidelines. This is evident in the International Council on Mining and Metals (ICMM 2013) position statement on Indigenous Peoples and Mining, which endorses the UN Guiding Principles on Business and Human Rights (Owen and Kemp 2014; MacInnes, Colchester, and Whitmore 2017).

In some cases, national laws and regulations recognising indigenous peoples' rights may be absent or extremely weak, while companies, international NGOs, or funding agencies may be willing or even forced to stick to their guidelines and policies. Companies, for instance, may only maintain access to targeted markets if they fulfil the requirements for certified sustainability. NGOs run the risk of complaints among their constituencies if they do not uphold collective human rights standards. Sometimes, these international sets of human rights standards go beyond national legislation, in which case they may stimulate national governments to pay more serious attention to the recognition of such rights.

The integration of indigenous peoples' rights into the policies of the sustainable timber trade is an interesting, sector-specific example of how indigenous rights can trickle down. Since the early 1990s, the Forest Stewardship Council (FSC) recognised indigenous peoples' rights in its standards. In fact, the FSC was founded by environmental organisations

as a result of the public outcry against the injustice done to the indigenous Penan, who confronted loggers in Sarawak (Malaysia). In a later stage, the other certification system, PEFC,[2] was forced to recognise these rights to be eligible for sustainable timber import into European countries. Most of these countries require adherence to all major declarations and conventions[3] in this field. These international certification systems also influenced timber-exporting countries, which could no longer refrain from accepting indigenous rights, even if their national governments were initially reluctant to do so.

Malaysia is an interesting case in this respect. Through pressure from FSC and PFEC, as well as the Dutch Timber Procurement Policy (TPAS), the Malaysian Timber Certification Scheme (MTCS) has gradually incorporated elements of indigenous rights in its standards, including FPIC (Royal Haskoning DHV 2016; Malaysian Timber Certification Council 2012). This is remarkable since national legislation within Malaysia is still quite ambivalent on this issue. For some time, it has been questioned whether these incorporations were illegal under Malaysian law. However, doing more than what is legally required domestically is, of course, different from acting illegally.

While FPIC has gained considerable political acceptance, there have also been initiatives by both governments and private companies to weaken FPIC's possible impacts. Some governments and business organisations are not in favour of the need to obtain 'consent,' since it risks indigenous communities refusing the planned activities. There have thus been attempts to replace 'consent' with other concepts, like 'consultation,' 'constructive dialogue,' 'respect,' or 'serious engagement.' But these attempts have not been successful since the international standards are quite clear on the proper meaning of 'consent' (MacInnes et al. 2017).

Even though the terminology used by governments, private companies, and NGOs may look similar, there are big differences in how they approach FPIC. Moreover, there is usually a gap between the language and the practice of FPIC in the field. Many organisations struggle with implementing FPIC. Practical and operational guidelines are often lacking, and even crucial questions in this process are not easily answered. These questions include (Berlin and Berlin 2003): Why is FPIC needed in a particular case? Who is to give (or withhold) consent? How should FPIC be obtained? What is the evidence that consent has (not) been given? Who decides whether it is given? Some of these issues have to do with the social complexities in the field, examples of which we will discuss below. Others refer to problems that also apply to other legal domains, in which the implementation of rights poses challenges

that are difficult to overcome (e.g., in the case of creating social security through legalising land rights) (Otto and Hoekema 2012).

Though many international declarations are particularly focused on large-scale interventions (e.g., logging, mining, infrastructural development, or conservation), FPIC has also become a requirement for researchers. It is often in the research institution's or professional organisation's ethical code of conduct. But the local community (e.g., South African San Institute 2017) and (self-appointed) caretaker institutions are also increasingly independently demanding FPIC.

Comparatively speaking, researchers have been more open than governments or companies about the challenges they have encountered in meeting FPIC requirements or acquiring FPIC permission from stakeholders (see Berlin and Berlin 2003). These challenges include deciphering how to create consensual and benefit-sharing processes that are culturally appropriate, satisfactory to the research bureaucracy, and feasible given the available time and resources. Conflicting ethical codes pose a particular challenge. For instance, scientific publications now require data storage, data sharing, and open access to information; requirements meant to enhance scientific transparency and replicability. However, the full disclosure of such information is often unacceptable to the indigenous communities who have provided it (e.g., as occurred in projects related to ethnobotanical research). For example, researchers obtained FPIC on the condition that they prevent pharmaceutical or plant-breeding companies from appropriating the communities' knowledge (i.e., 'bio-piracy'). But such restrictions (as agreed upon by communities and researchers) may be in tension with the ethical policies of research institutions or publishers (Brown 2004).

Proportionality is a further issue. As there is usually no difference between FPIC requirements for research activities and large-scale development interventions, researchers sometimes feel that the requirements are not proportional with the aim and the scope of their activities, compared with those of mining or logging operations. This is especially relevant when communities (or agencies speaking on their behalf) have previously interacted with extractive companies, which greatly influences local expectations of benefit sharing.

FPIC and hunter-gatherers

We will now focus on a particular category of indigenous peoples: hunter-gatherers. While many of our observations apply to indigenous communities more broadly, we will show that the specific characteristics of many hunter-gatherer populations call for even greater caution and

care in applying FPIC. The discussion below is based on our own experiences with the implementation of FPIC processes between two hunter-gatherer populations. First, we look to the Orang Rimba, a group of approximately 3,000 people living in the central part of Sumatra (Jambi Province, Indonesia). Second, we focus on the Agta, a population of about 2,000 people that live in the forests and along the coasts of Northeast Luzon (The Philippines). Both populations subsist on a combination of hunting, fishing, gathering, (barter) trading of forest products, extensive agriculture, and wage labour. They have a long history of domination by neighbouring farming populations and encroachment of their hunting and fishing grounds by extractive industries, infrastructural development, and in the case of the Orang Rimba, plantation agriculture (Minter 2010; Persoon and Ekoningtyas 2017).

1. Scope and representation

Two interrelated questions arising at the start of the FPIC processes are: 1) what should be the scope of the procedure (i.e., how large is the population and geographic area that it must cover) and 2) how should representation be organised (who should speak on behalf of that population)? These questions are key in any FPIC procedure, but in the case of hunter-gatherers, additional challenges arise.

Mobility

Although hunter-gatherers vary greatly in their mobility across and between populations (Ikeya 2017; Kelly 1992), many groups and individuals are relatively mobile. They live in small, widely dispersed settlements covering large areas of tropical forests or coastal regions. Also, the remoteness of areas inhabited by hunter-gatherers offers specific challenges for setting up communication that is crucial for a meaningful FPIC process. Roads are often absent, as are modern communication tools.

Involvement

Partly related to this mobility aspect is the question of who is and who is not to be involved in the procedure. Again, this question is not exclusively related to hunter-gatherers, but their resource and land tenure systems further complicate it. For instance, in the absence of explicitly demarcated territorial boundaries, the Agta's land rights are often incorrectly assumed to be highly flexible. However, while individuals commonly hold land and resource rights in multiple locations (usually those locations from which

they originate and the location in which they marry), the terms and scope of resource access are locally well defined (Minter 2017). Thus, relatives living at a great distance may have culturally recognised interests and rights in an area that would be affected by a proposed intervention.

Internal representation

Many hunter-gatherer societies have a relatively egalitarian social structure and are thus uncomfortable with the idea of being represented by a particular group member. For outside agencies coming from political structures that rely on political representation mechanisms, this is a practical inconvenience. Therefore, they often resort to introducing such mechanisms on the spot, by selecting representatives either through voting or (more often) through appointment. Such selections create multiple problems: the 'invented leaders' may lack local legitimacy and recognition, may lack experience with requirements (e.g., accountability and transparency), and may be biased in favour of the outside agency's proposed activity (e.g., mining or logging). Another issue with the imposition of foreign representation structures is that they are usually patriarchal in nature. That is, while leadership may not necessarily be considered a male trait in hunter-gatherer societies, the 'instant leaders' created for FPIC purposes are most often men.

External care-taking

In many cases, government agencies, NGOs, or even individuals act as (self-appointed) caretakers for particular hunter-gatherer groups. Such external caretaking is often unknown to the communities themselves and can easily be based on perspectives that may not be mutually shared or may be poorly discussed. External caretakers may influence the FPIC process in ways that are not necessarily broadly supported by the entire community, thereby often favouring one position over another. For instance, in the Philippines, the government agency that is mandated to look after the country's indigenous peoples (the National Commission on Indigenous Peoples [NCIP]) is also responsible for implementing the FPIC process. Despite strong resistance to mining applications among the Agta over the past decade, the NCIP 'caretaker' has consistently defended the interests of the mining industry. As a result, FPIC processes have always endorsed mining operations (Buenafe-Ze, Minter, and Telan 2016; Minter et al. 2012).

2. Free, Prior and Informed Consent as a process

Freedom of choice

Among the fundamental ideas of FPIC is that the decision to give or withhold consent for a planned intervention is made free of coercion or manipulation (MacKay 2004). There is, however, a whole range of subtle and less subtle options for influencing the direction of the decision-making process. These options include the choice for the setting of the meeting, the selection of the time and place, and the selection of the people to be invited. They may also involve choosing the way in which information about the planned interventions is communicated, the language that is used, the distribution of smaller or bigger rewards for supportive individuals, and the outright use of (the threat of) violence against less supportive people. Hunter-gatherers are particularly vulnerable to all of these limitations to their freedom of choice because of their weak internal organisation. Systematic communication and coordination between different sub-groups of the same overarching population are often lacking. This limits hunter-gatherers' ability to take firm collective positions, or to make strong demands on behalf of a population that is larger than the immediate group. Moreover, many hunter-gatherer societies are known for their non-confrontational strategies, especially with parties that are perceived as more powerful. Thus, in FPIC procedures that involve hunter-gatherers, an assertive 'no' to planned interventions is rarely the outcome.

Being prior informed

Two other fundamental pillars of FPIC are the requirement of full information provisioning on the proposed activities (Informed), and the need to do this before the actual commencement of the intervention (Prior) (MacKay 2004). Thus, people covered by the FPIC process should be made fully aware of the scope of the planned activities and the potential positive and negative impacts on their lives and environment, both in the short- and the long-term. Moreover, information must be presented in ways that are understandable to the affected population. However, this requirement is complicated by the wide knowledge gap between those who provide the information (e.g., usually urban, well-educated, and relatively wealthy individuals) and those who receive it (e.g., members of the remotest, and most economically and educationally disadvantaged rural communities). Again, this gap is most extreme in the case of hunter-gatherers, who often do not even speak the national language. Moreover, the majority is illiterate, and even if they are not, they are unlikely to have a full understanding of the terms and conditions stipulated in

the process. Even if serious efforts are undertaken to communicate in a mutually understandable language, it is unlikely that the terminology used will be sufficiently understood.

Proof and acceptance of decision

Closely related to the problem of meaningful communication is the question of how to come up with culturally appropriate forms of proof that a decision has been reached. Does this always require some form of voting, followed by the signing (or thumb-marking) of written documents that are unreadable by the people who attach their names to them? Again, such impositions of foreign political and contractual systems are often disempowering rather than empowering. It pulls hunter-gatherers into contractual agreements, of which they cannot confirm the contents and over the implementation of which they have no power. Unsurprisingly, therefore, FPIC processes are frequently associated with allegations of fraudulent 'proofs' of decision (e.g., Minter et al. 2012, 1247).

Consent versus consultation

To avoid some of the problems surrounding the requirement of obtaining 'consent,' in practice, the 'C' in FPIC often means 'consultation' at best. Consultation, however, is something radically different than consent. It implies a de facto elimination of the final decision-making power of affected communities. Consultation with indigenous communities may only involve one or more meetings to discuss the nature and scope of the intervention, without working towards a moment of explicit decision-making by the community on whether or not they agree with the planned intervention. FPIC procedures also prescribe an undisputable decision-making process in the form of documents and proof of consent in the form of signatures or fingerprints. Consultative meetings do not usually have such documentation as proof, even though companies often tend to present reports about such meetings as evidence of having achieved consent with the local communities.

3. The nature of agreements

Duration of contracts

Opportunism is a term that is often used to describe hunter-gatherers' lifestyle. In this context, it refers to a strategy for coping with prevailing conditions by making the best possible use of available opportunities through diversification and flexibility (Kelly 1995). Such a lifestyle is

radically different from living on stipulated limitations, as laid down in a contract with a potentially long duration. Proponents of interventions (including research) often see the requirement of obtaining FPIC as a one-off event. However, especially in case of long-term activities or involvement, it is desirable to periodically re-evaluate the terms and conditions under which the community gave its consent. Re-evaluation is desirable because circumstances may change, both on the side of the affected population and the implementing agency. The intervention itself may also have unanticipated consequences that may require a reassessment of previous decisions or conditions.

Compensation

Notably, in the context of extractive industries, the negotiated agreements usually include monetary compensation for the losses that the intervention brings to livelihoods or culturally important sites. This compensation, particularly in the form of money, often has great appeal to people who otherwise have little access to cash and luxury items. But cash compensation is always surrounded by issues of distribution, management, and gender-inequality (e.g., Dyer 2016; MacDonald 2017; MacIntyre 2016, 10). Moreover, hunter-gatherers are ill-equipped to assess the fairness of the amounts offered. While monetary compensation has no long-term value, other forms of compensation such as infrastructure construction (e.g., roads, bridges, transport systems, educational or health care facilities) may be more meaningful. However, promises to provide such development are rarely fulfilled. For instance, decades of mining and logging have left the Agta of Dinapigue with damaged hunting and fishing grounds as well as polluted water sources. Meanwhile, the promised 'social welfare benefits' have not been forthcoming (Minter et al. 2012). Most importantly, compensation packages rest on a 'logic of equivalence' (i.e., the idea that they are commensurate with what is lost) (Li 2011, 19). However, for hunter-gatherers, who are highly economically, culturally, and spiritually resource-dependent, losing that resource base can essentially mean losing the foundation of their society (Buenafe-Ze, Minter, and Telan 2016).

Violation of contract conditions/complaint procedures

If one party does not fulfil its obligations, the disadvantaged party has the right to file a complaint with a third party, which could be a designated person or formal institution. In the context of hunter-gatherers, such a step would always imply moving far beyond the home territory and engaging in formal bureaucracies in ways in which hunter-gatherers are

usually unfamiliar. The financial and time costs and the cultural barriers associated with such complaint procedures imply that FPIC procedural violations usually remain unreported.

Conclusion

On the one hand, it is obvious that FPIC has become an important instrument in the recognition and protection of indigenous rights, as part of efforts to improve legal certainty and social justice. The fact that FPIC features in all major declarations and policy statements concerning indigenous rights speaks for itself. UN bodies, private companies, international funding agencies, banks, international NGOs, and an increasing number of national governments have accepted FPIC as a basic principle in dealing with indigenous peoples. More specifically, FPIC sets a minimum standard for the direct involvement of relatively vulnerable groups in decision-making about interventions that will likely affect their territories, resources, or cultural knowledge.

On the other hand, it is clear that FPIC as a process for bringing about justice and legal certainty is still far from perfect. There are misuses and manipulations and the involvement of self-appointed intermediate parties aiming to intervene in the process. There is also a mismatch between corporate ideas about damage compensation and the far-reaching everyday implications of afflicted damage for indigenous communities. FPIC alone cannot resolve all problems related to marginalisation, lack of participation, or lack of democratic inclusion. FPIC is just one element in the wider field of human rights recognition and democratic functioning of society at large (Fontana and Grugel 2016).

Even in positive cases where well-intending individuals, companies, and organisations are truly working in the spirit of what FPIC is aiming to achieve, the process is filled with complexities. Among these is the need to view FPIC as a continuous process that does not end once consent has been granted, but instead entails monitoring of both parties' fulfilments of rights and obligations. Another major challenge pertains to situations where indigenous peoples claim restoration or compensation for serious injustice and harm brought about as a consequence of interventions that were carried out without FPIC. This challenge may also have implications for protected areas or World Heritage Sites. Where these sites were established without recognition of indigenous peoples' rights, there may be demands for restorative justice. In many cases, however, there will be much public resistance from people who have migrated into such areas at a later stage or from governmental agencies against

such an 'undoing of history' as a result of newly established rights. Here, competing principles of justice may be difficult to synchronise.

We have highlighted the specific challenges surrounding the meaningful implementation of FPIC regarding hunter-gatherers. Often lacking hierarchical political leadership structures, a foreign representation structure is imposed on them to facilitate the FPIC process. This imposition is neither effective nor ethically just. Hunter-gatherers' mobility and resource tenure systems pose additional challenges concerning the scope and practical organisation of FPIC procedures. Finally, belonging to any country's most marginalised and disempowered populations, hunter-gatherers are particularly ill-equipped to negotiate with powerful actors on equal footing. This makes the FPIC process highly prone to manipulation and decision-making in favour of the proponents. It is even questionable whether or not the FPIC procedures are applicable in the context of hunter-gatherer societies. However, since an alternative for hunter-gatherer involvement in the decision-making processes has not yet been found, the best way forward currently seems to involve a sincere willingness to face and overcome the challenges outlined above.

To deal with these challenges, a lot of effort, often with the help of committed NGOs and scientists, is directed at promoting the appropriate and meaningful application of FPIC by learning from previous mistakes, looking for best practices, and developing training manuals and practical guidelines. In one review, the Forest Peoples Programme notes that some improvements can be detected in the implementation of FPIC (Forest Peoples Programme and SawitWatch 2012). First, there is an increased awareness of human rights concerns in the operations and obligations of national governments, the private sector, and internationally operating NGOs. Secondly, a growing corporate social responsibility is noticeable in many companies, which increasingly prefer to engage in real dialogue with local communities to avoid future complaints and legal procedures. This is partly the result of public blaming and shaming through publications of investigative journalism and critical researchers. Hopefully, these concerted efforts will contribute to a situation in which FPIC will indeed create legal certainty for hunter-gatherers and other indigenous peoples.

Notes

1 Examples from the UN system include the International Covenant on Civil and Political Rights (1966), the ILO Convention No. 169 on Indigenous and Tribal Peoples (1989), the Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and

Social Impact Assessments (2004), the Nagoya Protocol on Access and Benefit Sharing (2010), the Expert Mechanism on the Rights of Indigenous Peoples (2011), and the UN Guiding Principles on Business and Human Rights (2011).

2 PEFC (Programme for the Endorsement of Forest Certification) is an international, non-profit, non-governmental organisation dedicated to promoting Sustainable Forest Management through independent third-party certification. While it initially was the European timber trade certification system, it has become a global umbrella organisation that endorses national forest certification systems.

3 Regarding timber importation, most European countries most notably require adherence to these standards: ILO Convention No. 169, the UN Declaration on the Rights of Indigenous Peoples, and the Convention on Biological Diversity.

3 The Constitutional Dimensions of Decentralisation and Local Self-Government in Asia

A. Harding

Tribute

Over the span of Professor Jan Michiel Otto's long and fruitful career in academia, he has made many contributions that are relevant to this piece. He has an abiding interest in law and development. His work has also spanned public administration and decentralisation. Asia, especially Indonesia and India, has been at various times a focus or locus of his research, and his law and development activity. He has also supervised several doctoral candidates with interests in local government and decentralisation.

This piece does not in itself convey—so I convey now—the way in which Jan Michiel Otto has been an inspiration to scholars such as myself over the years. But for his inspiration and his friendship, I for one would certainly not have embarked on veins of academic work that have led me to think about areas such as (to name but one) decentralisation in Asia. The quality of his wisdom is not strained. Jan Michiel Otto exhibits wisdom in full measure, and it is right to salute such an outstanding career that has in so many ways made the world a much better place.

Introduction

Since the early 1990s, a largely unsung drive towards decentralisation has occurred across most of the world, including Asia[1] (Turner 2000;

Harding and Sidel 2014). In virtually every country, subnational autonomy (extending to local governments) has increased over the last half-century. In many cases, this development has been constitutionally sanctioned or mandated (Marks, Hoogh, and Schakel 2010). Decentralisation has conferred autonomy on regional, provincial, and local government authorities. This study focuses on the latter: local government authorities. Democratic elections have increased at the subnational level, extending the reach of democracy and constitutional government.

The benefits of decentralisation and empowerment of localities (i.e., the democratisation of local governance) are generally uncontested. The main questions focus on how far such a policy should go, with what resources, and what control mechanisms are appropriate (in terms of central-local relations and accountability of local authorities). At the very least, as one commentator has put it, "local councillors should not be dependent on national politicians for getting windows fixed in city hall" (Eaton 2001). Democratic legitimacy, as well as administrative convenience, efficacy, and efficiency, figure strongly in the mix of reasons for decentralisation, especially in larger countries. I will argue that in Asia, there are also local identity and cultural factors that exercise traction in the decentralisation project.

Decentralisation has largely been a topic for consideration by political scientists interested in why and how decentralisation occurs, how successful or legitimate it has been, or how it helps in managing issues of ethnic or religious identity (Toniatti and Woelk 2017). Public administration and development scholars have also looked to decentralisation to maximise administrative efficiency and effectiveness, or for fiscal balancing (Frerks, Otto, and Asmerom 1996; Nelson 2004). Legal scholarship has displayed little interest in this phenomenon, despite its constitutional importance regarding origins and consequences, and its substantial impact on administrative law (cf. Davidson 2017). There is, of course, persistent interest in the theory and practice of federalism, which has largely bypassed Asia. East of India, only Malaysia has a formally federal system (Harding and Chin 2014; Brand 2017).[2] More recently, the constitutional aspects of asymmetric devolution, which involves special rules for devolved entities, have merited attention (e.g., Leyland 2011). Asia has instances of this (e.g., Aceh in Indonesia, Muslim Mindanao in the Philippines, and Hong Kong and Macao in the PRC). However, this chapter's consideration of local government does not include such geo-political constitutional fixes (Ghai and Woodman 2013).

With increasing prosperity and decentralisation in Asia, local governments increasingly make more decisions and provide more services and programmes. These decisions and services are often the ones that most directly affect the lives of citizens. For example, local government deeply

affects spatial and development planning, the environment, and public health. Increasingly, local governments are even taking responsibility for delivering previously centralised services such as education, healthcare, and social welfare (e.g., Harding and Leyland 2011, chap. 4). Large cities, which are drivers and consumers of all aspects of development (save perhaps agriculture), have been granted unprecedented autonomy as they have grown in practice beyond their constitutional status as well as their legal boundaries. In Asia, the population of some cities exceeds that of many sovereign states across the world. Constitutional or public law has responded by increasingly granting special status to large cities, which often have equivalent power. The law has even granted such status to provinces and extended boundaries. In 2010, Taiwan recognised five cities besides Taipei as megacities entitled to enhanced powers (Yeh 2014, 46ff.; 2016, 146ff.). Bangkok and Pattaya have special statuses in Thailand's local government structure (Harding and Leyland 2011, 125). Gubernatorial elections in Jakarta are a matter of national importance (Burhani 2017). Phnom Penh has in effect swallowed up a neighbouring province (Biddulph 2004). Myanmar has three cities with special status (Naypyidaw, Yangon, and Mandalay), each with their own development councils and mayors. Meanwhile, the Philippines has created no less than 38 'independent cities' (Ishii, Hossain, and Reeves 2007).

All this has, of course, resulted in an intensification of local politics, especially in large cities. Those local leaders have in-turn been elected to national levels: Presidents Chen Shui-bian and Ma Ying-jeou of Taiwan (both former Mayors of Taipei), President Lee Myung-bak of South Korea (a former Mayor of Seoul), President Joko Widodo of Indonesia (a former Governor of Jakarta), and Philippines President Rodrigo Duterte (a former Mayor of Davao).

Decentralisation is not confined to large countries like Myanmar, the Philippines, and Indonesia. Even the small city-states of Singapore (16 town councils) (Li-ann 2009) and Hong Kong SAR (18 district councils) (District Administration 2018) have somewhat decentralised. Another small state, Brunei (with a population of less than 500,000), is an absolute monarchy, virtually without any democratic structures. However, even it has four administrative districts in which adherence to local tribal customs is allowed. Village headmen may be elected to act as mediators with the central government, creating a base for village consultation, even if not direct democracy (Commonwealth Network 2018).

Public law relating to local government has been almost entirely neglected in Asia. A notable exception is the Philippines, where the Local Government Code 1991 has received a good deal of attention (Gatmaytan 2014; Casis 1999).[3] Comparative work has hardly been undertaken at all. Law schools in Asia (or indeed for that matter in any Western

countries, except perhaps Canada and the United States) generally do not teach local-government law. This is a problem, especially since many legal practitioners will spend their careers dealing with issues of local democracy and various forms of public participation. These include planning law and other spatial or land issues such as compulsory acquisition, transport, and infrastructure. They can involve licensing, educational rights, and even social issues, such as the care of children and the elderly. They may cover public health and many other important local-government issues that immediately (and sometimes drastically) impact the citizens' lives and the local economy.[4] These issues also have constitutional dimensions. These include territorial governance, the division of powers, democracy (e.g., electoral rights and freedom of information), good governance (fiscal and policy transparency and accountability), and the role of administrative and judicial dispute-resolution.[5]

This underdeveloped legal-complex is as evident in Asia as it is elsewhere. In Asia, there is a state-centric nature of dominant-party systems and a post-war subordination of all power sources to the overriding objective of development, characteristic of the Asian developmental state. Therefore, one might expect (and argue) that these two factors make local government and its law a matter of small detail (Johnson 1995). This study will, to the contrary, show that in Asia, democratic local self-government has proceeded almost everywhere, irrespective of the developmental state. Indeed, local self-government calls into question whether the Asian developmental state is even still a relevant concept. Since the early 1990s, state after state in Asia has decentralised decision-making and service-delivery in ways that have probably contributed significantly to political and economic development.[6] Democracy and good governance cannot fail to have impacted constitutional government and democracy as a national way of life. Cities have especially grown to be powerful agents, with both national and international political impacts (Lin, 2018). Local government everywhere has galvanised local development and local initiative. Indeed, as Eslava puts it, decentralisation "has been the official channel through which local jurisdictions have been transformed into the new foci of development" (Eslava 2015, 54; Hardoy and Satterthwaite 1991).

At the same time, it bears recognition that political power and administrative capacity were centralised in Asia from the 1950s onwards, largely in pursuit of development goals. Asian developmental states (as dubbed by Chalmers Johnson and Alice Amsden) centralised power especially during the 1960s, 1970s, and 1980s (Johnson 1995; Amsden 1989; Woo-Cummings 1999; Tan 2004). In 1993, the World Bank lauded these states for having done so (World Bank 1993; The report looked at eight

high-performing Asian economies). As Kevin Tan argues, states need to acquire power before they can foster development (2004, 272). This idea fits with the traditional Asian culture of respect for, as opposed to distrust of, government. For many, the Asian developmental state is still with us. But it is nonetheless rarely recognised that these developmental states have recently, from the aspect of territorial governance, disaggregated to a surprising extent, in a trend that contradicts the prevailing narrative of centralisation (see Table 1). This aspect of state development seems to have been little noticed or examined in constitutional terms.

We will also see that decentralisation has contributed to nation-building in Asia by giving voice, expression, and continuity to local identities, which proliferate as deep cultural elements amongst Asia's teeming and extremely diverse populations (Chua and Engel 2015, 219). One overlooked objective of local government—or at least one outcome of decentralisation in Asia—has been to provide an opportunity for local difference, whether ethnic, cultural, or religious, to be expressed through the exercise of local autonomy. A striking example of this is the *nagari* of West Sumatra. The revival of *nagari* and the accompanying local customary (*adat*) traditions, is an outcome (even if not specifically intended) of Indonesian decentralisation (Benda-Beckmann and Benda-Beckmann 2013; Vel and Bedner 2015; Vel, Zakaria, and Bedner 2017). Another example is Mongolia's *bag*, which are the state's way of recognising and administrating nomadic communities. A phenomenon further from the conventional Western concept of local government can hardly be imagined. Similarly, Thailand's decentralisation process since 1997 has emphasised the preservation of customs and ways of life of 'traditional communities'; these are recognised as constitutional rights (and duties) in successive constitutions (see below).

Asia has suffered the downsides and upsides of development. Rapid development leads to a greater disparity between rural and urban areas. Despite the overall increase in prosperity, this disparity creates political tensions that can be seen most obviously in Thailand (Glassman 2010). But they seem to be present almost everywhere. Urban areas have also experienced a kind of powerlessness as megacities have grown without limit and corresponding governance reform. The state does not normally recognise their very existence as megacity-conurbations as they grow beyond their legal boundaries.[7] Both deprived rural communities and urban residents are left out of decision-making, adding to a demand for more local autonomy. The common Asian phenomenon of the flight from rural to urban areas leaves many urbanites with an insecure economic (or even legal) status in cities. This insecure status leads to pressing social issues in both rural and urban areas. Urban authorities, in particular,

have difficulties responding to this need and are often in conflict with the centre.

These factors, contributing as they do to the push for decentralisation, actually pose an analytical difficulty. Those who advance developmental states' claims to success argue that they have ruthlessly centralised power in the interests of rapid development. If this is the case, then why have these same states decentralised power over the last three decades to the extent that they have, without significant retraction, and apparently no differently than other parts of the world? It is, of course, more than just a linguistic point that centralisation is a precondition of decentralisation. Asia has generally experienced progressive centralisation of power throughout its history. Recent decentralisation appears to be somewhat of a reaction to over-centralisation in the decades following World War II. Indonesia is a striking example of this (see below). Decentralisation requires considerable political will and vertical mobilisation. It also requires a devotion of resources at the centre, spreading downwards towards the locality. Powerful central agencies also need to give up some of their power. We will see that decentralisation has generally not forced central agencies to surrender power to ambitious local players. Nor has it happened in a fit of absent-mindedness. Rather, it has been a top-down enterprise that represents a considerable and deliberate disaggregation of Asia's developmental states since the early 1990s. Table 1 shows that in most cases, decentralisation in Asia commenced during that decade. Therefore, we may see this development as part of Asia's democratisation process following the end of the Cold War.

In this article, I do not attempt to investigate all of these issues or provide final proof of the stated propositions. The latter go somewhat beyond the reach of constitutional study. My purpose is rather to try to answer three related questions about this process of decentralisation.

First, how, if at all, does Asian decentralisation reflect traditional, pre-modern forms of local governance? Are they simply modern, standardised agencies imposed territorially? Are local authorities 'organic' (i.e., evolving out of traditional forms of local governance) or 'administrative' (i.e., conforming to a centrally-conceived framework)?

Second, does constitutional law in Asia provide for decentralisation in the form of something like a right to local self-government, embodying entrenched existence and/or development of autonomous local powers and democratic processes? To be clear, I am not concerned here with central government agencies operating locally, or with local agencies implementing centrally-determined policies. Instead, I focus only on democratically elected, autonomous, local self-government. For the sake of focusing the argument and evidence, I exclude one-party socialist states (the PRC, Vietnam, Laos, and North Korea). However, one can also

find a surprising amount of genuine devolution of powers in those states as well, as a result of reform processes in recent decades (Harding and Sidel 2014, chaps. 2 and 4). I am principally concerned with cities and lower, sub-provincial, or sub-regional forms of government.

Third, and following from the first two questions, how is the relationship between local government and the centre provided for constitutionally or statutorily? Are local governments subject to having their powers taken away in certain circumstances?

The historical record: how traditional is local government in Asia?

In this section, we look briefly at the history of local government in Asia and ask the question: is Asian local government organic or administrative?

Although we tend to think of local government as organised and controlled from the centre in a kind of cautiously retractable beneficence, it is important to remember that modern constitutionalism in the West grew out of local government, not the other way round. Democracy itself started in the West as an urban phenomenon; in Europe, cities were generally democratic and often quite autonomous in some respects, both in the ancient world and in the medieval period. Standardisation of local government in England, for example, was only achieved in the late 19th century (Wilson and Game 2011, chap. 4). In Asia, on the other hand, local government has largely been directed from the centre, and state-building has mainly involved the conquest of smaller kingdoms by larger ones. The concept of the state tended to that of a centre radiating influence outwards in concentric circles of progressively diminishing influence; this is the galactic state formed in the shape of a mandala (Fukuyama 2011, chap. 7).[8] In Japan, the modern state emerged only in the last 150 years, and in South Korea and Taiwan, this occurred even more recently. The Meiji government abolished traditional local daimyo-ruled, castled domains and created new administrative local governments based on a standard pattern. Since the 1946 Constitution, local governments have been elected and autonomous. This approach characterises much of Asian local government as we see it now. Table 1 indicates that Asian local government is highly articulated, with three to six different levels of government and local elections almost everywhere.

To the extent that Asian local government has been anything other than the assertion of central power locally, it was in fact villages (i.e., the face-to-face communities) that counter-balanced the impersonal state. Villages acted as a focus for clan-based resistance and local identity, rather than for deliberate decentralisation (Fukuyama 2011, chap. 6). This tendency

of village resistance has somewhat continued into the modern era (Scott 2009). Colonialism continued and reinforced the trend of centralisation. It generally suppressed (or tried to suppress) localism, or tolerated it only by necessity or as a façade of indirect rule.[9] In British-ruled territories in the 20th-century, colonial administrations usually organised the local government, often using it as a sandpit for developing national democracy before the granting of independence.[10] In the Dutch East Indies in the early 20th century, there was a deliberate attempt at modest decentralisation to urban municipalities. However, these municipalities were based on the Dutch pattern rather than relying on the existing *desa* or *kampong*. To this extent, they were administrative rather than organic. Indeed, Van Vollenhoven described them as "Western enclaves in an Eastern society" (Otto 2015).

Insofar as there are typically or uniquely Asian types of local government, these are probably, therefore, more likely to be found at the village- rather than subnational-level. Asia does not generally have anything quite like India's *panchayat* republics, which were deliberately promoted as an indigenous form of governance during decolonisation (Thiruvengadam 2017, 96-98). But Asia does have traditional concepts of village government. These include Vietnam's *huong uoc* (i.e., village laws/contracts) (Viet Huong 2011), the *barangay* of the Philippines (Tapales 1992), Malaysia's *mukim*, Thailand's *tambon*, Java's *desa*, and West Sumatra's *nagari*. In this last case, the von Benda-Beckmanns have shown how decentralisation has resulted in a strong revival of these traditional local-government units since 1999 (Benda-Beckmann and Benda-Beckmann 2013, chap. 7). This revival is an example of organic local government (*nagari*) resisting the standardisation inherent in the administrative variety (*desa*) imposed from the centre (267). Village governance has not yet been the subject of any concerted comparative study in Asia. These units are traditionally named and have their traditionally named officials and (sometimes) deliberative councils or consultative mechanisms. Nevertheless, they seem to practically function as administrative units within the overall democratic governance structure rather than continuing traditional or pre-modern forms of local government in a new constitutional setting. The *nagari* appear to be an exception, representing both a rebellion against the standardisation (termed *desa-fication*) inherent in the Indonesian decentralisation project, and an expression of unique Minangkabau *adat*-based culture (267). Interestingly enough, although the 2014 Village Law allows villages to become *adat* villages, few outside West Sumatra have actually done so (Vel, Zakaria, and Bedner 2017).

Traditional culture normally comes into the picture through the use of local autonomy and community rights to preserve such culture and

identity (as in Indonesia, see above, and Thailand, see below). Amidst the tension in Asia between the impersonal state and local identity, using local autonomy for cultural preservation is surely one of the major purposes of having autonomy in the first place.

In Burma, as in India, the British attempted to use the village as a basis for administration, and the village head as a mediator. Furnivall writes of Burmese resistance in the face of British attempts to convert traditional, organic villages with their own headmen into constitutionalised, administrative units. The administrative system was not based on what was naturally there but rather attempted to distort it into something suited to the needs of the administration rather than the expression of custom and tradition (Furnivall 1957, 194ff.).

In Asian states, state-building was done somewhat at the cost of local autonomy. In pre-modern Thailand, for example, the Siamese state that ultimately modernised the country during the Bangkok period was constructed out of small kingdoms (*mo'an*) corresponding to modern provinces. The prevailing historical narrative is one of gradual centralisation of power, which eventually embraced the Malay provinces in the South and the Lanna kingdom in the North. Thus, there was nothing corresponding to modern local self-government. However, the detailed 1727 Edict on the Method of Provincial Administration embodies ideals of good governance, a response to rapacious ambitions of provincial governors. It ensures that governors report to the King regularly on all relevant matters. They must not take local women as wives or servants without their parents' consent, must not sit in judgment without being accompanied by a legal officer, and must generally exercise powers for the peace of the district and the happiness of the people (Wales 1934, 126-30). The accretion of power at the centre has now had to be balanced by decentralising reforms, not just in the interests of efficient decision-making, but to preserve identity, customs, and culture in a very diverse country (see below).

In this section, I have nuanced the idea of traditional Asian local government as entirely state-directed. We now move to the next question: what is the current, constitutional status of local government in Asia?

Local self-government in constitutional law

In this section, I explore the extent to which local government is a subject of constitutional law, as opposed to a subject of ordinary legislation. Most constitutions in Asia recognise the existence of, and the necessity for, local government as an aspect of territorial governance. It is indeed striking that constitutions often, after saying that the country is

'indivisible,' proceed to explain how it is divided, without explaining how these two ideas are supposed to coexist.[11] The question here is whether local self-government is entrenched in the constitution, and whether there is a right to elected local representation. Local government may be seen either as a convenient way of implementing national policy at the local level or as a means whereby localities can decide and prioritise actions according to their own needs and wishes. The concept of local self-government indicates a form corresponding to the latter as opposed to the former perspective.

Here we can recognise two broad types of cases. Either local government is essentially statutory, or it is constitutionally entrenched.

Local government regulated by statute

In the first case, local government is either not recognised at all, or is mentioned only as a subject for legislation. Even this limited entrenchment is at least recognition that local government has some kind of quasi-constitutional status.

Cambodia

Cambodia provides an example of this (Muny 2016; Cummins and Leach 2012). Articles 126-7 of the 1993 Constitution provide that Cambodia shall be divided into provinces (*khett*) and municipalities. It writes that provinces shall be divided into districts (*srok*), districts will be divided into communes (*khum*), municipalities shall be divided into districts (*khan* and *sangkat*), and that all of these shall be governed in accordance with organic law. These provisions leave the power to delineate local governments (i.e., their powers, governance, and central-local relations) to the central legislation. However, the provisions have not prevented attempts to decentralise power since the 1993 Constitution came into effect, such as the government's Seila project. The UNDP's Cambodian Area Rehabilitation and Regeneration 2 project supported the Seila project in 1996 (Biddulph 2004). In sum, such decentralisation is not, precisely, constitutionally mandated. Similarly, Articles 117-18 in South Korea's Constitution recognise local government and assume there are elected local councils. However, the details are left to organic law.

Malaysia

In Malaysia, local government is a state function and is recognised by the Federal Constitution. The Constitution provides for a National Council on Local Government. It also allows the federation to enact legislation on

local government for the sake of uniformity, which it has done (Harding and Sidel 2014, 155). However, there is no right to local democracy. In fact, local government elections were suspended as an emergency measure in 1965 and then abolished on a permanent footing in 1976. The demand for restoration of local government elections nonetheless persists. In spite of the abolition of elections, a legal framework exists for holding them whenever they are reintroduced, even if it is not currently, legally possible to use this framework (160-1). As matters rest, local authority members are appointed by state governments, while the federal government appoints the *Datuk Bandar* (Mayor) of the Federal Territory of Kuala Lumpur. Furthermore, courts ruled that it was unlawful to attempt to hold local quasi-elections in the state of Penang by consulting the electorate on local government appointments.[12]

One can at least say that in this case, given the constitutional status of the National Council on Local Government, it would be difficult to proceed on the basis that the continuance of local government (as opposed to its democratic nature) is entirely a matter of parliamentary discretion.

Myanmar

Myanmar's 2008 Constitution provides for elected state and regional assemblies.[13] Altogether, Myanmar has no less than six levels of government (see Table 1). The states and regions, of which there are seven in each category, have a similar status to each other as well as to the union territory of Naypyidaw, the five Self-Administered Zones, and the single Self-Administered Division (Harding and Sidel 2014, chap. 6). States are defined by ethnicity, or the 'national races' in Myanmar discourse, whereas regions comprise the Burman ethnic majority (110). Each state/region is divided into districts, then townships, then wards and village tracts, and finally into villages. The Constitution recognises all of these.[14] Townships form the basis of representation in the lower house, while states and regions form the basis of representation in the upper house, rendering Myanmar similar to a federal state.[15] Of these local entities, only the states and regions have their own elected governments and assemblies. The entities at the lower levels are administered from the centre by the powerful General Administration Department (GAD), which falls under the Ministry of Home Affairs. However, the boundaries of a township cannot be altered without the consent of a majority of its electors.[16] As part of the 2008 constitutional process, three or more adjoining townships were allowed to join together to form a Self-Administered Zone, based on their common ethnicity (different from that of the state/region in which the townships are situated) (113ff.). This

is a form of ethnic-minority-identity management to deal with ethnic enclaves.

In 2012, during the government of President U Thein Sein (2011-16), indirect elections of ward and village tract officials were introduced.[17] But there are widespread feelings of the need for local government reform that would make it more democratic and more effective. This is just one of many governance challenges Myanmar faces, which include reform of the GAD itself (Arnold 2016). The future nature of local government is thus currently in doubt.

These examples are typical in delegating to organic law the detailed powers and modes of governance for local government. They also are typical in refraining from establishing a citizen's constitutional right to elected representation in autonomous local governments. This does not mean that such rights do not exist as a matter of ordinary law. However, the examples of Malaysia and Myanmar show that in the absence of a constitutional right to elect local representatives, there is a real danger that such a right will not be granted (or once granted, it may be withdrawn).

We can, however, look at some examples, which indicate the second type of approach in which there is a constitutional right to elected, local self-government.

The right to elected local self-government

Philippines

The Philippines has historically been a decentralised state, due to a combination of factors. Hutchcroft contrasts the "centralising ethos" of Thailand's prefectural reforms in the late 19th century with the lack of any such history in the Philippines (Nelson 2004, chap. 6). A combination of a political culture of localism and deliberate policy during the period of American rule (1898-1946) ensured that local self-government along the Jeffersonian pattern was entrenched, even before national democracy came about. The Philippines was one of the earliest states to engage in decentralisation, through US-facilitated projects in the 1960s. During the post-Marcos period (1986 to date), there has been a strong debate and political emphasis on the idea of local government reform as an antidote to the Marcos period's centralisation of power. This developed into "one of the world's most ambitious decentralising initiatives" (313). After much debate, Congress passed the Local Government Code, one of the most far-reaching and impressive local government codes in the world. Therefore, the Philippines Constitution of 1987 takes local government very seriously as an entrenched constitutional subject. Article X entrenches local autonomy and allows local authorities to create

their sources of revenue, subject to limitations "consistent with the basic policy of local autonomy." It requires[18] a local government code (which Congress enacted[19] in 1991), which shall provide for a more responsive and accountable local government structure. This code is to be instituted through a system of decentralisation, with effective mechanisms of recall, initiative, and referendum. It allocates powers, responsibilities, and resources among the different local government units.

Given the ubiquitous problem of local government finance, s.7 of Article X is of special interest:

> Local governments shall be entitled to an equitable share in the proceeds of the utilisation and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.[20]

These local authorities and the preservation of their boundaries are also protected by a local plebiscite requirement regarding any proposed changes. Local authorities are empowered to "group themselves, consolidate or coordinate their efforts, services, and resources for purposes commonly beneficial to them." The President is required to provide regional development councils or other similar bodies composed of local government officials, regional heads of departments and other government offices, and representatives from non-governmental organisations within the regions. This is intended to support administrative decentralisation, to strengthen the autonomy of the units "therein," and to accelerate the economic and social growth and development of the regional units.

Thus, the Philippines' Constitution effectively recognises a right to the continuous existence of local authorities, to local autonomy in power and finance, and to a supportive and developmental national policy on local government. Currently, there are proposals to convert the Republic into a federation. Each of the proposed models would render the Republic even more decentralised than it already is. But it is not clear how this development (if it comes to pass) will affect local government (see, e.g., Malaya 2017).

Thailand

Unlike the Philippines, Thailand has historically been highly centralised as a prefectural state since the late 19th century, when Bangkok asserted its power over the Lanna Kingdom in the North and the Malay provinces in the South (Harding and Leyland 2011, 123). A process of progressively

decentralising powers and providing for local democracy at every level has occurred under the recent democratic constitutions (i.e., those established in 1997, 2007, and 2017). Neither Thailand's historical disposition towards centralisation nor the oscillation between military and civilian government since the end of the absolute monarchy in 1932 has interfered with this process. The process contributes to nation-building in two ways.

First, it encourages the practice of democracy under the Thai mantra of "the democratic regime with the King as head of state."[21] The development of local government (and also provincial government) is indeed a state duty,[22] the process of which has been continuously implemented since the enactment of the Decentralisation Plan and Process Act 1999. This development of local government involves electoral democracy[23] as well as what the current Thai Constitution of 2017 prescribes as local autonomy. The latter occurs in the form of "self-government according to the will of the people in the locality."[24] This decentralisation also embraces democratic participation and freedom of information, with an emphasis on utilities and services.

Secondly, the 2017 Constitution specifically provides for the preservation of local communities, heritage, cultures, and customs. This is a particularly important factor in the most ethnically diverse areas of Asia, such as Northern Thailand. This is expressed as both a democratic right of local communities and as a duty of both state and citizens.[25]

Thailand also has a complex and democratic system of provincial and local government (see Table 1). The functions exercised by these different types of authority are typical in that they include matters close to the land and the environment.[26] What is slightly unusual in Thailand is the power to provide social welfare. Health services are provided nationally, but welfare is a local function in the absence of any national scheme. Development coordination is a function of provinces. All levels of provincial and local government are elected. Even tiny villages (*mooban*) elect two representatives to the local *tambon* as well as their village heads (*kamnan*), from whose number the *tambon* head is elected. In practice, the restrictions placed on how local authorities can spend their limited revenue, as elsewhere in Asia, prevent local government from being truly autonomous. For example, the provincial governor must approve local budgets. Local authorities are highly dependent on higher levels of government, even though most of their funding is raised locally. Central government grants are tied to specific programmes and are mostly dispensed in a politicised and unsystematic manner (Harding and Leyland 2011, 131ff.). Despite the problems in consolidating viable democracy at the national level, the everyday practice of the 'democratic regime' in Thailand, with its regular, tiered elections and frequent public

hearings, is clearly consolidated at the local level. This process began with the "people's constitution" of 1997 and has continued, in spite of military rule between 2006 and 2008, and between 2014 to date (Ginsburg 2009).

Indonesia

Indonesia represents the clearest case of urgent political necessity for decentralisation, as a way to disaggregate an oppressively centralised developmental and corrupt state. In addition, the danger (as it was seen in 1999) of the Republic breaking into several units needed to be averted through deep and democratic decentralisation to regencies and cities. After almost 20 years of this process, provinces, regions, cities, counties, and villages have all gained enhanced powers, and all now elect their leaders. Decentralisation must be judged a success in terms of its objectives, despite the fact that all has not gone smoothly or successfully (see Butt and Lindsey 2012, 185ff.).

Two laws passed in 1999 (i.e., the Regional Autonomy Law and the Fiscal Balancing Law), which commenced the process, were provided constitutionally to ensure their entrenchment. This was done in the 2000 amendment to the Indonesian Constitution, through Articles 18, 18A, and 18B (Butt and Lindsey 2012, 158ff.). Under these provisions, new Regional Autonomy and Fiscal Balancing Laws were also enacted in 2004. They returned some powers to the centre in a modest form of re-centralisation. It is clear from these Articles that in Indonesia, there is a clear constitutional right to democratic local self-government. Under Article 18, Indonesia is divided into provinces, which are in turn divided into regencies and cities (see Table 1). All of these entities are guaranteed the wide-ranging autonomy of their governments under elected leadership and have their own elected representative bodies and legislative powers. The relative powers of central, provincial, regional, and city governments are regulated by law, with due regard to "regional uniqueness and diversity." In a country with more than 300 officially identified ethnic groups, six official religions, and more than 17,000 islands, this reference to uniqueness and diversity is no mere constitutional verbiage. The diversity is further recognised by the provision in Article 18B that the state (as is the case in Thailand) recognises and respects *adat* law communities and their traditional rights. Village governments are not constitutionally entrenched but are provided by statute. Even they have elected heads, deliberation boards (whose members are selected by traditional deliberation and consensus rather than election), and powers (including legislative powers) over their *hak asal-usul desa* (i.e., village customary and original rights) (165).

The reforms did not stop there. A new assembly of regional representatives was created (the *Dewan Perwakilan Daerah* [DPD] or Assembly of Regional Representatives) to ensure specific representation of regions in the legislative process. These representatives are also members of the upper house (the *Majelis Permusyawaratan Rakyat* or People's Consultative Assembly), which also comprises of the lower house members (*Dewan Perwakilan Rakyat* [DPR] or Assembly of People's Representatives). Although the DPD does not have the power to make its laws, it can provide input into the legislative process and present bills to the DPR (Butt and Lindsey 2012, 58). Local elections fall under the Election Commission. Local electoral disputes, of which there have been many, are dealt with by the Constitutional Court (185ff.).

Opinions vary as to the success of Indonesia's decentralisation efforts. Initially, some confusion reigned as decentralisation started to occur in advance of legal and constitutional provisions. If we are to judge by enhanced democratisation, the reforms have been successful. A similar judgment is warranted if we look at the outcome of maintaining the integrity of this diverse republic. Local initiative has been enhanced, and local identity has been given an opportunity for expression. Aceh has achieved a significant measure of autonomy under its Law on Special Autonomy for Aceh 2001. In West Sumatra, decentralisation has resulted in the revival of its traditional customary (*adat perpatih*) laws and offices, to the surprise of many and the delight of the provincial Minangkabau people. It has also resulted in a revival of the pre-colonial *nagari*, which had been suppressed during the New Order period by the imposition of administrative village governments (*desa*) (Butt and Lindsey 2012, 165). Bali, with its traditional Hindu culture, has also managed to retain its distinctiveness through decentralisation (Benda-Beckmann and Benda-Beckmann 2013).

Lindsey and Butt conclude that the 1999 Law on Regional Government "radically reconfigured the Indonesian polity, transforming it from one of the world's most authoritarian and centralised to one of its most democratic and decentralised" (Butt and Lindsey 2012, 161). The best way of indicating the enormous breadth of decentralised powers is to list the powers reserved to the central government, as the rest remain with regional governments. These powers include foreign affairs, defence, security, judicial affairs, monetary and fiscal policy, and religion.[27]

Overall, Indonesia's decentralisation has not been perfectly implemented or realised and can be criticised for allowing many opportunities for local corruption. However, corruption is a national (rather than just a local) problem (Butt 2012, 8; Nordholt and Klinken 2007). Given the dire predictions in the late 1990s of Indonesia's imminent fragmentation and

the demise of its young democracy, decentralisation must largely be seen as a considerable success.

Taiwan

Since Taiwan embarked on a transition to a multi-party democratic system, there has been a parallel development of local self-government. This process was reportedly started in 1954, with the *Outline for the Implementation of Local Self-Government in Every City and County of Taiwan*. However, according to Yeh Jiunn-rong, local self-government was "make-believe," due to Kuomintang manipulation of local elections, despite an expansion of local autonomy in the 1960s. This changed with Taiwan's democratic transition from 1990 onwards (Yeh 2014, 44). In 1990, the Council of Grand Justices (now Constitutional Court) in JY Interpretation No. 260 held that local governments had no power to legislate under the Constitution. This problem was resolved by a 1992 constitutional amendment, creating Additional Article 8 of the ROC Constitution, which guarantees both legislative power and a right to elected (instead of appointed) local governments. These rights were implemented by the Self-Governance Act for Provinces and Counties[28] and the Self-Governance Act for Special Municipalities. Both were passed in 1994, swiftly followed by the first local elections of governors and mayors in December 1994. A further statute, the Local Government System Act 1999, and the upgrading of five cities to special municipality status under revisions to the 1999 Act completed the present system of local government. There are now six special municipalities, 13 counties, and three cities. Under those are 368 sub-divisions, comprising 164 districts, 122 rural townships, 38 urban townships, 14 county-controlled cities, 24 indigenous mountain townships, and six indigenous mountain districts. It is noteworthy in this story that the first party created in opposition to the Kuomintang, the DPP, was created in 1986, at the cusp of democratic change. The DPP gained its first victories in local elections. Mayoral elections, especially in Taipei, have proved a major arena for party politics in Taiwan, and the Constitutional Court has mediated conflicts between central and local governments.[29]

These examples indicate that in many parts of Asia, democratically elected and centrally supported local government is well entrenched constitutionally. Indeed, it might well not be an exaggeration to say that in such instances, local democracy is as deeply entrenched as national democracy.

The question then arises, how does local government relate to central government? We now turn to this topic.

Central-local relations

The question of central-local relations comes down to the question, what powers does a central government have to control local governments, and how or when are those powers exercised?

One would expect that in a system of central-local relations there would be circumstances, albeit exceptional ones, in which the central government (or an administration above local government) could take over the functions and operations of a local government, or direct it to take or refrain from particular actions. Such reserve powers, where they exist, are necessarily limited to special circumstances such as extreme mismanagement or dereliction of duty. Therefore, they are not suitable for exercising routine or continuing control over local government, although they do set some limits to local autonomy. For example, in studying the Fukushima incident in Japan, Matsui finds that Japan's central government had too little power to act decisively in an emergency and that local governments had too little power to orchestrate recovery after the emergency was over (Harding and Sidel 2014, chap. 7).

What is quite striking in the case of Asian states is the absence of such oversight provisions in the law or the constitution. In those systems where local autonomy is guaranteed constitutionally, such reserve powers are indeed rare. For example, Indonesia's Law on Regional Autonomy of 2004 provides for the abolition or merger of a region (not for it being taken over) if it is unable to implement regional autonomy.[30] Regional heads are directly elected and can only be dismissed by the regional assembly through a tortuous procedure. Dismissal is only available under a violation of the oath of office or failure to fulfil duties. Even then, the assembly must pass a motion supported by at least two-thirds of those present, which must be at least three-quarters of the total membership. The assembly must then refer their decision to the Supreme Court, which must examine and try the matter within 30 days. If the Supreme Court approves the decision, the assembly must pass a motion (similar to the Supreme Court referral) to refer the matter to the President. The President must then dismiss the person within 30 days.[31] This does not apply to the commission of serious criminal offences, in which case the President may simply dismiss the offender.[32]

Of course, there are other means of controlling local government. Finance is a perennial problem for local governments almost everywhere. Naturally, the impact of exercising local authority powers will be limited if there is inadequate funding. Therefore, local governments tend to find imaginative ways of raising money. Indonesia's decentralisation has been particularly problematical in this respect but illustrates how central government can place some control on both legislation and finance. The

central government has power[33] to invalidate local by-laws (*Perda*) on the grounds of being contrary to the public interest or higher law. The government has extensively employed this power, despite having only 60 days to review such laws. After that period, the by-laws are in force, and the government loses its power of invalidation. Nevertheless, out of 15,000 *Perda*, the government invalidated 951 between 2009 and 2012. As one would expect, the most common issue here has been by-laws designed to raise local revenue through local taxes and levies in ways that contradict central revenue streams. Apart from this, the Supreme Court has the power to invalidate local legislation on grounds of being contrary to higher law or because its enactment violated legislative procedure.[34]

Even so, there seems to be little evidence across Asia of any deliberate tightening of purse strings as a means of rolling back local government powers. Indeed, it may well be that such methods would be found unconstitutionally undermining local autonomy. As we have seen above, in the Philippines, a local government's fiscal autonomy is constitutionally protected. Local governments are entitled to an equitable share of the national wealth proceeds that are developed within their respective areas. In Indonesia, there is a separate law on Fiscal Balancing that ensures that the central government treats local governments fairly in this regard.[35] To the extent that there has been a roll-back of regional governments' powers in Indonesia following decentralisation, this has, under the revised law of 2004, taken the form of giving more powers to provinces. This has included supervisory powers over regional governments and provinces acting as agents of the central government. Arguably, the problem was not so much the difficulties with decentralising power to regional governments, which was done to outflank separatist tendencies in some of the provinces. Instead, the problem was that provinces had been unreasonably restricted in their decision-making capacities (Butt and Lindsey 2012, 171-2). Perceiving local government power as essentially legislative has the consequence that control over such power is seen as control over legislation. This system has created some confusion in Indonesia over the validity of local by-laws, which have been enacted profusely over the last 20 years. Administrative courts can review any administrative decisions made by local governments.[36] But this is a system for citizen (rather than central) control over local governments. The lack of administrative mechanisms to call-in or reverse local decisions seems to be attributable to the constitutional entrenchment of local government autonomy. The overall picture is one of considerable legal uncertainty, even 20 years after the commencement of reforms. However, it cannot be denied that the outcome is one of considerable autonomy for local governments.

In the Philippines, the Code deals extensively with 'inter-governmental relations.' Although the President exercises supervisory powers over local governments, this has to be exercised through the relevant intermediate government and is confined to keeping local governments within their powers, rather than calling in their decisions. Intermediate governments have their own supervisory powers, but these again are confined to ensuring lower levels of local government act within their powers.[37] In coordination efforts, local governments must be allowed to participate in planning and implementation. They can request the President to order fiscal and other assistance.[38] Again, the outcome is one that exemplifies local government autonomy.

Taiwan's case is described by (Yeh (2014) as one of "hybrid and dynamic transitional federalism," where local government elections were the basis for the emergence of a multi-party system. Therefore, progressive empowerment of local governments renders the legitimacy of the centre simply retaking control as superficial. Conflicts between local and central governments have indeed been fierce, given the usual situation of political-party antagonism. In two notable cases, the National Health Insurance and Local Elections cases, the Constitutional Court has acted as the arbiter. In both cases, it crafted a solution designed to lower the political temperature rather than simply endorsing the central government's position.

Where local-government autonomy is constitutionally entrenched, we have seen that it becomes difficult for a central government, short of using drastic emergency powers, to exercise real control over local governments. Central governments are thus usually reduced to invoking legal (rather than administrative) processes if they wish to control or reverse local governments or oust local government leaders. On the other hand, where local government is provided for statutorily, the extent of local-government autonomy is one for the national legislature to decide, absent constitutional restraint. But again, what is quite surprising is that there appears to have been no serious attempt to roll back or exercise greater control over local government powers. Malaysia is an exception here, having moved from strong elected city governments (1953-1965) to emasculation (post-1965). At the root of the narrative of local governments' increasing autonomy is the fact that these governments, across almost all of Asia, are elected and locally accountable. They enjoy a legitimacy that makes concerted control from the centre virtually impossible, short of glaring corruption or jurisdictional illegality.

Analysis and conclusion

Our knowledge of the constitutional functioning of local government in Asia is still quite limited. There are few studies comparing the legal structure with its real-life operation. This is a vast and complex topic, with many implications for national constitutionalism, central-local relations, and governance at the increasingly important levels of local decision-making and service delivery. What is especially noticeable from this brief study is that local democracy is extensively provided for in law, irrespective of whether the national constitution is genuinely or continually democratic, and irrespective of whether the constitution embodies a right to elected local self-government. In all the cases considered here (see Table 1) democratically elected bodies exist sub-nationally at least at one level, and in most cases at more than one level (Brunei is an exception; see above). There is, as it turns out, a remarkable degree of uniformity in local governments across Asia, despite the obvious differences in the region's political systems, which provide examples of multi-party democracy, military government, and dominant-party systems.

Local government is a fruitful area for both research and policy development. Asia has much to offer in terms of solutions to the problems of a plural society and the need for local autonomy. In this field, we have seen that expression of local culture is an element of this need. However, the pressures that tug the political system and administration towards decentralisation are in other respects probably little different from those in other parts of the world. The practice of democratic values of elections, accountability, integrity, freedom of information, and public participation needs to be entrenched at the local level as a way of life. To a large extent, this has been provided for. Everyday observance of these principles is not only itself desirable, but it helps to entrench these same principles at the national level. This is a process that may be observed all across Asia. However, it is rarely recognised how important local government can be in moving that process forward.

From this article's brief survey of local government in Asia, the main conclusion is that decentralisation in the form of entrenched local government autonomy has been provided for, and appears to contradict the Asian developmental state's assumption that centralisation of power is the route to successful development. Whether one considers that decentralisation has occurred during and in spite of the ascendancy of the Asian developmental state is largely a question of whether one considers that state to still exist or to be merely a historical description. My own view is that the state has not ceased to be interested in development, but there is an evolution in how it sees and implements development, and how it constitutionally responds to the changed conditions of

Table 1 *Subnational government in Asia*[1]
NB. "Munic" = Municipality

Country	*Level 1*	*Level 2*	*Level 3*	*Level 4*	*Decentr-alisation*	*Entrenched*	*Local election at level*
Brunei	District (4)	Sub-district (38) Munic (4)	Munic (11)	Village (329)	Historic	Yes	4
Cambodia	Province (24)/Munic (1)	District (121)	Commune (1609)	Village (13,406)	1996	No	1,2,3
Hong Kong SAR	District (18)	-	-	-	1999	No	1
Indonesia	Province (34)	Regency/city (508)	Districts (6,543)	Village (83,000+)	1999	Yes	1,2,3,4
Japan	Prefecture (47)	City (790)	Town (745)	Village (183)	1947/1999	Yes	1,2,3,4
Korea S.	Province (9), City (8)	City/county/district (263)	Town, neighb'd (3,487)	Village (?)	1999	No	1,2,3
Malaysia	State (13)	City (12), Munic (39)	District (86), Division (17)	Subdivision (65)	Historic	Yes	1
Mongolia	Province (21)	Subdivision (331)	Nomadic group	-	1992	Yes	1
Myanmar	State (7), Region (7)	Self-admin. (6)	District (67)	Township (330)	2008	Yes	1,2
Philippines	Province (81), Aut. Region (1)	Indep. city (38)	City (145), Munic. (1,489)	Village (42,029)	1991	Yes	1,2,3,4
Singapore	Town (11)	-	-	-	1988	No	1
Thailand	Province (75), City (2)	Munic (1,456)	Village (7,255)	-	1997	Yes	1,2,3
Timor Lt	Munic (13), SAR (1)	Village (2,336)	-	-	2014	Yes	1,2

[1] This table somewhat oversimplifies the levels of local government, which can be extremely complex, as, for example, in the Philippines, where the various levels merge into each other; may differ internally, as in Malaysia (East Malaysia has a different structure from West Malaysia); or may be incomplete (as in Myanmar which has, below level 4, levels 5 and 6: wards/village tracts and villages). I have used English terms in this table for ease of comparison, but it is noteworthy that in the various constitutional texts considered here even the English versions use vernacular terms, which are generally historic. This does not necessarily of course imply the survival of traditional *modes* of local government, but may give expression to local identity in some fashion.

decentralisation. Indonesia is a striking example of this. In Supomo's "integralist state," the idea of autonomous local self-government would seem to be a complete contradiction of such conception of the state. However, the sea-change of 1998 rapidly ushered in a period of intense, deep, and probably irreversible decentralisation. The Philippines Local Government Code of 1991 is also a deeply impressive piece of legislation containing many innovative provisions. Decentralisation has not proved to be an inoculation against the further dismemberment of the Philippine state. On the contrary, it has further led to demands for decentralisation in the form of federalisation.

It is striking that in almost all cases across Asia, decentralisation began in earnest during the 1990s (see Table 1) at the height of globalisation and after the end of the Cold War. That process was by no means limited to a brief moment in history. On the contrary, decentralisation has advanced and found a better balance between centre and local powers. Local self-government in Asia is now not just a useful development strategy but has become a defining, constitutionally entrenched fact of democratic existence.

Notes

1 Asia is defined here as Northeast Asia and Southeast Asia, excluding other parts of Asia and also the one-party states of Vietnam, Laos, and China.

2 In 2018, peace talks in Myanmar and proposals in the Philippines are embracing the possibility of moving towards federalism in both of these states. Some observers already describe Myanmar as a quasi-federation.

3 There has also been extensive study of Indonesia's decentralisation (see below) and local government finance in China, both of which lie outside the scope of this piece.

4 A study of planning law in Kuala Lumpur revealed that lawyers hardly deal with planning matters at all except for occasional instances of judicial review and planning appeals, relevant work going mainly to architects (Harding and Sharom 2007, 136). So it may be that the neglect of this area is actually to the detriment of the legal profession.

5 The Constitutional Courts of Indonesia, South Korea, and Taiwan have made many important decisions relating to local government. Examples from Taiwan are given below.

6 Although 1990 may be seen as a turning point, it should also be recognised that some states had mounted extensive decentralisation projects during the 1970s and 1980s, and even in some cases the 1960s (Rondinelli 1983).

7 Kuala Lumpur, for example, has expanded far beyond the Federal Territory into the state of Selangor, but the law does not recognise the integrated nature of the conurbation, extending as it does over many local-government areas.

8 In the idea of a 'galactic state,' which is much concerned with the geo-body of the state, consciousness lies at the centre and satellites surround it (Tambiah 2013). Gilbert Rozman presents an interesting argument that central-local relations in East Asia (China, Taiwan, Japan, and Korea) can be reformulated on the basis of a localist interpretation of Confucianism. He finds evidence that Confucianism, rather than

encouraging centralisation, actually sought to balance the power of the state with institutions lying between the state and the family. The implication is that they have not in fact done so in recent times (Bell and Chaibong 2003, chap. 7).

9 For an example of Indonesian history, see Benda-Beckmann and Benda-Beckmann (2012, chap. 6).

10 For example, in Malaya, see Harding and Sidel (2014, 143). Malaysian democracy started with local elections in the early 1950s. Similarly US democratisation in the Philippines under the Taft administration started with local government.

11 For example, art. 1(a) of Cambodia's 1993 Constitution states, "The State of Cambodia cannot be divided [...]," while art. 71 states, "The territory of the State of Cambodia is divided into [...]."

12 Government of the State of Penang and Anor v Government of Malaysia and Anor [2014] 7 Current Law Journal 861.

13 2008 Constitution of Myanmar, s.13.

14 Ibid., s.51.

15 Ibid., s.74.

16 Ibid., s.53.

17 Ward and Village Tract Administration Law 2012, chap. IV.

18 1987 Constitution, Article X, s.3.

19 Local Government Code 1991 (Republic Act 7160).

20 There is a useful comparison here with Germany's Basic Law, Article 28, which guarantees autonomy to municipalities in terms of both competence and financial resources. Relatively few European constitutions have provisions guaranteeing local government autonomy (Rosenfeld and Sajo 2012, 616).

21 Currently, under military government since 2014, no local or national elections have been held, but it was announced that local elections would precede national elections during 2018 (Vietnam Plus 2017).

22 2017 Constitution, ss.76, 250.

23 Ibid., s.252.

24 Ibid., s.249.

25 Ibid., ss.43, 50, 57, 76.

26 Ibid., ss.43, 58.

27 Constitution of Indonesia, Art.10(3).

28 Taiwan province was streamlined with the central government, which in effect abolished Taiwan province as a separate government.

29 See JY Interpretations 550 (national health insurance costs) and 553 (postponement of elections) in Yeh (2014, 51-3).

30 Regional Government Law 2004, Article 6.

31 Ibid., Article 29.

32 Ibid., Article 30.

33 Ibid., Article 145(2).

34 Butt and Lindsey (2012, 172-3); See, further, Vel, Zakaria, and Bedner (2017) on the 2014 Village Law.

35 Law on Fiscal Balance 1999.

36 Law on the Administrative Courts 1986.

37 Local Government Code 1991, ss.25, 29, 30.

38 Ibid., s.25.

4 Indeterminacy, Uncertainty, and Insecurity

K. von Benda-Beckmann

Tribute

Throughout his career, legal certainty has been a constant concern in the work of Jan Michiel Otto.[1] It was a major issue in his empirical research on state administration in Egypt and Indonesia. It has been a driving force in his comparative work. His inaugural lecture was also devoted to the topic (Otto 2000b). His contributions to the rule of law are premised on a deep conviction that it is vital for legal certainty as a core pillar of a well-functioning society and its economy. In this perspective, uncertainty is an anomaly, a result of a poorly functioning state, while certainty is the norm.

Introduction

It seems fitting in this collection of papers to contribute to Otto's interest in legal certainty by posing some questions that emerge from an anthropological perspective. Let me be clear that in no way do I want to question that more legal certainty is desirable in many regions of the world. Many regions suffer severely from a lack of it. However, the logic of legal certainty through the rule of law deserves reflection. What uncertainty should be addressed? A good starting point is the insight that a fundamental level of uncertainty is not necessarily an anomaly. Certainty is perhaps more of an exception than is generally assumed. As

Sally Falk Moore (1978, 48-49) formulated it, "social life is presumed to be indeterminate except in so far as culture and organized or patterned social relationships make it determinate." Organisations, including polities such as the state and its laws and regulations, are never more than "islands of determinacy in a sea of indeterminacy" (Benda-Beckmann and Benda-Beckmann 1994, 7; Moore 1978, 41).

The second set of issues is somewhat of a subset of the first and concerns legal certainty. So much energy is put into attempts to generate more legal certainty that one might get the impression that the more legal certainty there is, the better it is for society. At face value, this seems entirely convincing. However, Moore's analysis implies that the human condition is one of only partial determinacy. The question then is where the comfort zones of certainty and uncertainty might be. To be sure, too much indeterminacy and uncertainty are threatening. But too much determinacy, or certainty, may be suffocating. Both would ultimately make social life impossible. Social life can be no more than partially determinate. Certain degrees of uncertainty are necessary, but the levels of certainty and uncertainty that people can tolerate vary a great deal. A well-functioning legal system offers both the uncertainty that comes with freedom and certainty. To put it differently, a well-functioning state's legal system offers certainty in where it does and does not allow freedom. The problem is that states often play an ambivalent role. They may simultaneously be an important source of desired freedom (i.e., uncertainty) and undue uncertainty.

In this essay, I want to briefly discuss three major problems related to the state's role in undesirable legal uncertainty: Incommensurability of legal regulations, corruption and incapability of the state administration, and hyper-regulation. Incommensurability is an issue that has been especially relevant in former colonial states. There it has been acknowledged as a serious problem since colonial times but has acquired importance in industrialised societies with increasing globalisation. Corruption and incapability are chiefly problems in ill-functioning states. Hyper-regulation pertains mainly to well-functioning states but has an impact on ill-functioning states as well.

(In)Determinacy and the social

Moore developed her ideas about (in)determinacy in a profound discussion of the study of law, which critically reviewed the then current anthropological approaches to law and regulation (Moore 1978). She wrote at a time when the once-dominant structural-functionalist perspectives that focused on order were being challenged. Processual

approaches that emphasized conflict became en vogue. Moore took issue with the dichotomies that dominated these discussions and from which researchers were to choose, such as order versus conflict, regularity versus change, structure versus process, and many more. She questioned the suitability of such dichotomies. Instead, she regarded these characteristics as co-existing aspects of social life that were to be studied in conjunction with one another. Therefore, she called for an analytical anthropological framework to take account of continuity and change, micro- and macro-perspectives, all premised on the postulate that "social life should be considered to be one of theoretically absolute indeterminacy [...] an underlying, theoretically absolute cultural and social indeterminacy, which is only partially done away with by culture and organized social life, the patterned aspects of which are temporary, incomplete, and contain elements of inconsistency, ambiguity, discontinuity, contradiction, paradox, and conflict" (Moore 1978, 48-49). Such a model, she suggested, allows for studying the interrelated ways by which indeterminacy and determinacy, defined as that which is culturally or socially regulated or regularised, are produced and reproduced (53). It includes both intentional regulation and things that become intentionally or unintentionally regularised, such as patterns of behaviour that emerge over time through interaction. In short, only part of social life is regulated, and much regulation leaves considerable scope for freedom and thus uncertainty. Indeterminacy is the structural condition from which uncertainty in social interaction derives. And uncertainty may generate feelings of insecurity. One might say that rule of law mechanisms address the unintended uncertainties in the realm of intended determinacy. These mechanisms may especially address uncertainties that generate a sense of insecurity.

Forty years later, Moore's remarks have lost none of their urgency. Even where organisations and institutions, including the law, have been established with the explicit goal of instituting high degrees of certainty, it requires a lot of energy for them to come even remotely close to accomplishing this goal. Within the realm of law, there remains much uncertainty. This is not always bad since overly strict regulations would seriously hamper efficiency, creativity, and flexibility. Indeed, various degrees of freedom and uncertainty are deliberately included in open regulations. But the very uncertainty that is welcomed by some generates deep feelings of insecurity in others. For example, we know this from the field of social security and from recent developments in the field of flexible labour relations and migration. Moreover, legal certainty in modern legal systems is unevenly distributed. Mechanisms to ensure legal certainty are strongest and institutionally most entrenched where it serves the interest of the powerful. The interests of the poor and powerless

are far less institutionally supported; they enjoy lower degrees of legal certainty. Fundamental issues of power and inequality are involved. The rule of law and the underlying quest for legal certainty is not an entirely unproblematic way of dealing with these issues.

Incommensurability and mechanisms for providing legal certainty

In many parts of the world different types of law co-exist, especially in former colonial states such as Indonesia. Of these types, state law is only one. Other legal orders may contain full-fledged sets of regulations and procedures or may be less explicit or differentiated. Yet other sets of regulations that compete with state law (e.g., secular or religious transnational law) may be more encompassing. Sometimes the scope of a set of regulations is confined to specific issues, such as the regulations of the International Labour Organization or other international organisations. This means that in certain realms of social and economic life and for certain purposes, people have to operate in constellations of legal pluralism. More often than not, the relevant alternative regulations are incommensurable. Incommensurability is by itself a significant source of uncertainty. In practice, if not according to state law, it is often unclear which of the alternatives is applicable and how people operate in this context of legal pluralism.

In this essay, I want to point at an additional problem that generates uncertainty. Different legal orders may have different ways of guaranteeing (degrees of) certainty. Today, most debates about legal certainty focus entirely on the state and its laws. The idea of rule of law is founded on clear regulations for law-making, an administration that observes the law, an independent judiciary, and a system of documents and registration. Together these regulations are supposed to constitute validity, coherence, and clarity for the interpretation of its content. They are also supposed to constitute certainty in the application of laws and, in general, trust in the law and the state. But there are other context-specific arrangements that may generate more certainty than a state can offer.

Many local laws, referred to as *adat* or *adat* law in Indonesia, have mechanisms to ensure legal certainty.[2] These have been called "supported observance" (*gesteunde naleving*) by Van Vollenhoven (1931, 251) and "preventive law care" (*preventieve rechtszorg*) by Logemann.[3] For important transactions, such as land transactions, witnesses attend to attest that the transaction is properly done according to the local rules. Often these witnesses have a special status, either because they are the owners of adjacent land plots or because they are authorities. Van Vollenhoven (1931,

295, 297ff.) referred to this type of witnesses as "intentional witnesses," as opposed to "accidental witnesses" (i.e., persons who accidentally happen to be present at a transaction). For example, the Minangkabau of West Sumatra require the official representative of a matrilineage (*panghulu*) or sub-lineage (*mamak kepala waris*) to attend a land transfer of (members of) their kin group. In addition, the representatives or owners of the adjacent plots of land also have to be present. The *adat* officials have the authoritative knowledge of *adat* and of their lineage's land. The presence of owners of adjacent plots ensures that the boundaries are established and confirmed. Together, these witnesses testify that the land belongs to the person or kin group that want(s) to transfer it, that the recipient is entitled to receive the land, and that all *adat* rules have been followed. Attendance of these intentional witnesses is a prerequisite to making the transaction valid. Logemann (1924) discusses many examples of intentional witnesses and supported observance from different parts of the archipelago. These oral methods of creating a high degree of certainty serve to prevent future conflict. Scholars studying *adat* in the first half of the twentieth century regarded these mechanisms as a major reason for why there were relatively few full-fledged conflicts in the region.

With the expansion of the plantation economy, the colonial government became increasingly uncomfortable with these oral modes of land tenure. They preferred a system based on registers because that was better suited to guaranteeing the legal certainty needed for the plantations. On Java, this policy proved successful and was used to register a large amount of land. But in other areas within the archipelago, the registers were regarded with much suspicion. If anything, these registers became a symbol, if not an outright source, of uncertainty and insecurity. This had much to do with problems of incommensurability entailed in the recognition process of *adat* land rights.

The first problem was that the Dutch did not recognise all local land rights but only those that resembled Dutch ownership. They recognised uncultivated communal land but in an ambiguous way. The land became subject to the sovereign right of the colonial government, which was interpreted as the government's right to declare that this land be used for economic development. This policy was laid down in the Agrarian Decree (*Agrarisch Besluit*) of 1870 with the so-called domain declarations, specified in the Domain Declarations for each region. On that basis, the government began to expropriate large tracts of uncultivated land for the plantation economy. Registered land titles for these tracts were allocated to European planters. These expropriations created an enormous sense of insecurity among the local populations, who were confronted with what they regarded as illegal dispossession of their communal village or family land. In their understanding, they held this uncultivated land in

reserve for future generations. Because of the radically different views about the character of communal rights, the registers came to stand as a symbol of the uncertainty and insecurity of *adat* land titles. Secondly, in as far as the registers did allow for the registration of *adat* land titles, they did not capture the full complexities of these local land rights, pressed as they were into the moulds of Dutch property rights. From the outset, most Minangkabau distrusted the registration system of the colonial government. Apart from some land in towns for colonial administrative buildings, schools, etc., hardly any land was registered. Where they could, people stuck to their local ways of ensuring legal certainty in land issues.

But the colonial government also negatively affected these local ways. The Dutch kept tinkering with local village governance. They did not want to deal with the multi-headed village governments in which all lineage heads (or clan heads) collectively formed the highest authority. They limited the number of recognised lineage heads, installed village heads, and generally kept reforming village governments. The current hybrid system of village governance includes features of state and *adat* law. It has a long history of successive half-hearted attempts to bring it more in line with the colonial notions of governance. This did have a negative impact on local mechanisms of legal certainty. It offered malicious lineage heads more leeway to cheat their lineage members and reduced the internal control mechanisms on these *adat* officials. But though the local mechanisms of guaranteeing certainty were far from perfect, they were more flexible than the state registration system. Individuals could seek redress for mistakes more readily than in the more rigid state registration system. Most deemed these local methods better than the alternatives.

After Independence, the Indonesian government continued to ambivalently recognise *adat* land rights and the tradition of successive changes in village governments. They were therefore met with the same suspicion and resistance to registration. In the 1970s, we observed that only persons who wanted to secretly transfer land without 'interference' from the intentional witnesses would register plots of land. This would invariably lead to serious conflicts that ended up in court. But here parties would be confronted by yet another source of insecurity, besides the corruption of the judiciary. The way courts dealt with evidence was strikingly different from the evidence evaluation methods used by *adat* authorities. Because of their procedures, courts unwittingly developed a different interpretation of Minangkabau *adat* from the *adat* that was used in villages (Benda-Beckmann 1984, 65-98).

Even today, resistance to registration continues. Now, a major reason for resistance is a corrupt and incapable state administration. This results in registers containing many mistakes and irregularities. Since the judiciary

is considered corrupt and incapable, people have little chance to gain redress from an irregular registration. Even though most Minangkabau today would in principle favour a well-functioning registration system, their oral ways offer a preferred backup option so long as they distrust the government. They do so even though today *adat* authorities with a deep understanding of the local situation are rather rare. Extreme centralism under Suharto seriously undermined interest in village affairs, because most relevant decisions were made at higher administrative and political levels. This left deep marks on *adat* authority and many positions fell vacant. However, the decentralisation policies that set in with Reformasi rekindled interest in local government and especially in communal land. In its wake, many vacancies were filled. But these new *panghulu* often live in urban centres and not in the village in which they occupy their *adat* position. They are often elected on the basis of their higher education, good position, and experience with the state administration, rather than for their knowledge of local *adat* and land relations. The more reliable and comprehensive knowledge about land relations lies in the hands of elderly women who have lived their whole lives in the village. But these women do not possess the authoritative knowledge that is required. It is often in secret consultations with such elderly villagers that a *panghulu* acquires his knowledge of the local situation. But this knowledge would be of little avail if the *panghulu* would not also know his way in the state administration.

What does this example tell us about uncertainty in land issues? In the first place, the introduction of a legal system without consideration for what it might mean for existing entitlements has itself generated much legal uncertainty. After Independence, the Indonesian government has done little to reduce that uncertainty. To different degrees, it continued its ambivalent recognition of *adat* land titles. More importantly, legal, semi-legal, and outright illegal expropriations thrived during Suharto's Orde Baru. To this end, officials and politicians close to Suharto manipulated the very ambivalences and deficiencies of a state legal system. They made extensive use of their clientelist networks if not of outright corruption within the state system. This resembles what Chabal and Daloz (1999, 141) described as 'the political instrumentalization of disorder' for the African contexts. There, high-level politicians and officials play out the registers of law, corruption, and development to illegally capture resources to generate legitimacy within their clientelist networks. Such persons were masters in simultaneously playing out the available legal registers, the register of political and clientelist allegiance, and the register of corruption. This allowed them to reframe local land titles to their advantage, often with the help of corrupt *adat* authorities. The uncertainty due to incommensurable legal systems of land tenure

and *adat* government is enhanced by a state administration that is seen as corrupt and incompetent. Local people rely more on local oral mechanisms for supporting legal certainty in land issues, despite the fact that these mechanisms have weakened substantially. The paradox is that many of the current *panghulu* have at one stage in their life worked for the state as civil servants or even in the armed forces. In their capacity as state officials, they are as distrusted as other state officials. However, by an act of "kinning the state" (Thelen, Thiemann, and Roth 2014), in another capacity, these authorities are seen as—more or less—trusted relatives. And indeed, since Reformasi, many have been instrumental in regaining previously expropriated land.

Similar problems of conflicting legal orders are known throughout the world, though the extent to which this is possible varies a great deal. In these legal orders, powerful actors manage to negotiate the various registers to obtain access to land at the expense of less powerful and less knowledgeable actors. However, even within Indonesia, there is much variation, for not all regions have such developed *adat* systems as the Minangkabau. Additionally, not all regions have such well-educated people at their disposal who are well-entrenched in the economy and in urban society. They do not have access to people who are capable of dealing with the contradictions of competing legal systems. In the mineral-rich regions of Kalimantan and Papua, local population groups have to fight powerful national and transnational companies with the state officials that stand in their legal or illegal pay. Besides, they often have to compete with migrants from different parts of Indonesia.[4] Their local mechanisms of legal certainty are also often less differentiated and less elaborated than in West Sumatra. This makes for a dangerous mix that is prone to violent outbursts, in which claiming *adat* land titles is much more difficult. In these regions, legal uncertainty is many times higher than in the relatively homogenous and resource-poor West Sumatra. At the instigation of AMAN (*Aliansi Masyarakat Adat Nasional*), some have begun to reframe their claims concerning indigenous peoples in terms of international law. This has certainly provided them with a higher profile by which they are heard more than before. But the attempts to translate the concept of international law into a conceptual framework derived from Van Vollenhoven and the Adat Law School have added another element of incommensurability and ambiguity to the already complex legal constellation in Indonesian land rights.

Ill-functioning states

Ill-functioning states are, of course, a major source of (legal) insecurity, but the kinds of deficiencies and the reasons for them vary a great deal. It may be that war or other major catastrophes have destroyed state institutions or a country may not have enough capable persons to run them. Here the malfunctioning is a sign of a weak state. But strong, powerful states may also be deficient because of rampant corruption. Often it is a combination of factors that prevent state institutions from functioning properly. In Indonesia, there are two major sets of issues: corruption and clientelism as well as an inadequate legal education. Such education produces a legal profession incapable of contributing to a coherent state legal system. We have already seen that the incommensurability of *adat* and colonial law has rendered Indonesian law a degree of incoherence. When Indonesia decided to terminate education in the Dutch language in the law faculties but kept to a Dutch-based legal system, the legal profession rapidly lost the language skills necessary to safeguard coherence in legal developments. Instead of seeking a legal education in the Netherlands, lawyers turned to countries of Anglo-American legal traditions. On that basis, they began to install elements from these traditions into Indonesian law without considering the implications for the overall legal system, thereby increasing incoherence (Massier 2008; Bedner 2013). The result is that the Indonesian legal system suffers from serious incoherence, fragmentation, and internal contradictions. The institutions that should counter these deficiencies lack the skills to do so.

Incoherence certainly is an important factor for legal insecurity. But for most people, it comes second to corruption. Put differently, only when corruption is overcome does the issue of coherence show its full damaging impact. But legal coherence offers no solace for the vagaries of corruption. Local populations are generally less concerned with the state law's internal coherence than with corruption, which they face in all state institutions and which has deprived so many of their land. This is not to say that all civil servants are corrupt and that, in the case of land transactions, all registrars are corrupt and all registrations are therefore incorrect. Nor does it mean that every single court case is decided on the basis of corruption money. What makes the system so uncertain and unpredictable is that everyone at all times has to reckon with the possibility of corruption and incompetence. There is little they can do about it. The judiciary, as the backbone or last resort, should put the rule of law in place. However, it is incapable and often unwilling to do so. Cynics might say that a corrupt administration and judiciary generates certainty: the party that pays most usually wins. Using a more sophisticated argument, Chabal and Daloz (1999) and Schlee (2002) argued that corruption and

even warfare follow regularities and therefore, offer a certain degree of certainty and even legitimacy. It is true that as long as Suharto sat firmly in the saddle, his corrupt political system did indeed provide a certain level of certainty to his clientelist networks. However, when armed forces employed and stimulated turmoil after the demise of the Suharto regime, while they may have been successful in staying in power, they seriously destabilised the clientelist networks. Such networks no longer offer the degrees of certainty they once did. Nevertheless, both well-entrenched and unstable corrupt clientelist systems generate welcome inclusion for some and problematic forms of exclusion for others. The fact remains that a state system engrained with unchecked corruption generates grinding injustice. It also generates an enormous degree of undesired uncertainty, especially for those not well-versed in communication with government officials and in playing the different legal system registers and the registers of corruption. As long as corruption remains entrenched in the state and its legal system, its promises of legal certainty remain in vain. Registration systems, meant as the backbone of legal certainty in land issues, are used in the power games to capture land. In those games, registration may offer security for the powerful but the general public will view these registers as a source of insecurity.

Uncertainty and hyper-regulation

From the early 2000s, we have seen a wave of publications in social theory concerned with temporalities of change. Giddens discussed it in terms of 'time-space compression' (Giddens 1985) and 'hyperglobalization' (Giddens 1996). Rosa (2003) and Rosa and Scheuermann (2009) formulated their views in terms of 'acceleration.' It certainly was not the first time that the sense of rapid change was subject to public and scientific debate. Koselleck (2009) gives an interesting historical glimpse of the history of time perspectives and metaphors used to express experiences of acceleration. Koselleck also gives insight into the ups and downs in public debate about acceleration. Rosa and Scheuermann (2009), analysing the social and political dynamics of acceleration, show that at the turn of the twentieth century, scholars discussed the—mainly—problematic side of the accelerated speed at which technology, the economy, and society were changing. They point out that only a few scholars at that time called attention to legal issues. Those scholars saw rapid legal change primarily as a challenge to democracy. Democracy in this view is a political model based on deliberation and building alliances. And this requires time that seemed to be increasingly lacking because life was speeding up. How much acceleration could a democratic order tolerate? One of the authors

that addressed legal issues was the conservative scholar Carl Schmitt. He argued there were problematic practices of coping with acceleration. One such technique involved delegating and making legislation without or with little political debate. Emergency Law, which was increasingly used in the Weimar Republic, decreased the time available for political deliberation even further. These considerations were certainly important and they still are. But they capture only a part of the issue. A century later, globalisation has picked up speed. In its wake, additional levels of law-making have emerged, exacerbating the challenge to democracy. Now law-making at levels outside the national legislator is not merely a matter of delegation. Legislation is increasingly made by relatively autonomous circles in which epistemic communities play a crucial role. Transnational organisations and NGOs that are relatively disconnected from any national system are important sources of regulations. Here, democratic rules of political deliberation hardly apply.

Not only has the volume of legislation increased to an unprecedented level with globalisation. The turnover of regulations has also accelerated. In many realms of social and economic life, regulations have an ever-shorter existence. This poses problems for democracy in the sense of political deliberation that was so much at the heart of criticism in the early twentieth century. Rapid turnover of legislation also produces increasingly complex constellations of legal pluralism. It is often not the case that every regulation has been discussed according to all democratic requirements and that political deliberations have been adequate. However, even in such rare events, the multiple overlapping and rapid successions of regulations constitute an immense challenge for legal certainty. These temporal aspects of legal complexity also have a spatial corollary, as Delaney (2010) showed. He argued that legislators at all levels are increasingly pre-occupied with crafting the ultimate right regime for a particular space. But they do so with different purposes and from different perspectives. The result is what he calls "hyperterritoriality," in analogy with Giddens and Rosa (Delaney 2010, 138). The term refers to the current condition in which, in quick succession, ever more overlapping regulations regulate the same space. Because these regulations are often contradictory, they call for more coordination and adjustment. Thus, the very attempts to create 'regimes of continuity' create spaces that are everything but enduring. This insight has much broader implications for the acceleration of law-making in general. As Franz von Benda-Beckmann and I have argued, we live in a time of what we could call "hyper-regulation," with all the contradictions and coordination problems that Delaney pointed at (Benda-Beckmann and Benda-Beckmann 2014, 31, 44-46). Viewing the developments from a processual perspective reveals that the problems of hyper-regulation are confounded. Old regulations often retain at least

some of their influence after they have been officially abolished. Some new regulations (e.g., the introduction of EU regulations in new member states) or promises to subscribe to international human rights treaties and conventions cast their shadow before a state formally signs them (Benda-Beckmann and Benda-Beckmann 2006). As a result, it is often unclear which regulations apply in a certain situation. This means that every new regulation generates a certain amount of uncertainty. Usually, this uncertainty is limited in duration. However, if rule-making accelerates and overlapping regulations are increasingly made for one physical or social space, the overall effect is a permanent situation of considerable uncertainty. To be sure, hyper-regulation is not evenly distributed. It is particularly strong in fields such as social security, environment, urban planning, natural resource management (e.g., fisheries, gas mining), migration and asylum, international trade relations, and transnational production chains. Other fields such as property relations tend to have more enduring regimes. Here again, issues of inequality are at stake. The negative consequences of hyper-regulation seem to be more serious for powerless groups than for the powerful. The powerless have good reasons to be the first to lose trust in the legal system.

One might think that this is only a problem for industrialised societies since ill-functioning states typically do not have the capacity to make so many regulations. But even within ill-functioning states, people cannot always escape the effects of global hyper-regulation. They often find themselves at the lower end of production chains, where they may be forced to comply with the various national laws within the production chain alongside international and transnational regulations of different sorts. Besides, organisations for development cooperation or disaster relief are themselves tied to the rapidly and often capriciously changing regulations made within donor countries or international organisations, or both. These have direct implications for their clients, who have no insight into the multiple processes by which these changes are made. Hyper-regulation is a phenomenon that affects all and creates considerable uncertainty. The uncertainties are unequally distributed. Powerful organisations are better situated to deal with these uncertainties and use them to their advantage than powerless persons and groups that have little influence in law-making processes and do not have the means to be well informed about all the relevant legal changes.

Conclusions

An anthropological take on issues of legal certainty suggests that indeterminacy is as fundamental for human existence as determinacy

and that social organisation offers varying degrees of determinacy and certainty. There is, to put it pointedly, desirable and undesirable uncertainty and certainty. Therefore, the issue of legal certainty has to be situated in the context of finding appropriate positions between certainty and uncertainty. Besides, there are different ways of generating certainty. The mechanisms of the state and its laws are only one way of doing this. Our examples of land registration have shown that the state legal system relies on documents. Other legal orders and the orders of clientelist networks and of corruption practices entail different modes of guaranteeing degrees of certainty, each with their own normative register. A system based on documents works well under conditions of a well-functioning administrative apparatus but is regarded with suspicion if clientelism and corruption trump proper administration. In such cases, other mechanisms that rely on specific social relations are preferred, which in our case includes the involvement of *adat* officials. It may offer more certainty and may be less susceptible to illegal transactions, though they are also no guarantee against the corruption of *adat* officials.

People also differ in their desired degrees of certainty, in which issues they prefer freedom, and in which interests they believe should be protected by certainty. Legal certainty on specific issues and interests may be desired by some and seen as an inappropriate constraint of their freedom by others. Power differentials tend to protect the interests of the powerful more than those of the powerless. Thus, degrees and modalities of desired legal (un)certainty tend to be more geared towards the powerful. Moreover, powerful people tend to be better equipped to play on the ambiguities and possibilities entailed in the available plurality of normative registers in such a way that best serves their interests. However, the ambiguities of plural legal orders may also offer choices to resist undue influence from powerful actors. The example of land registration has shown that less powerful people, under certain conditions and for certain purposes, may also be capable of choosing the option that is best for their interests. Chances are higher if the alternative modes are relatively well institutionalised and if the officials of that legal order are well educated.

Democratic rule-making, the issue that was so hotly debated a century ago, somewhat mitigates power differentials and somewhat balances diverging interests. But legal (un)certainty depends on much more. The rule of law is another mechanism to prevent or redress undesirable uncertainty induced by state agencies. There is no doubt that it is crucial to assist ill-functioning states in transforming into better functioning states. Such states should then be bound by the law, guarantee that laws are made according to set procedures, ensure that such laws are enforced, and thus be able to provide a certain degree of legal certainty.

But the examples from Indonesia have shown that there are issues for which the rule of law seems to be less well-equipped. One is that legal incommensurability in situations of legal plurality generates much undesirable uncertainty. However, that uncertainty may unexpectedly help one avoid the undesired consequences of legal certainty encoded in one of the relevant sets of rules. Recognition and integration of other types of law into the state legal system are meant to generate legal certainty. But paradoxically, they tend to undermine the foundations of the legal order that is pressed into the moulds of state law and thus create more uncertainty than certainty. Though this has generally been an unintended consequence of rule makers, we have argued that powerful actors often quite intentionally manipulate the ensuing uncertainty (e.g., acquiring land in an illegal or semi-legal way).

The other issue that deserves more consideration from a rule of law perspective is the uncertainty that stems from the rapid succession of often-contradictory regulations. These regulations are enacted at so many different levels and are each cast within their own constraints, possibilities, scope, and aims. This uncertainty generates new degrees of legal plurality that binds law-making at the national and supra-, trans-, and infra-national levels. It even affects states and polities that by themselves may have a low turnover of regulations.

Questions that arise include whether incommensurability and hyper-regulation fall within the ambit of the rule of law at all or whether they should be situated beyond its scope? More concretely, is the modus that relies on written documents necessarily and at all times the best way to generate legal certainty? Might the very mechanisms made to generate legal security under certain circumstances add to insecurity instead of providing—partial—security? And what, if any, implications does this have for the way we think about the rule of law? I do not pretend to have an answer to these questions. But I do suggest that they are of vital importance for a well-functioning state and legal order in which citizens may trust that it provides desired degrees of certainty and uncertainty.

Notes

1 I thank Barbara Oomen for her constructive comments on a draft of this essay.

2 For the examples in this section, see Benda-Beckmann and Benda-Beckmann (2013).

3 In his translation of Van Vollenhoven's work, Holleman translates *gesteunde naleving* as "attested observance" (Van Vollenhoven 1981, 222) and "guided observance" (229).

4 See, e.g., Li (2001) and Bakker (2009).

Supporting the State: The Relevance of Institution Building

5 The Uncertain Future of Legal Reforms in China's New Era

J. Chen

Introduction

Post-Mao legal reforms started with a 'modernised' traditional approach to law, that is, law was seen as a political tool for defined purposes (Chen 2016a, 20-24). It was modernised because it was coded in a Marxist language (Chen 2016a, 54-58) and, further, post-Mao reforms were built, indirectly, upon the initial Qing and KMT legal reforms at the beginning of the 20th century that first introduced Western law and legal systems into China. These reforms developed rapidly. In a short period of some 20 years, not only the lawless days of the 'Cultural Revolution' (1966-1976) were gone, but a new legal system was firmly established. By 2011, China had declared to the world that a socialist system of laws with Chinese characteristics had been established in China (Information Office of the State Council 2011, 1-2).

Importantly, by the early 21st century, Chinese law, in its form, has been transformed into Western law based on a Continental civil law model, with mixed external influences, operating in a very different political, social and economic context. More substantially, the heavy utilitarian and instrumentalist attitude towards law that was clearly evidenced in the greater part of legal modernisation was losing its grip in China and increasingly being abandoned. Even if law might still be seen as an instrument, it was increasingly seen as such for justice, fairness and equality, not merely for creating and maintaining social stability conducive to economic development. In short, substantive development

in post-Mao China, especially since 1996, suggested that there had been signs of a transformation—tentative and hesitant though it was—from 'rule by law' to 'rule of law' in terms of legal development, and that the Chinese authorities' attitude towards law was much less purely instrumentalist in nature (Chen 2007).

While scholars in and outside China welcomed the significant progress in establishing a functional legal system in China, the weaknesses and major flaws of Chinese legal development and reforms were also well recognised. Fundamentally, Chinese law and the Chinese legal system continued to be ambiguous about many of the essential elements required for the rule of law, such as the separation of powers, checks and balances, and judicial independence. Most Chinese scholars agreed that political reform was seriously lagging behind economic and legal reforms and that China needed some serious political reforms to further stimulate legal reforms so as to establish a genuine rule of law in China (Guo, Li, and Hao 1998, 1). Indeed, with the exception of the WTO-induced reforms in civil and commercial law, legal development began to lose its momentum after some 25 years of rapid development. This led some scholars to describe the 10 years under the Hu-Wen leadership (2002-2012) as either the lost 10 years or as a period of regression (Minzner 2011).

The Party decision to deepen political and economic reforms that scholars and reformers had hoped for—in fact two decisions—came about in 2013/2014 (2013 Party Decision; 2014 Party Decision). Although these decisions were short of inspiration and expectations for political and constitutional reforms, they did contain many measures that were significant for improving the actual operation of the law and the legal system in China and, in this sense, they effectively re-launched legal reforms in China (Chen 2015; Beauchamp-Mustafaga 2014). However, it did not take very long for many scholars to see dark clouds on the horizon: legal reform would be a very strictly controlled process, oriented towards consolidating Party leadership in all spheres of the State (Chen 2016b). Increasingly, the official rejection of constitutionalism, separation of powers, checks and balances, and judicial independence is no longer rhetoric, but firm and explicit without any qualification. The demand for direct and absolute Party leadership, strict control over political ideologies, and the safeguard of the Party's core leadership makes it abundantly clear that they are not negotiable and form part of the State governance of the 'New Era'.[1]

So, what is the future of Chinese law and Chinese legal reforms in Xi's 'New Era'? Are we witnessing the return of legal instrumentalism to China? Even more challengingly, we must ask, could a rule of law exist in the absence of checks and balances, judicial independence, and

the separation of the Party from State? And this is no longer a purely theoretical question; it is a question about the Chinese governance model that is being promoted internationally.[2]

This paper examines the alarming, emerging trends of retreat from politico-legal reforms that were initially launched in 1978.

The shifting centre of gravity

When Deng Xiaoping started his reforms in post-Mao China, he made it clear that his reforms necessarily included political reforms. He pointed out that "[i]f we only carry out economic reforms without political ones, our economic reforms will not succeed" (Quoted in Yu 2015). However, there is a fundamental flaw in Deng's idea: his political reforms were primarily intended to ensure that his economic reforms would succeed. To him, the major problems were the non-separation of the Party and State, bureaucratisation, over-concentration of power, patriarchal methods, life tenure in leading posts, and privileges of various kinds (Deng 1984a, 309). His major concern was the efficiency of government and not government accountability, at least not towards the governed (Deng 1984a, 316). These concerns essentially formed the foundation for his argument for political reforms, with the separation of the Party from the State being the central piece of his design (Deng 1984a).[3] Not surprisingly, Deng was not in favour of the idea of the separation of powers. In fact, on several occasions, he unambiguously rejected the theory of separation of powers as a means for checks and balances of government powers (Deng 1994, 35-38).

The mid-1980s was a time when the calls from reformers for the separation of the Party and State were strong, and the Party and government were receptive to such calls. Thus the Political Report delivered at the 13th Party Congress in 1987 explicitly called for the separation of the Party and its functions from the government, and determined that such a separation should be implemented as the first priority in political reform (Zhao 1987). The crackdown on the June 4th (1989) democratic movement, however, led to the immediate cessation of political reform and the re-introduction of a repressive regime.

Nonetheless, heated discussions and debates on political reforms, especially the separation of the Party and the State continued; especially so when the phrase 'Ruling the Country according to Law' was incorporated into Article 5 of the Constitution in 1999.[4] Even though political reforms made little headway and were constantly lagging behind economic reforms and development, it is generally accepted that the Party and the

State are two separated authorities, each with their own responsibilities in line with the ideas outlined in Deng Xiaoping's speech of 1980.

It is worthwhile pointing out that Deng Xiaoping did manage to make some significant constitutional changes and arrangements in the early 1980s. Thus all explicit constitutional provisions in the 1975 and 1978 Constitutions—which declared that the Party was the 'core of leadership' and that supporting the Party leadership was a constitutional obligation—were removed from the 1982 Constitution (Articles 2 & 3 of both the 1975 and 1978 Constitutions, Article 26 of the 1975 Constitution, and Article 56 of the 1978 Constitution). This led to the Party only appearing in the Preamble of the 1982 Constitution. The requirement that the Premier of the State Council be nominated by the Central Committee of the Party was also dropped (Article 17 of the 1975 Constitution and Article 22 of the 1978 Constitution). Further, a State Central Military Commission was established to command the armed forces.[5] This establishment nominally makes the armed forces the army of the State, not that of the Party. Although such changes to the Constitution may not have changed the nature of Party control over State affairs[6]—indeed there is the argument that it is the power of the Party to recommend (though not directly to make) the appointment of State leaders (Guo 1994, 6)—it changed the mechanism of control, thus making it possible for a gradual separation of the Party and State, in the sense that Party policies would have to be translated into State law through legal procedures, and State powers would only be exercised by State mechanisms as defined by the Constitution,[7] at least in appearance.

In short, Deng Xiaoping made sure that State powers would only be exercised by State authorities in accordance with legal procedures, and the Communist Party would mostly operate behind the scene, guiding, supporting, and supervising the State authorities in the exercise of State powers, with the exception that the Party maintains its direct control over the armed forces, media (i.e., propaganda in communist terminology), and personnel (Chen 2016a; McGregor 2012; Callick 2013). In the absence of major political reforms since mid-1989, these 'arrangements' effectively formed an implied consensus among the political elites and scholars on the relationship between the Party and the State in post-Mao China, until very recently.

Xi Jinping came to power on the back of 35 years of economic success in China. This economic success led to strong confidence among the new leadership in asserting China's own model of governance which is now being promoted as a potential global governance model (see note 2). As a result, the overwhelming theme of the 2013 and 2014 CPC Decisions is to reclaim direct authority of the Party over all State affairs.

In terms of legal reforms, the 2014 Decision made it crystal clear that the Party shall take charge of the overall state of the country and coordinate all sides in the functioning of the People's Congresses, governments, political consultative conferences, and trial and prosecutorial authorities, and that Party leadership must penetrate into the entire process and all aspects of "Ruling the Country according to Law" (2014 Party Decision, para. 8). On the surface, one might say that the 2014 Decision perhaps makes no radical departure from the CPC's view that it is the de facto leader in the Chinese polity. However, many emerging trends have suggested otherwise.

First, the integration of the Party with the State has now been brought into the open, and the Party-State relationship has effectively regressed back to the 1970s in terms of separation of the two authorities. Further, the Party is firmly in the driver's seat, designing not only principles but also details for reforms or implementation of reforms. Thus, a Leading Group on Comprehensively Deepening Reform, headed by Xi Jinping, was established to design, coordinate, promote, and implement reforms (2013 Party Decision, para. 58).[8] As of February 2018, the Leading Group had convened 38 meetings, adopting some 365 documents containing various reform packages and outlining 357 key reform tasks and 1,500 specific reform measures, ranging from its own working procedures to law-making programs for the NPC, from cultural management reform to judicial reform, and from soccer administrative reform to financial system reform, and from Party development and reform to designs for the 13th Five-Year social and economic development plan, and covering all national affairs and local experiments in political, legal, social, cultural, environmental, Party-building, the military, and national defence areas.[9] Essentially, Xi's reforms intend to explore new mechanisms for direct Party control over not only the State structure and the so-called mass organisations (such as the union, women's association, etc.), but also those that had earlier been separated from the Party, such as the State-owned enterprises (Chen 2016b). By doing so, Xi has effectively made the national legislature once again a rubber stamp and largely sidelined the State Council in managing national affairs. The State authorities are further undermined by the establishment of the various 'Leading Groups' of the Party that have effectively overtaken the government functions, with the latest leading group being one on 'Comprehensively Ruling the Country according to Law.'[10]

Second, as mentioned earlier, State powers are supposedly exercised through State mechanisms while the Party remains in the background. This fundamental principle is being eroded quietly and rapidly. The 2013 Party Decision announced that the CPC would establish a Central Commission on State Security (an authority of the Central Committee of

the Party, not the State), without providing any details. In January 2014, the Politburo announced that the Central Commission on State Security was established, with Xi Jinping as its Chairman.[11] For this purpose, security is broadly interpreted to include political, military, economic, and social security, which clearly overlaps with social order and stability that are managed by State authorities (Xinhua 2014d). In July 2015, the State Security Law was adopted. Article 44 of the Law grants the Central Commission on State Security the power to establish and coordinate a national security system, and Article 63 of the Law further grants the Commission the power to deploy and manage State emergency measures and responses when national security is endangered. The State Security Law thus, for the first time in post-Mao China, grants a Party authority State powers and allows such powers to be exercised directly by a Party authority—a situation that only existed during the 'Cultural Revolution'. Clearly, the Party has now finally decided to walk out of the shadows by assuming directly some of the most critical powers of the State—the public power to handle State security and emergency issues. Similarly, the Central Politico-Legal Committee—a committee of the CPC Central Committee—has now begun to involve itself openly in law-making and statutory interpretation without any constitutional basis. Thus, in February 2014 the Central Politico-Legal Committee issued a set of guidance opinions on the application of reduction of imprisonment terms, parole, and serving of imprisonment outside of prisons (Xinhua 2014b). While these opinions may be well intended as a part of anti-corruption efforts, they clearly amount to statutory interpretations. As a Chinese lawyer has pointed out, it is simply unconstitutional for a Party authority to issue statutory interpretations, and the issuing of such opinions violates the rule of law (Gao 2014). Further, in January 2015, the General Office of the CPC and the General Office of the State Council jointly issued Opinions on Regulating the Disposal of Property involved in Criminal Cases. These Opinions were formulated in March 2013 but apparently were approved by the Party Leading Group on Deepening Comprehensive Reforms in December 2014 (Xinhua 2015b; Xinhua 2014c). The issuance of such opinions openly ignores even the need to pretend that any separation of powers or the separation of the Party and the State exists.

The most blatant disregard for the separation of the Party and the State has been the establishment of the State Supervision Commissions. Theoretically, this Commission (and Commissions at all levels of government) is an authority that merges all anti-corruption authorities in China into one unified authority. In reality, it is a combined authority of the CPC (its Inspection Commissions) and the newly established State anti-corruption authorities. By combining the Party and State authorities into one entity (so-called 'one entity with two names'), it legitimates the

otherwise largely unlawful and unconstitutional practice of the CPC's Disciplinary Commissions through authorisation by State law, including the revision of the Constitution and special legislation on the subject matter.[12] According to the Report delivered at the 19th National Congress of the CPC on 18 October 2017, the establishment of such combined authorities of the Party and the State is to be encouraged and developed from now on (Para. 6 (5) of the Party Report at the 19th National Congress of the CPC on 18 October 2017).

Finally, the Party, for the first time in Post-Mao China, has now managed to appear in a specific provision of the Constitution, instead of only being mentioned in its Preamble.[13] By doing so, a constitutional foundation is established for the re-integration of the Party with the State, instead of the separation of the two and, as such, one of the most important aspects of Deng Xiaoping's political reform is discarded and buried.

The return of legal instrumentalism

There is little doubt that post-Mao legal reforms started on an instrumentalist philosophy. To the then Party leadership, law was important for establishing a social order conducive to economic development (Ye 1979, 3; Hua 1979) and this was summarised by Deng Xiaoping as a 'Two-Hands' policy: On the one hand, the economy must be developed; and on the other hand, the legal system must be strengthened (Wang 1996, 7; Qiao 1984, 67). For Deng Xiaoping, law had to be used to establish stability and order for economic development (Deng 1984b, 335-355), and the establishment of the rule of law was not an end in itself. One of the most prominent and influential jurists at that time, Zhang Youyu, once clearly spelt out the role of law at the time thus:

"Socialist democracy and the legal system [*fazhi*, sometimes translated as 'rule of law'] are inseparable; both of them are [to be used] to consolidate socialist economic bases and to enhance socialist development. At present, they are powerful tools for promoting the Four Modernisations. Neither of them is an end but both of them are means" (Zhang 1984, 41).

The adoption, at the 14th Party Congress in 1992, of establishing a 'socialist market economy' as a new direction for economic reform began to change the nature of legal discourse. A market economy, for many Chinese scholars, demanded 'rational' law in the sense defined by Max Weber. As a consequence of the new policy, Chinese scholars began to openly argue that a 'market economy' was a result of human wisdom; it was not a 'privilege' (*tequan*) for the West (Liu 1995, 70). A socialist market economy, it was often asserted, was an economy under the rule of law (*fazhi jingji*) (Xiao 1994; Chen 1994; Legal Daily 1994; Economic

Daily 1994; Min 1994). The establishment and perfecting of a socialist market was thus said to be a process of establishing the rule of law (Wang 1996, 3).

As mentioned earlier, in 1999 China inserted the phrase 'Ruling the Country according to Law' into the Constitution. This, to Chinese scholars, meant the final acceptance of the notion of the rule of law and thus represented a new landmark in legal construction (Liu 1996, 73). Indeed, discussions on the phrase 'Ruling the Country according to Law' have all been based on the Western notion of the rule of law, embracing the concepts of supremacy of law, judicial independence, equality before the law, separation of powers, checks and balances, a parliamentary system, and the protection of human rights (Liu, Li, and Li 1996). Similarly, official propaganda machines also emphasised that the adoption of such a term indicated a deeper understanding of the socialist political system, imposed a higher standard for socialist democracy and a socialist legal system, and signified a new era in socialist democracy and legal construction (People's Daily 1997; Lin 1997; Xue and Wang 1997).

Whatever the phrase 'Ruling the Country according to Law' might mean in practice, it is important to note that it was the arguments for the establishment of constitutionalism, checks and balances, judicial independence, and so on, that transformed the discourse on 'Ruling the Country according to Law' to suggest that the rule of law per se has value and could be an end in itself. As such, the discourse on these Western notions has its special implications for establishing a rule of law in China.

However, the leadership under Xi Jinping is much less receptive to and more selective of Western influences and international experiences than any of its predecessors in post-Mao China. Perhaps it is just a logical result in asserting a Chinese model of governance. The 2014 Party Decision makes it abundantly clear that China is willing to learn from 'beneficial' experiences in rule of law practice abroad, but China will not indiscriminately copy foreign rule of law concepts and models.[14] On the face of it, the 2014 Party Decision suggests that China will reject blind Westernisation and, instead, will strengthen and modernise its legal system in accordance with Chinese reality and needs. However, it soon became clear that 'Chinese reality and needs' will be those perceived and construed by the Party under strict control of the Party ideologues,[15] and the emphasis on 'Chinese reality' is more about attacking Westernisation/internationalisation than about moving towards 'modernisation with Chinese characteristics,' and more about consolidating Party leadership than about establishing checks and balances (QiuShi 2013; Xinhua 2015).

In fact, attacking universal values started even earlier. In April 2013 a secret Party document, Document No. 9, entitled Communiqué on the Current State of the Ideological Sphere, was circulated within the

Party system but leaked through the internet to the outside world.[16] This document makes it clear that the CPC sees universal values, Western constitutionalism, civil society, liberalism, the Western press, etc., as factors that undermine party leadership and socialism. On Western constitutionalism, Document No. 9 states that:

Western Constitutional Democracy has distinct political properties and aims. Among these are the separation of powers, the multi-party system, general elections, judicial independence, nationalised armies, and other characteristics. These are the capitalist class's concepts of a nation, political model, and system design.

The Document continues that the goal of the recent advocacy for constitutionalism is to use Western constitutional democracy to undermine the Party's leadership, abolish the People's Democracy, negate our country's Constitution as well as our established system and principles, and bring about a change of allegiance by bringing Western political systems to China.

Not surprisingly, an '8.19 Speech', said to be delivered by Xi Jinping on 19 August 2013 at a Party propaganda meeting, was issued internally but was widely circulated by Western media.[17] This speech made clear that the Party must firmly control the right to lead, to control, and to speak in the ideological spheres and all Western notions that undermine Party leadership must be resolutely rejected.

In short, China does not accept Western constitutionalism which includes the separation of powers, the multi-party system, general elections, judicial independence, nationalised armies, etc., and, as such, constitutionalism, however it is understood, remains an elusive goal in contemporary China.

If law and legal reforms are not meant for establishing a rule of law, constitutionalism, checks and balances, judicial independence, and the protection of universal human rights, what is the point in having law at all, other than for purposes defined by the ruling elite? As such, it is not surprising that legal institutions are described as the swords of the Party and an important tool for the people's dictatorship,[18] and that the President of the Supreme People's Court, Grand Justice Zhou Qiang not only calls for resolute rejection of the Western notions of constitutionalism, separation of powers, and judicial independence (Legal Daily 2017), but also demands the judiciary to 'raise the sword' against the ideologies of judicial independence, separation of powers, and constitutional democracy (Zhou 2017).

Concluding remarks

China is at a crossroads and, as far as legal reforms are concerned, is likely to regress from, rather than progress towards, establishing a genuine rule of law.

Deng Xiaoping's political reforms were flawed and limited, but he did establish a constitutional foundation for a gradual separation of the Party from the State. For practical purposes, he also forged a consensus in China that the Party would not directly exercise State powers. This consensus has now been breached, and a reform towards the separation of the Party from the State is now off-limits in the foreseeable future, and so is constitutionalism, however it might be understood.

Even more alarmingly, some of the reforms implemented by Deng Xiaoping have now been reversed. The Party has now re-entered into the specific provisions of the Constitution[19] and the abolished life tenure of the position of the President of the PRC has now been restored.[20] In light of these developments, the future of Chinese legal reforms is, at best, uncertain and, at worst, law might once again be blatantly used for establishing a one-party dictatorship or, worse still, a personal dictatorship.

Notes

1 Delivering his Party Report at the 19th National Congress of the CPC on 18 October 2017, Xi Jinping declared that 'Socialism with Chinese Characteristics has now entered into a New Era.' He did not, however, explain what that 'New Era' means in theory or practice. As usual, this latter task is left for 'scholars' to explain, and so far we have seen the use of this term but not much explanation of its meaning. See People's Daily (2018a).

2 Huge efforts have been made to promote Xi's 'governance model' globally: In September 2014, *Xi Jinping on Governance* was published by the Propaganda Department of the CPC (in collaboration with Documentation Department of the CPC and the China Translation Bureau). By January 2018, 6.6 million copies of this book had been distributed to more than 160 countries in 27 languages. In January 2018, this book was re-published as Volume One of *Xi Jinping on Governance*, after Volume Two of the book was published in November 2017 (Xinhua 2018a; People's Daily 2017). According to official Chinese sources, the Second Volume had by early February 2018 distributed over 13 million copies in Chinese and English (Xinhua 2018b). Further, upon the conclusion of the 19th Party Congress in October 2017, China has, by February 2018, sent some 30 delegations to some 80 countries/regions to promote the understanding of the 'spirit' of the 19th Party Congress, that is, the developing path and governance model of the CPC (People's Daily 2018b).

3 That article (in fact a speech delivered in 1980) by Deng was widely seen as a programmatic document guiding the reform of the political system.

4 At the 16th Party Congress in 2002 the phrase 'Ruling the Country According to Law' was also added to the CPC Constitution. On the adoption of 'Ruling the Country According to Law' as a Party and state development policy, see Chen (2016a, 67-70).
5 Under the 1975 and 1978 Constitutions, the armed forces were under the command of the Chairperson of the CPC (Article 15 of the 1975 Constitution and Article 19 of the 1978 Constitution).
6 For instance, in the case of the establishment of the Central Military Commission, Peng Zhen made it clear that the leadership of the Party over the army would not change as the affirmation of Party leadership in the Preamble would also include its leadership of the armed forces (Peng 1993, 20).
7 This point has been emphasised from time to time. For instance, the Political Report of the Party at the 14th Party Congress specifically stated that "the main method for the Party to exercise its political leadership over State affairs is to translate Party policies into State will through legal procedures" (Jiang 1992, 1-3).
8 The Leading Group was formally established on 30 December 2013 by the Politburo (Xinhua 2015c).
9 For a summary of decisions adopted at the 38 meetings of the Leading Group, see Xinhua (2018c). It should be pointed out that this Leading Group is an authority of the Central Committee of the CPC and, in typical Party fashion, their work is routinely treated as confidential, and documents adopted therein are generally not published other than through some brief media reports.
10 See Para. 6 (4) of the Party Report at the 19th National Congress of the CPC on 18 October 2017. So far, no less than 8 such Leading Groups have been established (with Xi as the Head of these groups), dealing with matters ranging from internet security to State economic and finance management, from military reforms to the relationship between the military and civilians (BBC 2017). Some of these groups, such as the Leading Group on Comprehensively Deepening Reform and the Leading Group on Comprehensively Ruling the Country according to Law have now been upgraded to being 'commissions', suggesting the permanent establishment of such Party authorities. For details, see *A Plan to Deepen Party and State Institutional Reforms*, issued by the Central Committee of the CPC in March 2018.
11 This Commission is defined as a decision-making and coordination authority of the Central Committee of the Party, and is accountable to the Politburo and its Standing Committee (Xinhua 2014a).
12 For a comprehensive report on the establishment of the Supervision Commissions, see Xinhua (2017). This report defines the Supervision Commissions as 'political authorities,' not administrative or judicial authorities.
13 The 1982 Constitution was amended for the fifth time on 11 March 2018. The original Article 1(2) stipulates that 'Socialism is the fundamental system of the People's Republic of China.' Through the Amendment, it is now added that 'The leadership of the Communist Party of China is the most fundamental feature of Socialism with Chinese characteristics.'
14 See the second-to-last paragraph in Section One of the 2014 Party Decision.
15 Such control is now so strict that the 2014 Party Decision requires that approved uniform textbooks must be prepared and used in law schools and for judicial examinations. See Para. 6 (3) of the 2014 Party Decision.
16 The Hong Kong magazine, *Mingjing Yuekang* (*Mingjing News*) was the first to publish the document in full (<http://www.mingjingnews.com/2013/08/9.html> accessed 2 September 2013). The Chinese document was then translated in full by China File (available at <https://www.chinafile.com/document-9-chinafile-translation> accessed 12 May 2014, and adopted above). When the document was initially leaked there were

some doubts as to its authenticity. On 5 May 2014 a Chinese journalist, Ms Gao Yu, was charged with the criminal offence of leaking a Party confidential document to overseas organisations. Ironically, it is this criminal charge and its reported offence that confirms the authenticity and accuracy of the document (See People's Daily [2014b], South China Morning Post 2014; Sydney Morning Herald 2014).

17 A full Chinese text of the speech is available at http://chinadigitaltimes.net/chinese/2013/11/.

18 See *Notice on Strengthening Social Stability and Politico-legal Work*, issued by the Central Committee, quoted in Inside Story (2014). Describing the politico-legal institutions as swords of the Party is clearly in reference to treating the military as guns of the Party.

19 See *supra* note 13.

20 Article 79(3) of the 1982 Constitution stipulated that the President and Vice President of the PRC shall serve no more than two consecutive terms. This restriction was removed by the 2018 Constitutional Amendment, adopted on 11 March 2018.

6 The Role of Local Bureaucrats in the Law-making Process

R. Simarmata

Introduction

As a unitary state with a decentralised government system, the making of local regulations in Indonesia is a dynamic process. On the one hand, local regulations function as implementing regulations to national laws and regulations. On the other hand, local regulations are made to respond to local aspirations to which national laws and regulations probably do not respond well. Sometimes local regulations are incompatible with national laws and regulations because they cater to particular local needs. A reverse situation may occur as well, in which local regulations are less responsive to specific local conditions as a result of being in conformity with national legislation.

In addition, some 'behavioural' factors are even more influential in local law-making than legal considerations. I talk about behavioural factors when the law-making process is deliberately used to serve individual and group interests. In a similar fashion, the ideas of local bureaucrats regarding issues that local regulation drafts intend to address, affect the law-making process. The social status of those affected by local (draft) regulations also influences the behaviour of the officials involved.

In Kutai Kartanegara district (East Kalimantan), both structural and behavioural factors affected the making of fishery regulations between 2004-2011. In that period, policy in fishery matters was still a matter of the districts and provinces, even though this started to change due to re-centralisation by central government. Four district draft regulations

were prepared: Fishery Revenue, Fishing, Standardised Aquaculture, and Fishery Enterprise. Two drafts were made to adjust the old district fishery regulations to the new Act on Fishery. Another two were made in an attempt to respond to specific local issues or need, such as the wish to increase local government revenues and protect the environment from destructive aquaculture.

Kutai Kartanegara officials, in particular from the fishery agency, were involved at every step of the making of the draft regulations. They engaged in formulating reasons to propose the drafts, in drafting, consultation with other stakeholders, and in political lobbying. Even though there are some similarities in the way the district officials were involved, there were also major differences from one draft to another. District officials took various factors into consideration when they formulated arguments supporting the draft proposal, carried out consultations with stakeholders, and engaged in political lobbying to get endorsements from local legislators. The differences in involvement were also caused by such a simple thing as lack of knowledge of how the law-making process ought to be conducted.

This paper examines how the different ways of district officials' involvement in drafting the four fishing regulations influenced two things: first, the way fishing community groups were involved, and second, the content of the drafts. This paper argues that even though the making of the four drafts meant to implement the national laws and regulations, the interests and perceptions of local bureaucrats made the law-making process complex and extended.

Bureaucracy in the development process

One line of scholarship sees the bureaucracy mainly as an actor hindering development. This occurs when the bureaucracy is so powerful that they can allocate resources and provide public services in a way that serves their self-interest. In such a situation, the bureaucracy is not responsive and sensitive to public needs, making it "a dead weight" on society (Jain 1992). When conversely the bureaucracy appears powerless, it will be subject to interference from external actors, such as elites, patrons, or families, which makes it dependent and preferential (Dube 1969; Eisenstadt 1969; Haque 1997; Hyden, Court, and Mease 2004). As Haque (1997) points out, the bureaucracy in developing countries in general, instead of being the agent of development and change, tends to maintain existing structures, to benefit from affluent classes and foreign capital, and to exacerbate the dependence and underdevelopment of poor classes and the nation. Riggs (in Hirschmann 1981) even points out that

the bureaucracy may contribute to negative development, while Harold Laski (in Sayre 1969) sees the bureaucracy as a threat to democratic government.

These pessimistic views have been subject to considerable critique. One argument, for example, is that it is unlikely that the bureaucrat is only an impediment to development, whilst at the same time the bureaucracy has an interest in ensuring that development continues. Moreover, as a result of establishing relations with external groups, the bureaucracy is constantly influenced and therefore adapts to external demands (Eisenstadt 1969).

Rather than looking at bureaucracies in developing countries either as powerful and self-interested, or powerless and ineffective, some depart from the assumption that bureaucrats always have to adapt to the societies in which they live. Firstly, bureaucrats in developing countries often perceive themselves as the agents of development, who often assign themselves the duty to modernise more traditional, lower-educated people (Dube 1969; Asmerom, Hoppe, and Jain 1992; Kajembe and Monela 2000). In such a context, the bureaucrats are required to be pioneers, negotiators, and motivators rather than policy implementers (Eisenstadt 1969; Esman 1974).

For critics who regard the bureaucracy as an obstacle to development, law-making is seen as a top-down process in which particular elites or small groups of powerful persons wield considerable influence. When the law-making is carried out in a society in which family ties and traditional forms of authorities are still prevalent, elitist or corporatist groups may dominate the law-making processes. Not only the domination of the elites influences the formation of law but also the competition among government agencies in pursuing their own agencies' interests (Otto, Stoter, and Arnscheidt 2008). The type of law-making in which the public hardly participates and in which there is hardly a rational debate and decision-making process can jeopardise the quality of the law.

When bureaucrats have the task of locally implementing national laws and regulations but try to take into account local aspirations, they try to make the law accommodating and render it responsive. The gap between the demands of the law and what social reality requires is the main reason for the need for this balance. It is important to acknowledge that bureaucrats attempting to make the law responsive and adaptable are not always merely driven by the interest of maximising wealth or maintaining the existence of the bureaucracy, but also by social concerns and solidarity with the affected groups (Dixit 1997).

Kutai Kartanegara in brief

Kutai Kartanegara district was founded in 1999 when Kutai district was broken up into three districts and one municipality. Before, Kutai was an autonomous district (*swapraja*) together with three other districts and two municipalities (*kota praja*) through Law 27/1959.

Kutai Kartanegara district is one out of 10 districts in East Kalimantan. The capital city of this district is Tenggarong, which is around 30 km from Samarinda, capital city of East Kalimantan Province. The district comprises of 18 sub-districts and 225 villages. Six sub-districts have a coastline territory, which is located on the coast (Muara Badak, Marangkayu, Anggana, Sanga-Sanga, Samboja, and Muara Jawa). The district is 27,263 km^2 in width, of which 4.097 km^2 are marine and water areas.[1] The district population in 2016 was 717,789. There are 39,986 households that rely for their livelihood on fishery, both cultivated fishing or catch fishing.[2]

Kutai Kartanegara is known as a rich district. Two years after decentralisation started (2001), the annual budget reached US$150 million and continued to expand to reach its peak with US$610 million in 2015, to subsequently drop to only US$360 million in 2016 and US$300 million in 2017. The huge district budget originates from a significant shared revenue from oil and gas extraction. The importance of the oil and gas sector to the district economy continues up to present.[3]

The fishery sector's contribution to the District's GDP is less significant. Together with husbandry and forestry, the fishery sector contributes only 10.25%. That also appears from the Kutai's annual revenue (*pendapatan asli daerah*). In a joint annual report of the Central Bureau of Statistics of Kutai Kartanegara Office and Regional Planning Agency, there is no record of the amount of annual revenue from fishery, but the report says that in the same year (2015) the district fishery yield was 121,932 tons which covers 50.80% of the province's total production.[4] That makes the district the largest producer in the province.[5]

The making of four draft local regulations[6]

The first fishing regulation in Kutai Kartanegara district dates from 1978 when in an attempt to implement the provincial fishing regulations of 1969 and 1973, the district promulgated District Regulation 18/1978 concerning Fishing within the Administrative Territory of Kutai District. The main provisions of the provincial regulations stated that the fishing territory would be divided into four fishing zones, and that any activities in this field required a Fishery Business License (FBL), a license for using

a vessel, and that there was a fishing prohibition in sanctuaries. To follow up on the provision on sanctuaries, the District Head later issued Decree 79/1978, which was later replaced by a Decree of the Head of the Kutai Fisheries Agency (E.1.5234/137A/SP/V/2009 concerning the Sub-District Committee on Fishery Resources Conservation).

As a response to the enactment of a new Fishery Act of 1985, the district government substituted the 1978 regulation with Regulation 3/1999. This Regulation reiterated what had been stated in the Fishery Law of 1985 by prohibiting the use of destructive equipment as well as catching breeding fish and trading fish eggs. Other provisions stipulated that fishing should be in accordance with the rules on a fishing zone division, and any fishery resource use is prohibited in the sanctuaries unless it does not harm or destruct its fishery resources.

The District Regulation of 1999 added another two provisions, which existed neither in the 1978 Regulation nor in the 1985 Fisheries Law. The first provision stipulated that the installation of gear that could possibly endanger a public shipping line (*alur pelayaran*) would be prohibited. The second stated that any fisherman who wishes to fish outside his village or sub-district should obtain a written letter from the village head and sub-district head where the fishing grounds are situated. This provision was not only an addition to but was also in contradiction of the 1985 Fisheries Law and its subsequent implementing regulations that did not recognise fishing territory based on administrative boundaries.

After the enactment of Law 22/1999 on Regional Autonomy, the District government promulgated four local regulations in only one year: Regulation 27/2000 on the Authority of Kutai District Government, Regulation 34/2000 concerning Quality Control of Milkfish Fry and Fish Seeds, Regulation 37/2000 on Organoleptic Quality Control, and Regulation 36/2000 on Fishery Business. Regulation 36/2000 is the most important of the above three regulations. It regulates both capture and aquaculture.

Regulation 36/2000 also enacted some new provisions, which the higher national legislation did not stipulate. Firstly, the Kutai Regulation sets almost the same requirements for obtaining a Fishery Business License (FBL) as a Small Scale Fisheries Registration Certificate (*Tanda Pencatatan Kegiatan Perikanan* or SSFRC).[7] Three of the requirements are permit location, business plan, and letter of recommendation from the Kutai Fisheries Agency. Secondly, it restricts the length of validity of an FBL to thirty years with the possibility of another twenty years of extension. Thirdly, it elevated the SSFRC to the same status as an FBL.

The drafting and enactment of Kutai regulations on fishery resource use from 2004 onwards showed a new dynamic and expansion when compared with the previous periods. During 2004-2011, the Kutai District government initiated four Kutai Draft Regulations: the Draft Regulation on Fisheries Levy, the Draft Regulation on Fishing, the Draft Regulation on Fishery Business, and the Draft Regulation of the Kutai District Head on Standardized Ponds.

Agencies involved in the drafting process in this period varied, and so did the subject matters. The Kutai Fisheries Agency is not the only agency that initiated draft regulations on fishery because other agencies took initiatives as well. The reasons for drafting and enacting the Kutai regulations are diverse, ranging from technical and incidental to substantial and future-oriented. The diversity of reasons eventually translates into various subject matters and goals of the enacted and draft regulations. The following section describes the four regional law-making

initiatives of fisheries regulations in Kutai District. It pays attention to reasons, input-gathering methods, as well as substance.

Draft regulations initiated by the Kutai Fishery Agency

Draft Regulation on Fishery Levy

The demand to make the Draft Regulation on Fishery Levy originated from a call made by the Secretariat Office of the Kutai District government in 2005 asking all agencies to find as many potential local revenue sources as possible.[8] Incidentally, a senior staff member of the Fisheries Agency joined a 2005 comparative study trip of the Kutai District government in Banyuwangi District in East Java. During the study trip, the senior staff member was informed that in Banyuwangi District there was a local regulation concerning a Local Fisheries Levy. On the basis of this information and in response to the call of the Secretariat Office, a year later, a legal drafting team was appointed by the head of the Fisheries Agency to prepare the draft regulations for Kutai District.[9]

The drafting committee of the Regulation on Local Fishery Levy hardly listened to the input from target groups. To prepare the drafts the appointed members of the legal drafting team relied heavily on their own knowledge. They conducted four or five internal meetings to share this knowledge. The team gathered input from outside by conducting two comparative studies, one in Banyuwangi District of Central Java, and one in Pasir District, a southern district of East Kalimantan province. Those two comparative study trips took place in 2006.

Each of these study trips offers some interesting stories. The agency chose Banyuwangi District because the above-mentioned senior staff member had visited the region in 2005. However, during the 2006 comparative study they were surprised to be informed that to be able to collect fishery levy, the Agency should first construct a so-called fish auction (*Tempat Pelelangan Ikan* or TPI) and fish port (*Pangkalan Pendaratan Ikan* or PPI). At that time, the Kutai District government had neither. Having learned about this condition, the Fisheries Agency changed its priorities and took the first steps to build the two required public facilities. Meanwhile, the comparative study trip to Pasir District took place towards the end of 2006 (22-26 December). The fact that the last two days of the study coincided with the Christmas holidays raises the question of how effective it was. Indeed, it had no influence on subsequent events.

The content of the Kutai Draft Regulation on Fisheries Levy is a continuation of what was stipulated in Regulation 34/2000 and 37/2000.

As already mentioned, these two regulations required that any transported and traded shrimp and milkfish seeds, as well as processed fish products, had to undergo a quality test. The products that would pass would receive a certificate issued by the Fisheries Agency. These two regulations did not oblige fishermen, farmers, or traders to pay a levy if they passed the test and received the certificate. The Kutai Draft Regulation on Fishery Levy stipulated that any quality test followed by a certificate should be completed with a levy payment. The making of this draft did end up with the enactment of a regulation on fishery levy. Nevertheless, in 2011 the District government enacted Regulation 19/2011 concerning general regional levies. One of the levies in the Regulation is the fishery levy.

Draft Regulation on Fishing

A demand to revise Kutai Regulation 3/1999 on Fishing arose when the implementation of the regulation turned out to be ineffective. Many small-scale fishermen complained about large-scale fishermen who used prohibited equipment such as trawl nets in the 0-3 nautical mile zone. They also used trawl during the day which is against a traditional fishery custom, prescribing that trawl shall be used at night only. Besides the use of trawl, there were complaints about other destructive fishing practices, such as the use of chemical, poisonous, and explosive substances. The small fishermen also tried to curb the destructive fishing practices by warning and sometimes expelling the fishermen concerned, but the latter contested the legitimacy of such actions. Aware of not having any legal grounds to rely on, the small fishermen asked the officials of the Fisheries Agency to revise the prevailing legislation in order to allow them to take action against those breaking the law.

Like the Draft Regulation on Fishery Business, the making of the Draft Regulation on Fishing also included a comparative study trip as well as consulting with related ministries and with the Legal Bureau of the provincial government. However, the drafting process also engaged affected groups by conducting serial discussions with fishing and farming communities. In addition, the appointed Legal Drafting Team held five internal meetings. All of the above-mentioned activities took place in 2008.

The comparative study trip went to Pati district of Central Java Province. Consultation with ministries and the Legal Bureau of the Provincial government aimed to get input concerning three matters. First, how to properly revise Kutai Regulation 3/1999. Second, how to make a local regulation in a short period of time. Third, how to draft a local regulation which would not contradict higher national regulations.

Regarding consultation with fishing and farming communities as potentially affected groups, it was initially proposed to gather input from fishing and farming communities in two ways, namely by a survey and a series of discussions. Yet the survey was cancelled due to time constraints and the fact that the model that was supposed to be used to develop a questionnaire for the survey somehow disappeared. Due to budgetary restraints, the Fisheries Agency could only organise one discussion in each of the six sub-districts. The available budget for each sub-district was only US$1,000. Each meeting lasted for 2 to 2.5 hours with around 30 participants on average.

Even though there were no systematic minutes of the six discussions, the team members assumed that they would manage to take into account the input from the participants of the meetings. However, as an official of the Kutai Fisheries Agency who was the secretary of the team commented:

> If the input from the fishermen and farmers differs from the agency's view, the team will use the agency's view. That is because the agency's view is scientific while the input from the fishermen and farmers is unscientific given that they are less well-educated.

The halting of the drafting process was connected with the situational mood of the Fishery Agency officials who at the time of the drafting process were in high spirits given that they had just moved to a new office. It explains why there was no unit within the Fisheries Agency, which was willing to take responsibility for continuing the drafting.

After a one-year program was run in 2008, the drafting process of this regulation ceased altogether. A lower member of staff of the agency who was in charge of the draft and who acted also as a Secretary of the Legal Drafting Team actually set up a program proposal for 2009. Through the program, he projected to accomplish a final draft in 2009, which was to be sent to the Legal Bureau of the Kutai District government. He believed that the process in the Legal Bureau would not take long given that the Secretary of the Fisheries Agency was known to be capable of lobbying the Legal Bureau officials. Yet his superior rejected and later fully cancelled the program proposal. This superior was thought to have done so because he was about to move to another agency and he probably felt that he would not benefit from the draft regulation agenda.

Ideas to continue the formulation of the Draft Regulation on Fishing rose again in 2010. In the same way as the previous year, the lower member of staff prepared a program proposal. Yet this time it was unclear whether his new superior passed the program proposal on to the Head of Division, because he suspected that the latter was not interested—unhappy as he was with his new position because he used to be assigned

to another division of the Agency where his main task was to handle issues related to the marketing of fish products. Recognising that the drafting process was stagnant, the Agency Head suggested to the lower member of staff to continue the process by only inserting minor points of revision, such as adding the new name of the district to the draft. Yet the lower member of staff refused to do so, given there was no budget allocation for the minor revision.

In the same year that the preparing of the Kutai Draft Regulation on Fishing commenced, a proposal to continue the preparing of the Kutai Draft Regulation on Fisheries Levy appeared. The proposal came from another division of the Fisheries Agency. As now there were two proposals, the Agency Head decided to prioritise the Kutai Draft Regulation on Fishing. It is not clear why the Agency Head came up with that decision, yet the membership composition of the Legal Drafting Team suggests that it was a compromise between four various divisions of the Agency. Not only did they have to revise Kutai Draft Regulation 3/1999 on Fishing, but the Team also had to revise three other Kutai Regulations: 34/2000, 36/2000, and 37/2000.

Draft regulations initiated by another agency

Draft Regulation on Fishery Business

The Kutai Draft Regulation on Fishery Business was initiated by a newly established agency called Bureau of Natural Resources. The Bureau had effectively started running in 2009. According to a Decree of the Kutai District Head, one of the duties of the Bureau was to formulate policies concerning natural resources. The officials of the new bureau seemed to regard drafting regulations as one of their favourite activities in their first year in office. The bureau aimed to make three Kutai Draft Regulations, one of which was the Kutai Regulation on Fishery Business.[10] To start the lawmaking process, a Legal Drafting Team was established by the Kutai District Head. There were eleven officials on the team, one from the Fisheries Agency, one from the Legal Bureau, and the remaining nine from the Bureau of Natural Resources itself.

However, the formal intention of the Bureau of Natural Resources to engage with other related agencies in the drafting process was hindered by the behaviour of the bureau officials in establishing and running the team. The Bureau never informed the Fisheries Agency and Legal Bureau that their staff had been included in the drafting team. In addition, the Bureau did not involve the other two agencies in the drafting process from an early stage, but only after it had already prepared a rough version of the Draft Regulation on Fisheries Business. The officials of the Fisheries

Agency were surprised to find out that they had not been involved in the first round of drafting.

The making of Draft Regulation on Fisheries Business had diverse objectives. The Draft claimed that the prevailing Kutai Regulation 36/2000 on Fishery Business was ineffective as large-scale natural resource extraction formed a new threat to fishery resource use. It added that Regulation 36/2000 was considered out of date and in need of adjustment since the new Fishery Law 31/2004 and Government Regulation 54/2002 had been enacted. However, the Kutai Draft Regulation on Fishery Business contained very general goals. Apart from the two above objectives, the making of the Kutai Draft Regulation was also said to be undertaken to generate the use of renewable resources and local revenue as well as to create a conducive environment for investment.

However, the Kutai Fisheries Agency officials suspected that the above-mentioned reasons were fake. As a new agency, the Bureau of Natural Resources needed to create programs and activities in order to secure their budget. The bureau officials' motive to get funds rather than being genuinely interested in the new regulation can be inferred from the fact that they set up a three-year program to make the Kutai Draft Regulation on Fishery Business, which according to the Fisheries Agency officials, is longer than necessary. The three-year program was intended to enable the officials of the Bureau of Natural Resources to conduct more travelling. A larger budget for travelling recently emerged as a source of additional income.

As said, only after they prepared a rough draft, the Bureau of Natural Resources invited the two other agencies to a first meeting where all eleven members of the team were present. In that meeting, the team members from the Fisheries Agency informed the Team members that the Fisheries Agency was preparing two draft regulations concerning fisheries. However, even though the team members were informed about the previous initiatives of the Fisheries Agency, there was no willingness to figure out the similarities and differences between the rough drafts prepared by the Bureau of Natural Resources and the two draft regulations previously prepared by the Fisheries Agency. Being told that the Kutai Fisheries Agency was preparing two draft regulations concerning fisheries, the Head of the Bureau of Natural Resources simply commented:

> Any agency can take an initiative to draft a regulation as long as it is for the sake of the people.

One of the heads of the sub-division of the Bureau of Natural Resources reiterated the above pragmatic notion during the regional law-making process. He said:

> It would not be a problem if our bureau is preparing regional draft regulations even though other agencies or offices have prepared or are preparing similar drafts. We have two options if such a situation emerges. Firstly, we will ask other agencies or offices to incorporate the contents of their regional draft regulations in ours, or secondly, we just discontinue preparing our drafts and let other agencies or offices continue theirs.

Although they suspected a personal interest of the Bureau of Natural Resources, the Fisheries Agency officials expected that the Bureau of Natural Resources would likely be more successful in pursuing the draft regulation. This was mainly because the Bureau had a closer formal line with the Kutai Secretariat Office as well as the Kutai District Head. Moreover, the Bureau had informal political access to some members of the Kutai House of Representatives since the Head of the Bureau was close to several MPs.

Following an administrative tradition in regional law-making, the Bureau of Natural Resources consulted with the Provincial government and two national ministries, the Ministry of Home Affairs and the Ministry of Marines and Fisheries Affairs. Once again, they did not engage the two other district agencies in the consultation despite having promised to do so.

The Bureau of Natural Resources did fulfil its promise to involve the Fishery Agency when they organised two comparative study trips to Riau Province in 2011. During the first trip, the Bureau of Natural Resources of Kutai District and the Legal Bureau of the Provincial government met with the officials of the Riau Provincial government. During the second trip, some members of the Kutai House of Representatives joined. The second trip was initially set up to meet the government of Riau Island Province. Yet, due to miscommunication, they changed the trip to Pekanbaru city of Riau Province.

The expectation of the Kutai Fishery Agency that the Bureau of Natural Resources would be more successful in pushing through draft regulations turned out to be correct. Unlike the failure of the Kutai Fishery Agency to propose the Kutai Draft Regulation on Fishery Levy since 2006, the Bureau of Natural Resources managed to have the Kutai Draft Regulation on Fishery Business enacted as Kutai Regulation 15/2011 on Fishery Business.

Not only did the Bureau of Natural Resources succeed in getting the regulation passed, but the regulation also contains provisions concerning a fishing levy. As previously stated, in 2006, the Kutai Fishery Agency ceased to make the Kutai Draft Regulation on Fishery Levy when they were told that Kutai District is required to have the so-called fish market and fish port to be able to collect a fishery levy. At the time of the enactment of Kutai Regulation 15/2011, the two required public facilities had not been constructed yet.

Thus, by having provisions on a fishery levy, Kutai Regulation 15/2011 broadened and superseded Kutai Regulation 26/2000. Nevertheless, the rest of the content of Kutai Regulation 15/2011 closely resembles Regulation 26/2000. In that respect, its primary legal objective, namely to supersede the old regulation, is achieved. Meanwhile, its other original objective, namely to couple increasing threats from other large-scale natural resource uses to fishery resource use, was addressed in a new separate Kutai Draft Regulation on Fishery Resources Conservation. As had happened when the Kutai Draft Regulation on Fisheries Business was made, the Bureau of Natural Resources formed a Legal Drafting Team in which an official from the Kutai Fisheries Agency and Legal Bureau were included. For this law-making initiative, the Bureau of Natural Resources held two consultations with the Ministry of Marine Affairs, and with the Faculty of Fishery and Marine Science of Mulawarman University, and met with related Kutai agencies and local offices of the Kutai Fishery Agency.

Draft regulations initiated by joint collaboration

Draft Regulation of the Kutai District Head on Standardized Ponds

Kutai District collaboration in regional law-making initiatives concerning fisheries was suggested by the Kutai Kartanegara District's Committee on Conflict Resolution (KKDCCR). This made sense, given that KKDCCR members came from various agencies of the Kutai District government. The following two initiatives of regional law-making are instances of such collaboration.

The making of Draft Regulation of Kutai District Head on Standardized Ponds was born from the experiences of the KKDCCR. With regard to fishery disputes, the KKDCCR had long encountered a common pattern whereby shrimp farmers complained that company activities had contaminated the water in the ponds and damaged pond constructions. For any loss resulting from the contamination and damage, the farmers asked the company for compensation. The success of earlier complaints

for compensation actually inspired other farmers to behave similarly so that the number of complaints increased gradually.

In response to the growing number of complaints, the KKDCCR had to think of a way to control them. The team, therefore, decided that it was best to select complaints that really needed settling, which meant that they could refuse complaints that did not meet approved formal criteria. The team eventually came up with a definition of a 'standardized pond'. The basic idea was that only the complaints of farmers whose shrimp ponds met the criteria of a 'standardized pond' would be taken into account. Like other fishery policies and regulations of the Kutai District, the standard definition aimed at developing sustainable shrimp ponds which at the same time added to local income.

After half a year of occasional meetings, the KKDCCR organised several further, more regular meetings. To make use of all insights that had arisen during the meetings, two lecturers from the Faculty of Fishery and Marine Science of Mulawarman University were brought in to digest and write the remarks down in a draft concept paper. Once the draft was finished, the KKDCCR carried out some activities to get input from outside. First, they asked for feedback from the Bogor Agricultural Institute, which had carried out some research as well as served as a consultancy in the Mahakam Delta. Second, they consulted with the Ministry of Marines and Fisheries Affairs. Third, they carried out comparative studies in two districts in Java.

The KKDCCR did not deem it necessary to consult with the shrimp farmers or even the larger shrimp entrepreneurs (*punggawas*) for input on the concept paper, as they regarded the scientific input from academics as more reliable. Besides, in their view, the concept paper contained rather technical matters which the farmers would probably find difficult to understand. What the farmers needed to do at the time of interviewing, was to develop their ponds in accordance with the 'standardized pond'. In any case, the KKDCCR felt that they already knew what the farmers thought for they had met the farmers many times.

After the concept paper was completed, the KKDCCR asked the Legal Bureau of the Kutai District government to convert it into a legal text. They opted for a Regulation of the Kutai District Head instead of a Kutai Regulation. The making of the latter would take longer because it required a political process with the District parliament members. Yet, as of 2009, the drafting process of the regulation has stagnated due to two factors. First, the Deputy Head of Kutai District was detained by Indonesia's Commission on the Eradication of Corruption in 2008 for corruption charges, making it difficult to ask for his signature. Second, some key actors who used to actively engage in the formulation of the concept paper had been moved to other agencies, which did not deal with

the issue of the Mahakam Delta. As a result, they could no longer engage in the drafting process. Meanwhile, officials who took over the position of the previous key actors were not as concerned about the issue of the Mahakam Delta as their predecessors.

Following its title, the provisions of the Draft Regulation of the Kutai District Head on Standardized Ponds chiefly determine the standards for ponds with regard to the following three matters: location, construction, and management. With regard to location, the draft regulation stipulates one thing which is in direct contrast with what has actually been happening on the ground: it forbids all ponds which do not comply with land use planning. An instance of non-compliance is if a pond is located along a green belt (*sabuk hijau*). Concerning construction, the draft regulation states that the size of an ideal shrimp pond cannot exceed two hectares. In addition, the pond shall not be badly constructed to avoid it from being easily damaged by sea waves. Last, the draft regulation prohibits the use of chemical fertiliser in an attempt to prevent environmental destruction.

Conclusion

The making of the four District draft regulations had formal and substantive reasons. The formal reasons are clear from the fact that the majority of the draft regulations were made in an effort to implement national legislation. The drafts were made to adjust the old Kutai district fishery regulations to the new act. This is the unavoidable consequence of having a unitary state system, notwithstanding the decentralisation process that had started in 1999.

In the drafting process, the Kutai District officials played a role as interpreters of the provisions of the act. In the process, they did not just simply elaborate these provisions further into local regulations but also tried to envisage how the local regulations could be effective as an instrument to address the needs of the affected group. A provision of the Kutai Draft Regulation on Fishing which introduced an administrative approach to fishery permits is a good example of the latter, even though at the same time it promotes an increase in government control.

District officials would like to promote the social significance of the draft regulations. To make that happen, it was important to have an objective reason for the Draft that responded to a specific purpose, concern, or interest. As explained, the interests included increasing the District revenue from fishery levy, protecting fishery resources and the environment from destructive fishery activities, and resolving conflict in fishery sectors. It was perceived that the old fishery regulations were unable to cope with these issues.

Nevertheless, the district officials were not free from desires and interests in the drafting process. Despite their role as interpreters of the national law by making local regulations, these bureaucrats had interests and perceptions, which did influence the drafting process and the content of the draft. These interests were sometimes institutional and sometimes personal. In Kutai District, bureaucrats' personal interests in the law-making were diverse, including gaining additional income and reinforcing the power of their position (*jabatan*). Important was also how these bureaucrats perceived the capacity and social status of the fishermen and farmers as affected groups. In general, they saw the fishermen and farmers as less educated people who were unable to understand policy or legal issues. They were also suspected of being 'tricky' by always finding ways to push the oil and gas companies to compensate for damage caused to their vessels, nets, and fish ponds.

Such interests and this perception explain why these district officials were willing to travel hundreds of miles from Tenggarong to do comparative study visits and consultations. They even did so during a holiday. The effort and time this took caused them to have insufficient time to meet the fishermen and farmers for public consultation. As a result, the content of the drafts hardly responded to the real social and environmental issues that they were meant to respond to. Their perception of the fishermen and the farmers mostly led to the drafts adding new forms of government control.

In this manner, the district officials impeded the pursuit of development goals. They mainly allocated resources in line with their self-interest. As a result, social change and environmental protection were not realised, even if some of them genuinely intended to play a role as a social agent wishing to generate social transformation.

Notes

1 Badan Pusat Statistik Kabupaten Kutai, 2017, *Kabupaten Kutai Kartanegara Dalam Angka 2017*.

2 See on https://kaltim.bps.go.id/statictable/2015/03/10/81/banyaknya-rumah-tangga-perikanan-menurut-sub-sektor-perikanan-dan-kabupaten-kota-2015.html (downloaded on 14 April 2018).

3 See Badan Pusat Statistik Kabupaten Kutai Kartanegara dan Badan Perencanaan Pembangunan Daerah Kabupaten Kutai Kartanegara (2016), Statistik Pembangunan Kabupaten Kutai Kartanegara.

4 Ibid.

5 See https://kaltim.bps.go.id/statictable/2015/03/10/81/banyaknya-rumah-tangga-perikanan-menurut-sub-sektor-perikanan-dan-kabupaten-kota-2015.html (downloaded on 14 April 2018).

6 This section primarily originates from Simarmata (2012, chap. 7).

7 SSFRC is granted to small-scale or traditional fishing or aquaculture, which is valid for one year with the possibility to renew it for another year.
8 The call was made due to the small contribution of local revenue to the Kutai annual budget. Between 2001-2005, Kutai earned a local revenue of a mere US$2,576,000 (approx.) each year. In 2011, the total sum increased significantly to US$11,240,000. See Kaltim Post (2011).
9 The story was told by a middle-rank officer of Kutai Fishery Agency in August 2008.
10 The other two Kutai Draft Regulations respectively concerning Animal Husbandry and Health and the Utilization of Non-Timber Forest Products.

7 Law's Catch-22: Understanding Legal Failure Spatially

B. van Rooij

Introduction: legal failure

The assertion that state law sometimes fails is not new. Over three decades ago, Allott (1980, 55) wrote, "Laws are often ineffective, doomed to stultification almost at birth, doomed by the over-ambitions of the legislator, and the under-provision of the necessary requirements for an effective law, such as an adequate preliminary survey, communication, acceptance and enforcement machinery." Legal failure includes the law's in- and over-effectiveness, which may "create uncertainty, chaos, distrust, or hostility, rather than [...] regulate properly" (Cotterrell [1992, 52] summarising Teubner 1987). In case of legal failure, state law is not able to fulfil its inherent, contradictory promises of justice, certainty, unity, social cohesion, and social control. Those who have predicted legal failure (Savigny [1831] 1975; Sumner [1906] 1960; Cotterrell 1992) and those who have noticed it around them (Pound 1917; Ehrlich [1936] 1975; Allott 1980; De Soto 2000; Otto 2000a) have partly analysed it as a result of the law's alienation from society and state law being ill-adapted to local circumstances.

The question of legal failure has also been central to professor Jan Michiel Otto's academic work on law and development, questioning how to use the law to improve the goals of development (Otto 2009). He sought to promote a new view on the law that went beyond legal positivism and to stimulate a law that would be effective in directing positive social change. Professor Otto used the key concept of "realistic

legal certainty," which he launched in his inaugural lecture (2002b, 2004). With it, he sought to connect the thinking of traditional lawyers to the concerns of development administration and socio-legal scholars. Traditional lawyers focused on the law's clarity and predictability and thus on legal certainty as a core trait of a well-functioning body of law. Development administration and socio-legal scholars focused on issues of implementation and effective law in action.

This article analyses why it is so difficult (and often impossible) to adapt state law to local circumstances and what this means for the search for realistic legal certainty. It argues that there is a contradiction between the logic of modern state law and that of local norms. The logic of modern state law seeks unity and certainty and is thus not limited to a certain place and time. By contrast, the logic of local norms is geographically and temporally embedded and is thus varied and uncertain over place and time. This contradiction is one fundamental reason why state law cannot be well adapted to local circumstances and justice, and may fail. This article shows that this problem is rooted in a Catch-22 situation with regard to state law's levels of abstraction. As is often the case, state law's levels of abstraction become dislocated; overly specific state laws no longer represent an abstraction of all local norms. This causes problems in implementing such laws locally. The logical solution would be to only make state law as abstract as necessary so as to cover lower-level norms. The problem is that the large scope of modern state law would render such abstraction meaningless and would not provide certainty and unity. This article will show that this contradiction between state law and local justice can only be reduced, not solved. It proposes reducing the contradiction through spatially-planned lawmaking and the development of case law. Spatially-planned lawmaking can occur through social scientific-based codification. For developing civil law systems currently lacking case law, they can develop it as a bottom-up source of law through legal research of published court cases.

Modernity, state law, and bad maps

The process of modernisation, as described by Giddens (1990), involves scale enlargement. Within this process, social relationships come to operate on a larger scale and become "disembedded" from a specific place or time. The development of modern state law has been a precondition for and result of the same process.

State law came to serve as a trust system (in the words of Giddens [1990], an "expert system") not bound by time or place, coexisting with the personal (locally and temporally embedded) trust of pre-modern

society. The technological and societal forces driving the changes towards modernity came to full blossom in the nineteenth century and accelerated during the twentieth century. Those forces first coincided with large codification projects. Later, they occurred alongside top-down, state-led, regulatory lawmaking. These modern types of Western lawmaking arrived at colonial and other developing nations through processes of legal transplantation (Watson 1993; Nelken 2001).

Modern state law has served as a system of trust, enabling modern large-scale social relationships and providing unity and certainty. It has simultaneously become a space (in the sense of Giddens [1990]) disembedded from any specific place or time in which social interaction is possible. Modern state law has thus become a sphere outside of society that enables social relationships to operate at a larger scale. For this to be possible, the law had to loosen its relationship with society by cutting loose its local and temporal social ties. This section will show how the disembedding of modern law has led to contradictions between state law and local norms, worsening legal failure.

The history of the 'disembedding' process

Pre-modern existing norms were embedded within existing contexts of time and place. First, there were real customary norms; these were unwritten and embedded in specific times and places. Second, there was customary law, which consisted of written customary norms. Writing them down made them lose their original character. It alienated them from the original *volksgeist*, as argued by Von Savigny (Savigny [1831] through Cotterrell [1992]; for this point, see also Oomen [2005]). Thus customary law, in the form of written custom, was disembedded temporally but not locally. It was still the custom of one place but became fixed over time. Third, there existed local laws and regulations as a collection of custom and customary laws. These were more abstract and had a larger scope of application in, e.g., city-states or pre-modern kingdoms. Such local laws were less temporally and locally embedded than custom or customary law. Still, their scope of application was mostly limited, so there were different local laws for different locations.

The first step towards modern disembedded law involved separating customary law and custom, disembedding law from time. This often preceded the process of modernity.

The next step involved unifying customary law, other local, written laws, and normative systems in a legal code. By transforming written local and customary law into a written code that applied to multiple, local customary legal systems, the law became dislocated from local realities.

Modern law came to operate on a much larger scale than pre-modern customary law or local law. At first, its scope was the nation-state. But modern law, in the form of international law, increasingly moved beyond state territories towards a regional or global scope. Achieving a consensus involved increasingly complex and conflicting local political goals and challenges.

The third step was the advent of regulatory law and top-down lawmaking, which completely severed the age-old ties between the state legal system and society. Law became an instrument of policymakers instead of a reflection of local norms. In developing countries, the process of legal modernisation was mostly imported through legal transplants (Watson 1993; Nelken 2001).

In many developing nations, legal transplants originally took place under the influence of colonialism. Through the process of nation-building and modernisation, developing nations later voluntarily imported laws and legal institutions or were obliged to do so as a condition for receiving development funding. Legal transplants shared the characteristics of codification and perhaps even more, of regulation, not being embedded locally or temporally. Similarly to modern codification and regulation, legal transplantation aided the process of modernisation by providing a system of large-scale trust. This system was recognised within the nation-state and used by many states worldwide. This, combined with the development of international law, caused a globalisation of law, serving as a global non-embedded system of trust.

Modern (codified, regulatory, or transplanted) state law became its own sphere, largely isolated from society. This was justified and aided by the development of legal positivism and pure legal science, both central to modern and contemporary legal thinking (Cotterrell 1992). The rapid development and impact of legal positivism provided a framework for understanding the law that was no longer embedded in a specific time or place. The concept of law was no longer dependent on locally embedded values of justice, as it had been in the natural law philosophy. Legal positivism provided a value-free, and thus locally and temporally disembedded, conception of the law. Law was what the sovereign said it was (Austin [1832] 1995). Or, more influential until this day, law consisted of legal obligation rules made according to rules of recognition (Hart 1961). Legal science was highly influenced by legal positivism, as it developed a value-free method of analysing the law by an inner logic distanced from local and temporal social realities. This was perhaps best represented in the common law world by Langdell's case law method (Nader 2002) and in the civil law legal systems by Kelsen's theory of pure legal science (Kelsen [1945] 1960, as summarised by Cotterrell 1992 and Harris 1997). As a result of these developments, legal science

moved away from society. This led to reactionary movements, such as the legal realists and various law and society groups. However, all in all, legal science remains dominated by legal positivism. Socio-legal studies have had a relatively small impact on mainstream legal thinking and reasoning, as well as on legal practice (Tamanaha 1997).

Searching for unity and certainty amidst (dis-)embedded systems

The result of the modernisation process in law is that there now exist plural normative orders (Merry 1988). On the one hand, there are the disembedded normative systems of modern state law, and on the other, there are locally and temporally embedded local normative systems. The embedded systems existed in pre-modern times and (to some extent) continue to exist in modernity. In a sense, we could say that they coexist and are stacked (Roquas 2002) on top of each other. We could analyse them as "maps," as norms of different levels of abstraction operating at different scales (De Sousa Santos 1987). The most important aspect of scales is the difference in detail. Higher-scale maps (e.g., 1:300) cover a smaller geographical area and are more detailed and specific. By contrast, lower-scale maps (e.g., 1:300.000) cover a larger geographical area, are more abstract, and lack detail. Ideally speaking, lower-level norms (i.e., custom, customary law, and even local lawmaking) are more specific and can be compared to higher-scale maps (De Sousa Santos 1987). Lower-level norms should ideally be similar to local social contracts or conduct norms (mores) (Sumner [1906] 1960). Thus, such norms have a close relationship with the *volksgeist* (Savigny 1831) of what law ought to be and especially of what justice is. This is not always the case. Colonial customary law was often the result of negotiation between the colonial ruler and the ruled. Thus, it is an example of local norms which did not conform to this ideal (Starr and Collier 1987; Chanock 1989).

Nevertheless, as a result of their local specific character, lower-level norms can only apply to a certain local context. In the words of Giddens (1990), they are embedded within a certain place (and in the case of custom, within a certain time). Legal implementation requires both enforcement and invocation (Pound 1917). Since the norms are (ideally) similar to local society and justice, knowledge and invocation of such norms will be more widespread because they are locally legitimised. For the same reason (and because of the small scope of application), enforcing such norms will have low costs. Such local norms serve as the basis for social cohesion. Local norms govern the most basic building blocks of society (see Ehrlich's [1936] description of associations). The problem

with local norms in modernity is that they themselves cannot provide unity and certainty outside of their own locality, attributes necessary for non-local social relationships.

Modern state law is ideally of a lower scale (in the sense of the map metaphor) and should be more abstract. One method of abstraction involves codifying a recognised norm of custom and customary law, such as, e.g., in Ghana (Otto 2002b; Ubink 2008a). However, recognising locally (and in the case of custom, temporally) embedded norms at the national level leads to a state legal system with norms referencing different places (and for custom, different times). Cross-local social relationships are thus faced with different norms. Under such circumstances, maintaining cross-local relationships will be difficult since there is no mutual system of norms to build trust. The state legal system's recognition of custom and customary law does not solve this problem. State recognition of custom and customary law through abstraction thus undermines what modern state law set out to do in the first place: provide large-scale certainty and unity.

Codification is another method through which modern state law has abstracted norms from existing locally and temporally embedded norms. Codification is ideally the process of extracting local norms out of society and making them into uniform and unchanging law. In geographically larger legal systems, the abstraction of different local norms through state law would result in the norms having no meaning or power. Most states are too geographically large for state law to be made only through pure codification. Modern states share development goals that are partly based on certainty, goals such as nation-building, unity, and economic development. Thus, their legal systems cannot be so abstract as to no longer provide certainty and unity.

Therefore, in most states, lawmaking has not developed through recognising custom or customary law, or through abstraction. Instead, most states have used non-abstract codification, choosing to codify some norms over others. This has potentially privileged certain norms, as outcomes of political processes have favoured specific interests by exerting power during the final phase of codification.

Finally, state law has completely severed its ties with local existing norms by introducing regulatory law. This type of law neither consists of abstractions of local norms nor prefers certain local norms while neglecting others. Regulation is made to carry out state policy. Therefore, it is made to a large extent through a top-down process (Sabatier 1986). Regulatory law has grown immensely in the twentieth century. In many legal areas, it has come to replace codification-based legislation. Similar to codification, regulatory law can be abstract but in many cases, it can also be highly detailed. European law is a good example of detailed

regulatory law with a large scope of application. It has detailed norms and standards on issues such as the banning of livestock vaccination against foot and mouth disease. The codified and regulatory laws and regulations of modern developed countries have spread across the globe through the process of legal transplantation. As we have seen, those laws and regulations contained many specific norms.

Worldwide, state law has thus rapidly developed. Sometimes it has provided rules abstracted from local norms. But more often, it has provided norms that are largely unrelated to the many variations of local specific norms.

State law can be (and often is) specific and thus De Sousa Santos's (1987) metaphor of maps does not fully hold true. If state law is similar to low-scale maps, it is supposed to be more abstract. What kind countrywide map provides details of small streets? Yet this is exactly what modern law has started doing. Instead of just inducing (i.e., abstracting) local specific norms, state law often provides detailed regulation applicable throughout a larger territorial sphere. The result is that the uniform state law no longer represents the ideal sum of all local norms. This is understandable, as the process of modernity has led to large spheres of uniform law. If law behaved like a map in such spheres, large-scale law would lack any kind of detail. The lack of detail would entail norms that are open to interpretation and would thus not lead to unity and certainty.

Now that state law does have detail, a problem arises: detailed higher-level law may often be contrary to many sets of local norms and socio-economic circumstances. This has implications for the implementation of the law. Since higher-level norms are opposed to lower-level norms, they do not benefit local citizens. Thus, citizens will less frequently implement (e.g., through invocation) such high-level norms (e.g., as with contract law). Macaulay's (1963) study of contract law in the business community may serve as an example, in the sense that business relations were not made according to contract law. Inner community conflicts actively avoided the legal system and only used it as a last resort. Internal norms within the business community (i.e., local norms) were deemed more important. Outside norms of the legal system were not to be invoked "if you ever want[ed] to do business again." Research on Turkey's 1920s legal modernisation found that the impact of the new, transplanted, secular, state civil code had little impact on the majority of the society in which custom remained in use (Moore 1973; Merry 1988; Starr and Pool 1974). These are just two of many examples of a lack of state law invocation due to a contradiction between state law and local norms and circumstances.

Implementation through enforcement will also be more difficult. The social and economic costs of such enforcement will be higher for

norms that are against local practices, customs, or circumstances. This will lead to less enforcement to avoid high local socio-economic costs. Alternatively, if policy decisions are made to enforce high-level norms regardless of the local consequences, it will lead to over-enforcement with high local costs.

Implementation of higher-level norms has a secondary, well known, spatial implementation problem, which aggravates the problem of higher-level norms contradicting lower-level norms and circumstances: The larger the norm's scope of application, the more difficult implementation will be. With a large scope of application, the number of norm-addressees will be higher. It will thus be more difficult to let them know of the law, let alone empower them to invoke it. A lack of legal knowledge and legal experience will lead to less success invoking the law (Galanter 1974) and ultimately to less legal invocations overall. Furthermore, in terms of enforcement, the further away the level of regulation is from the regulated community, the more costly enforcement will be. Thus, the more difficult it will be to get accurate information on violations. In other words, the larger the number of norm addressees is and the larger the space in which violations of the law can occur, the more it will cost to detect violations, to execute sanctions for such violations, and to monitor compliance after enforcement. This is partly due to a lack of information because of the lack of top-down oversight, which increases along with the spatial distance between the regulation and the regulated. The lack of information will make enforcement both costly and difficult. In different enforcement regimes, this will either cause ineffective enforcement or blind over-enforcement. So the combination of a specific norm and a large scope of application will lead to less implementation.

Modern law is thus caught between two extremes. Laws that cover large jurisdictions can be adapted to local circumstances and feasibly implemented, but then require high abstraction and discretionary implementation, offering very little certainty and predictability. Alternatively, as has increasingly happened, laws that cover large jurisdictions can focus on providing certainty and unity on paper, but become too specific to be adapted to local circumstances and thus become highly challenging to implement. Following Heller's famous book, we may call this the law's Catch-22. If we make a specific certain and unitary law that looks good on paper, it has less effect in reality. If we make an abstract law that may have an effect in practice, it will neither look good on paper nor provide unity and certainty. This will result in (spatial) legal failure because of the spatial dislocation of modern state law and local norms, which cannot be fully solved because of the law's Catch-22. To illustrate this point further, the next sections look at Otto's critique of De Soto's discussion of legal failure.

De Soto's legal failure, balancing access and certainty

Legal failure became a "hot" topic again after the publication of the Peruvian economist De Soto's (2002) book, *The Mystery of Capital*. In his work, De Soto contends that the world's poor have an enormous amount of assets ($9 billion) which they cannot transfer into capital. According to him, this is what keeps them poor and prohibits their development. Their assets cannot be transferred into capital because the assets are not recognised by the formal (i.e., state) legal system, but are based on 'extra-legal law'. Therefore, "their assets cannot be readily turned into capital, [...] traded outside of the narrow legal circles where people know and trust each other, [...] used as collateral for a loan, and [...] used as a share against investment" (De Soto 2000, 6). In Otto's analysis (2002a, 2009), De Soto argues that the poor's assets have remained extra-legal due to two failures. First is the partial failure to enact reform laws that "address the needs and aspirations of the poor" (De Soto 2000, 154). Second is the unsuccessful implementation of those laws in the rare cases in which they have been enacted.

De Soto's analysis of legal failure excellently illustrates how spatial legal failure works. On the one hand, state law is necessary as a system of trust. It provides certainty and unity, enabling large-scale social interaction. De Soto's thesis for poverty alleviation is based on making the poor part of this trust system, which should enable them to transfer their (locally embedded) assets into (locally disembedded) capital. On the other hand, the state's law is abstract and/or contradictory to local norms. Thus, state property law is not well founded in social contracts and state property rights are not locally legitimised (De Soto 2000). Without such local legitimation, De Soto argues that state law recognition projects of extra-legal rights will remain unsuccessful. State law is complicated, dominated by legal elites, and at-times unacceptable to local people, so many cannot participate in its benefits. State law recognition of extra-legal rights that is not locally embedded will remain without effect. This is because the poor will continue to find ways of protecting their locally embedded rights outside of the state legal system, as long as it is not geared towards fitting their locally embedded interests. Therefore, De Soto wishes to find a way of recognising extra-legal rights in state law and creating large-scale certainty and capitalisation, while maintaining their local embeddedness in local contracts. De Soto thus brings to light the basic contradiction between the unity and certainty of the disembedded state legal system and the accessibility and acceptability of locally embedded extra-legal norms. The reason why the legal reform that De Soto proposes has not been made often (or if so, has seldom been successful) can also largely be understood spatially.

De Soto's legal failure and Otto's critique of his analysis (Otto 2002a) both serve to show that it is highly difficult, perhaps impossible, to solve the problem of spatial legal failure. De Soto has contradictory desires. He wishes extra-legal rights, which are too specific and locally and temporally embedded to be recognised in the legal sphere, to become legal rights. This would increase the poor's security, capital, and scale of participation. But the unitary logic of state law makes this impossible for one of two reasons. First, the extra-legal rights may become unitary state law rights, be transferred outside of the local sphere, and create the same problems of legitimacy and access in the existing state legal sector. In the words of Otto (2002a), "The core problem [...] is that law-making, even with the best information and intentions, will always affect and change the nature of pre-existing social contracts." Alternatively, the state legal system may simply recognise extra-legal rights as they are. However, this will not make them more unified or certain, thus prohibiting the poor from transforming their assets into capital.

De Soto's analysis of legal failure shows at once the importance of spatial legal failure for present world development. In his eyes, if the legal failure can be overcome, the poor will be able to make capital out of their extra-legal assets. At the same time, it shows that the spatial problem would not be solved, either by shifting the extra-legal into the legal sphere or by abstracting specific local norms into a larger-scale legal system. The present analysis has made clear that the problems underneath the two spheres of law are spatial. It has also noted that De Soto's solution does not solve the spatial difficulties of simultaneously providing locally embedded legitimacy and access while providing cross-local certainty to form capital.

Case law as intermediary and source of certainty

So far our discussion has focused on the law, its implementation, and its relation to spatial realities within society. Perhaps on purpose, or perhaps because few do so in a context of legal failure, this article has so far not looked at the role of adjudication and case law. In Western European civil law systems in which the continental legal system originally developed, adjudication might not set precedent. However, it does play an important role as a source of law (Guo 2015). Case law serves as an intermediary between the state's isolated legal system and local justice throughout society. On the one hand, the process of adjudication applies abstract state norms to specific local circumstances. On the other hand, because adjudication forms an informal source of law in Western Europe, case law serves as a form in which the norm interpretations applied in local

conflicts serve as a source of state law. Cases are made into case law through legal analysis, starting with legal arguments made in lower courts and solidified by the supreme and highest courts, which seek to provide guidance on the best judicial interpretations. Legal research plays a vital and often overlooked role in this process (Guo 2015). Legal scholars in Western Europe analyse the differences in how the relevant courts interpret abstract state law (Guo 2015). In doing so, they try to find doctrines (i.e., leading types of interpretations). Such doctrines are then described in articles, monographs, and (most importantly) textbooks used by legal professionals and law students.

Case law as a source of law has an important implication for our analysis of legal failure so far. Case law makes it possible to use abstract norms while creating legal certainty and unity. Its relative flexibility and specificity means it less frequently violates local norms when compared to ordinary state law, especially regulated state law. Without case law, state law has to be much more specific in order to provide legal certainty and is more likely to conflict with local norms and lead to legal failure. So without case law as a source of law, legislators face a much tougher challenge in overcoming the law's Catch-22. Legislators must then find a way to provide both certainty and adaptability to local circumstances. A political process that provides legislators with thorough inputs on local circumstances helps them understand the local contexts their laws must fit, but the primary challenge of balancing certainty and flexibility remains unresolved.

Case law's second implication for spatial legal failure is that it serves to transform local norms into state law. As we have seen, such a bottom-up process is rare in modern lawmaking, especially for regulatory law. We could conclude that case law as a source of law reduces spatial legal failure.

In many developing civil law systems, a well-functioning system of case law is not present. China serves as an example, while other developing countries as different as Indonesia or Mali present similar problems. As would be expected in a civil law system, the current Chinese legal system does not generally recognise specific legal interpretations made by courts as a source of law (Guo 2015). This makes the Chinese legal system very unlike Western European legal systems, where despite their continental roots and lack of formal precedent, court cases are vital sources of law. The Chinese one-party state has not wanted courts to create legally-binding norms. The exclusive power over lawmaking should rest with the legislator. There has been some recent change, including the Chinese Supreme People's Court issuing so-called "Guiding Cases," selecting a handful of China's lower cases as exemplary cases that should have a binding effect (Ahl 2014; Guo 2016). Yet even with this development,

China still does not have a true, bottom-up, norm-formation system that exists in legal systems that do recognise cases as sources of law. Meanwhile, Chinese legal scholars have not systematically reviewed cases. Many cases still lack elaborate motivation to serve as proper sources of legal interpretation (Guo 2016).

All of this has had several effects. First, the Chinese legal system lacks legal certainty. One study of Chinese tort law found that a Chinese legal practitioner has no way of knowing how to interpret the generally stated constitutive requirements of non-contractual civil liability. The law itself is vague on this point, as it is in most legal systems. However, where a Dutch, French, or German lawyer or judge would turn to case law and legal doctrine based on case law, a Chinese practitioner is left only with theory or foreign interpretations (Van Rooij 2000).

The lack of case law and doctrine in China has led to the responsibility for interpretation being vested in the legislators. When rules are not clear and need interpretation, legislators may issue new rules to provide further specification, which will only lead to more spatial dislocation. Alternatively, so-called formal interpretations may be issued by selected national entities, such as the National People's Congress and the Supreme People's Courts. Because such formal interpretations are not based on lower-level norms or conflict resolution, they are in no way comparable to case law. In many ways, they are similar to regular legislation.

Thus, the problem is not only a lack of legal certainty. Systems lacking case law as a source of law, such as China, will lack mechanisms to translate local norms into the legal system. Top-down legislative interpretations and specifications will only cause more contradictions between norms in the legal system and local norms. For those countries lacking a system of case law, including countries such as Mali, Indonesia, and China, setting up such a system would be an important improvement and would serve to reduce spatial legal failure.

However, De Soto's case of legal failure shows the limits of case law as a full solution to spatial legal failure. Case law may serve to bring certainty to abstract state norms and may serve as a tool to translate local norms into state law. However, it will neither bring certainty and unity to local norms nor will it make the state legal system more accessible to the local poor.

As we have seen, De Soto wishes for the poor to gain certainty of their extra-legal rights, which are embedded in local and temporal structures. State recognition of such extra-legal rights would not provide the certainty and unity they need. Case law as a source of law would not alter this.

De Soto also fears that if the extra-legal rights of the poor were translated into legal rights, then the poor would lose access because of the technical nature of the legal system. A system of case law would not solve this.

Legal doctrine is highly complex and is very much dominated by legal elites. Otto argues that De Soto's idea of formalising the poor's rights into the formal legal system will make them inaccessible. Similarly, we may fear that relying on case law to overcome the law's Catch-22 of balancing certainty and flexibility will not improve accessibility for the poor and the disenfranchised. We can thus conclude that case law may reduce spatial legal failure but cannot solve it for all of the types of problems involved.

Conclusion and recommendations

As professor Otto has argued, legal failure is highly complex and related to legal, political, administrative, cultural, and economic factors (2002b). A full understanding of legal failure requires understanding the interplay of these factors within the given situation of legal failure. This article has analysed an understudied aspect of legal failure, which causes and catalyses some of the more studied factors just mentioned: the spatial contradiction between unified and certain modern state law and the variation of local norms and justice. Spatial causes for legal failure need to be taken into account when studying other factors and finding solutions. If solutions for legal, political, administrative, cultural, and economic factors do not deal with the spatial contradiction involved, the basic problem of legal failure will naturally remain, asserting itself in a new manner.

As the Catch-22 analogy has made clear, the problem of spatial legal failure cannot be solved, only reduced. The first approach is to base spatially planned lawmaking on social scientific research. A policy choice has to be made at each level of lawmaking about which norms are to be codified or regulated at that level. In general, the higher the level and the scope of application, the more cautiously legislation should be approached. Ideally, at the highest levels, only norms that will need to be implemented uniformly throughout the large scope of application should be codified. There should be few of these norms. They could then be backed up with enough economic, political, and social implementation funds, even though they may not fit all local norms or circumstances. Higher levels of lawmaking should base their decision on what laws to make (or even better, on which to keep) on the basis of what norms are absolutely necessary to provide unity and certainty throughout their scope of application. Other norms should only be made in a more abstract sense, e.g., framework legislation, permit-based systems, and procedural laws (which can be quite specific while leaving the substantive law open). Alternatively, other norms can be left for local-level lawmakers or left in custom or customary law.

Second, legislation should once again, as much as possible, be increasingly based on and sensitive to local societal norms. Legislative drafting should be based on social scientific research. Such research should find out what the existing norms are within society and make a conscious choice about which of them to codify. It should further analyse the mutual effects of existing norms and new regulatory law. Such choice or analysis should estimate the effects of norm implementation and its effects on different localities. In certain localities, local norms are opposed to or different from those chosen in codification. Thus, the estimation should be made according to how those localities will react to the legislation and what the local socio-economic costs of norm implementation will be. When legal drafts are based on and accompanied by such research, the political processes of lawmaking can benefit from a better understanding of how the proposals fit the interests of different constituents.

As we have seen, for many civil law-based developing legal systems, there exists another problem which aggravates spatial legal failure: the lack of case law as a source of law combined with the lack of doctrine development through legal science. The lack of these two factors leaves no mechanism through which local norms can have an impact on the legal system. It also places the full responsibility of providing legal certainty on the lawmaker, resulting in too much and overly specific law. Such law is too rigid and poorly adapted to local and temporal differences. But perhaps even worse, it causes legal uncertainty because of unclear legislation, whose interpretation is not guided by any legal criteria, resulting in legal uncertainty.

To solve this problem, it is imperative that civil law based systems that lack a functioning system of case law start developing it. This requires several steps. It is not easy and it will take many years to do so. First, cases and decision should be published and should include as much information as possible about the motivation behind the decision. Second, there should be enough published legal decisions of a certain quality. This means that the judiciary must meet a certain level of professional standards. Then legal science must start to analyse this bulk of cases and discern what commonalities can be discovered in interpretations of certain norms. On this basis, an interpretation doctrine may be developed. Finally, legal monographs, textbooks, professional standard works, and teaching materials should be written on the basis of such interpretation doctrines. In all of this, digital technology now provides excellent tools that can ease these steps.

If these steps are followed, a new generation of legal professionals will be educated to interpret the law's uncertainty on the basis of induced doctrine. This will lead to a higher level of legal certainty, while also

lessening spatial legal failure because local norms will become part of the legal system. For large unitary legal systems such as China, perhaps several different doctrines for different parts of the country may develop, as a solution to the huge spatial challenges national norms must face.

The law's spatial dimension thus poses a challenge for legal scholarship. It demands that legal scholars seek mechanisms to integrate the abstract and specific, similarly to their colleagues in social science. In this, the work is similar to sociological integrative approaches of the last twenty years, whether it is integrating "micro and macro" (Ritzer, Alexander and Wiley; see Ritzer 1996) or "agency and structure" (Giddens and Bourdieu; see Ritzer 1996). Part of the integrative approach within legal studies consists of interdisciplinary research or multidisciplinary research collaborations with sociologists, anthropologists, political scientists, and economists. An exchange of knowledge and methods leads to a better understanding of the spatial dimension of law and how its different levels of abstraction can be integrated.

This author hopes that all of these ideas will help create a truly accessible form of realistic legal certainty that promotes the goals of development that professor Otto has argued for over the course of his career.

8 Missions Impossible to Try Rwandan Genocide Suspects?

N. Huls[1]

Introduction

In this chapter, I touch upon some of the themes that are close to Jan Michiel's academic heart, i.e., real legal certainty, rule of law building in post-conflict societies, and the role of traditional legal values in the law of developing countries.

I will argue that the international standards (*dedere aut judicare*, extradite or adjudicate) to handle Rwandan genocide cases have become too complex to produce legal certainty. Consequently, Western governments look for alternatives. Many Western jurisdictions are concerned about the kind of justice that Rwanda renders. Based on my own working experience in Rwanda and a socio-legal analysis of a few recent court battles, I formulate a possible way out of the legal swamp that has been created.

In 1918, Rwanda became a protectorate of Belgium. Originally, the Belgians supported the Tutsi elite, which constituted 15 percent of the population. However, after the democratisation wave in Africa of the 1960s, they changed their political support to the Hutu majority. After independence in 1962, many Tutsi had to flee the country because of violent actions against them.

The 1990s political turbulence in Rwanda led the United Nations to organise peace talks in Arusha, Tanzania, between the Habyarimana government and the Tutsi rebels. The opposing parties reached a kind of agreement about power-sharing. But this process was interrupted on

April 6, 1994, when the plane of President Habyarimana was shot down near his palace in Kigali, Rwanda's capital.

On April 6, the Rwandan genocide began, which lasted one hundred days (Des Forges 1999). In a very short period, hundreds of thousands of people were slaughtered, most of them Tutsi but also moderate Hutus. The Rwandan Patriotic Army (RPA) stopped the genocide. They were the army of the Tutsi rebels that had invaded Rwanda from Uganda in 1990. After 1994, the political landscape of the country was dominated by the RPF (the Rwandan Patriotic Front), the political wing of the RPA. Soon Paul Kagame, a former intelligence chief in the Ugandan Army and the military leader of the RPA, became the political leader. Since 2000, he is the President of the Republic.

In this article, I will focus on some legal complexities in the adjudication of genocide suspects during the aftermath of this tragedy. In the first section, I start with the legal responses in Rwanda itself via ordinary courts and via community justice (*gacaca*). I then turn to the International Criminal Tribunal for Rwanda (ICTR) and the role of the international community.

In the next section, I compare two recent extradition cases. High courts in the Netherlands and the UK reached opposite results, although both courts had access to the same expert reports of a Dutch prosecutor, Martin Witteveen, who had observed genocide court cases in Rwanda.

In the third section, I make a political analysis of the legal aftermath of the 1994 genocide where foreign courts have become opaque arenas for the Government of Rwanda (GoR) and its political adversaries in the diaspora.

In the fourth section, I assess the legal complexities in the developed legal systems of the West. I see a gloomy picture of legal uncertainty that makes these cases almost unmanageable and the outcomes unpredictable. This uncertainty leads to some undesirable consequences.

Finally, I argue that the GoR must make efforts to ensure that fair genocide trials can take place in Rwanda and I mention the steps that the GoR should take.

Legal battlefields after the 1994 genocide

In Rwanda

Ordinary courts

From December 2016, the new GoR started to adjudicate suspects that it had arrested within its territory before the national courts. There were hardly any judges left. The bar was also decimated during the genocide. Most cases resulted in long prison sentences and executions.

Gacaca[2]

Because of the weak legal infrastructure, it soon became clear that it would take decades before a court could adjudicate all genocide suspects, who were locked in overcrowded prisons (Tertsakian 2008). As a solution, the GoR revived an old tradition: *Gacaca*, a form of 'on the grass' community justice (Reyntjens 1990).

In a short period, the GoR installed thousands of peoples' courts and trained lay judges to decide cases of genocide suspects. The suspects were brought from prison to appear in front of the local community where the crimes were committed. In ten years, the *gacaca* courts dealt with almost two million cases through procedures of 'justice without lawyers'.

Today, the ordinary Rwandan courts deal with the national genocide cases. They also have jurisdiction to review *gacaca* decisions that have resulted in obvious mistakes. The Specialised Chamber for International Crimes of the High Court will deal with extradition and (most of the) expulsion cases. This Court—financed by the Dutch government—is scheduled to open in Nyanza in 2018.

The ICTR

The United Nations created the ICTR in Arusha for the trials against the main organisers of the genocide ('the big fish').

Rwanda was the only member of the Security Council that voted against this location abroad because it claimed that these heinous acts should be adjudicated in the country where they took place.

In the twenty years of its existence, the ICTR has adjudicated 92 individuals, which led to 62 convictions and 14 acquittals. The ICTR has not been an unqualified success (Cruvellier 2010; Bouwknegt 2017, chap. 4). The procedures lasted very long (7,5 years on average and as long as 13,5 years), were very costly, and verdicts were often unconvincing or in contradiction with earlier ICTR decisions (see the critical analysis of Bouwknegt 2017, 204n5ff.).

For the supply of witnesses, the ICTR was largely dependent on Rwanda's cooperation. A witness protection scheme was installed, and most witnesses were examined behind closed doors. The GoR did not cooperate full-heartedly with the ICTR. It was successful in preventing alleged RPF crimes from being brought before the ICTR. The government argued that this would fuel genocide denial. Carla del Ponte, who wanted to investigate RPF crimes, lost her job as Prosecutor in 2003 (Del Ponte and Sudetic 2009).

On December 31, 2015, the ICTR formally closed down. The remaining duties of the Tribunal were handed over to the International Residual Mechanism for Criminal Tribunals (MICT).

The ICTR referred three of the seven remaining cases to Rwanda after the GoR had adjusted its legal system.

Other countries

Genocide is the crime of crimes and impunity is not an option, according to international law. Therefore, host countries must either try genocide suspects or extradite them to Rwanda. Adjudicating in the host country is a complex and costly legal affair. Extradition on the request of Rwanda is cheaper but is only possible after the permission of a national judge.

When *gacaca* courts and the ICTR had closed down, the spotlight was put on the Rwandan legal system. France (to which the ICTR also referred cases) and Germany adjudicated genocide crimes themselves, based on universal jurisdiction. Canada deported Leon Mugesera and Henri Jean-Claude Seyoboka to Rwanda and tried Munyaneza and Mungwarere itself (Bouwknegt 2017, n. 4).

The ICTR's referrals and the ECtHR's Ahorugeze decision,[3] for which the Dutch government lobbied intensively, created a favourable legal climate in Europe to extradite suspects to Rwanda (e.g., in Norway and Denmark).

It is not easy to determine the exact numbers of extradition requests. In 2017, the National Public Prosecution Authority (NPPA) informed the Rwandan Senate that over a 10-year period it submitted 835 extradition requests to foreign states. Out of the 126 requests to African States, only three resulted in extradition. About 20 cases were granted for proceedings in Rwanda (National Public Prosecution Authority, n.d.).

The Netherlands and the UK: The Witteveen Reports and their contradictory results

The Netherlands

When the genocide started, the Netherlands did not even have an Embassy in Kigali. But when Minister Jan Pronk had seen the situation on the ground in 1994, he decided to help Rwanda overcome the disaster with development aid, focusing especially on the justice sector (Pronk 2018). Since then, the Netherlands has invested heavily in rebuilding a legal system in Rwanda. It has done so through intensive training programs, material investments in court buildings and prisons, and many other activities (Haveman 2012).

The political relations between the two countries became somewhat strained when Victoire Ingabire Umuhoza, a Hutu woman living in the Netherlands, went to Rwanda to run as a contender against Paul Kagame in the 2010 presidential election. She was arrested for genocide denial and for complicity in financing the FDLR (*Forces democratiques de la liberation du Rwanda*), which the Rwandan government considered a terrorist group. She was sentenced to 15 years imprisonment. Ingabire chairs a Rwandan opposition party from her prison cell in Kigali.

So far, the Netherlands has adjudicated two genocide cases. Joseph Mpambara was sentenced to life imprisonment. Yvonne Basebya was sentenced to 6 years imprisonment for inciting genocide. In 2016, Jean Claude Iyamuremye and Jean Baptiste Mugimba were extradited to Rwanda.

The Witteveen Reports[4]

Martin Witteveen is a senior Dutch prosecutor, who was an investigative judge (*Rechter Commissaris*) during the appeal phase of the Joseph Mpambara case and during the full investigation of Yvonne Basebya. During those cases, he heard from 72 witnesses in Rwanda and elsewhere. Initially, he was positive about the professionalism and the cooperation of the Rwandan judicial authorities.

In 2014, the Dutch government commissioned him to assist the NPPA in strengthening the capacity of the Genocide Fugitive Tracking Unit (GFTU), which is responsible for all phases of these cases (Witteveen 2014a). During that period, Witteveen also attended genocide trials in Rwanda. He decided not to renew his contract for another year and returned to the Netherlands to again become a senior prosecutor.

His reports about the legal quality of the genocide trials in Rwanda became pivotal in two recent extradition cases: one in the Netherlands

and one in the UK. Witteveen combined his observations with the notes of a Dutch Embassy monitoring assistant to offer a first-hand analysis of the processes in the courtroom. This monitoring assistant noticed that the judges found it hard to preside over the courtroom interactions that were dominated by NPPA prosecutors.

The quality of the defence was miserable. Advocates fought with the Ministry of Justice about their fees. Witteveen's most penetrating observation was that the defence lawyers did not argue against the prosecutors and did not critically interrogate or cross-examine the witnesses for the prosecution. They conducted no investigations themselves. They also did not present counter-evidence or defence witnesses.

Witteveen concluded that from the perspective of the suspects, Rwanda did not manage to conduct fair trials. He recommended that extraditing countries should provide and fund an experienced defence lawyer who would assist his Rwandan colleague in realising equality of arms vis-à-vis the prosecution.

In November 2015, a Dutch District Court refused to allow the extradition of Iyamuremye and Mugimba based on Witteveen's report.[5] In the appeal before the High Court in the Hague, the Dutch government lawyers argued that the two would face a fair trial in Rwanda. A journalist confronted a prosecutor in the case with the findings of Witteveen's report. The prosecutor's clumsy answer was that it was Witteveen's personal opinion since he was not a member of the Dutch Prosecution while he was in Rwanda. In July 2016, the High Court in the Hague allowed the extradition[6] and did not follow Witteveen's analysis. This court put more weight on a report by James Arguin (2016), a former ICTR prosecutor who argued that the ICTR's decision to refer cases to Rwanda was evidence that the necessary safeguards were in place.

The UK

In the appeal case in July 2017 before the High Court in London, Rwanda v. Nteziryayo and others, Witteveen became a "crown witness."[7] In 2007 there had been an earlier attempt to extradite four of the accused. The accused won their initial appeal in 2009 before the Divisional Court, which decided that "they would be at real risk of a flagrant denial of justice."

The Rwandan government made a second extradition request on 2 April 2013, arguing that the quality of its legal system had improved considerably ("a sea change") in the meantime. It changed the tenure of judges from a life-term to a determinate term of office, renewable by the High Council of the Judiciary. A November 2011 law now permitted

the Chief Justice to request judges from abroad to come and sit with Rwandan judges.

Two experts from the GoR were cross-examined before the High Court: Dr Phil Clark, a political scientist from the UK and Martin Witteveen. Professors Philip Reyntjens and Timothy Longman testified on behalf of the accused. They were both staunch critics of the GoR, no longer allowed to enter Rwanda (Reyntjens 2009).

Gerald Gahima gave a broad overview of the political situation in Rwanda. He was a former top authority in the Rwandan justice sector that left the country in 2003 and became one of the critics of the regime (Gahima 2013). In his testimony, he observed that a large number of judges, including the majority in the most senior courts, were active RPF-members. He also informed the court that on many occasions, President Kagame and security service personnel had overruled judiciary decisions and removed judges for failing to toe the line.

The High Court was convinced of the neutrality of Witteveen's testimony. Unlike Clark, he was a lawyer. Unlike Reyntjens and Longman, he had no political intentions. Witteveen gave the court first-hand and unbiased evidence of the situation in the Rwandan courtrooms. Witteveen argued before the District Judge that, "the facts in genocide cases can be established but 'only under the condition of high quality defence and professional investigations, applying internationally accepted standards. Part of this professionalism and these standards is the necessity to have defence attorneys who posess the knowledge, experience and the resources to conduct investigations for the defense, including the capabilities to conduct investigations abroad.'"[8]

The High Court was impressed by Witteveen's honesty, that he was willing to admit he had changed his mind. His initial point of departure was that extradition should be admissible. But after his observations in Rwandan courtrooms, he concluded that the existing court practice showed serious shortcomings, especially the quality of the defence.

Witteveen had his finest moment when the High Court concluded: "The courts expect clarity, reason and moral courage in an expert witness. It appears to us that Witteveen has shown those qualities here, responding to his growing acquaintance with the facts and his developing understanding of the true problems facing defendants in Rwanda in such a case."[9]

The High Court observed that after the delivery of his last two reports, the GoR treated Witteveen as a hostile witness. Witteveen had told the court that he was advised not to go back to Rwanda because his safety was not guaranteed.

On 28 July 2017, the High Court affirmed the decision of the District Court and denied the request for extradition. But the High Court was

prepared to permit the GoR a final opportunity to assure the Court that credible and verifiable conditions would be in place to overcome the legal bar to extradition. The High Court set forth the following conditions for extradition: (1) the GoR would provide adequate funding for qualified defence lawyers, (2) the Rwandan Bar Association would admit foreign lawyers as defence counsel, and (3) the trials would include at least one non-Rwandan judge.

When the GoR did not answer within the High Court's three-week deadline, the five suspects were released. Because the Rwandan Prosecutor General was not willing to cooperate with the UK authorities, prosecution in the UK was impossible. The suspects will probably remain at large for good. A third procedure for their extradition seems very unlikely.

The analysis of Van Koppen c.s. of the Mpambara case

A team of three students and two experienced legal psychologists from Free University Amsterdam's 'Reasonable Doubt Project' examined the Joseph Mpambara case. In *A Rwandan house of cards: A labyrinth of wavering statements*, they describe many inconsistencies in the witness testimonies that had led to Mpambara's conviction and life sentence (Bruïne et al. 2017). They also questioned the reliability of some witnesses.

The research team also concluded that Mpambara's defence lawyer's performance in the first and second instance was "not good." A file with 29.000 pages is too hard for a sole practitioner to handle. They argued that he emphasised the wrong elements. They characterised his examination of witnesses as irrelevant.

The team continues to suggest that the Dutch government's fear of becoming a safe haven for genocidaires, its desire for good relations with Rwanda, and the time and money it had spent in this case contributed to its determinacy to prove Mpambara's guilt.

The overall conclusion was that a sloppy defence and the political bias of the judges in favour of the government risked the credibility of the verdict.[10] In her afterword, Ingabire's and Joseph's new defence lawyer Caroline Buisman concludes that a review of the case is necessary.[11]

So here is where we are: A UK High Court refuses to extradite genocide suspects to Rwanda because of Rwanda's authoritarian government threatening citizens on UK territory and failing to guarantee fair trials. The Netherlands has extradited two suspects and sentenced Mpambara to life imprisonment based on what legal psychologists labelled as flimsy evidence. Furthermore, critics argue that it is not fair to adjudicate people like Joseph Mpambara in the Netherlands. Dutch authorities want to prove that they are tough on war criminals, defence lawyers do not

provide adequate legal representation, and Dutch judges are willing to assume guilt where it does not exist.

The result is that impunity becomes an option. The High Court releases five suspects in the UK, while Joseph Mpambara could become a free man if his verdict is successfully reviewed.

The political character of genocide trials

Governmental cooperation requires political will

The political dimension of these trials is obvious. The host governments that receive a request from the GoR to extradite a genocide suspect must be willing to fund legal actors (e.g., police, prosecutors, judges) to handle these complicated cases, both in the investigatory and extradition phase.

It is hard for the Dutch government to justify the high costs of adjudicating Rwandan genocide cases in the Netherlands during a period in which the government is under attack for limiting the national legal aid budget. Extradition is the cheaper alternative.

In January 2016, the Under Minister of Justice, Fred Teeven, signed a Memorandum of Understanding (MoU) with Rwanda to extradite 15 suspects. However, since he resigned soon thereafter, there has not been a follow-up as of April 2018.

Furthermore, the Dutch government has an interest in affirming that the Rwandan justice sector is in order after all of the development aid money that it has invested in the sector.

The UK government also offers generous development aid to Rwanda. During the UK trials, the GoR placed itself in a difficult position: Two Rwandans living in the UK had received so-called Ozman warnings from the police. They were in real danger of being killed. President Kagame mentioned these two in a speech when he complained that Lieutenant General Karake was arrested in the UK. Kagame said that this arrest was intended to show contempt for Rwanda and to destabilise the country.

The UK District Court observed that, "it is not a satisfactory state of affairs that a foreign government thought it appropriate to plan to kill those taking refuge here at a time they were seeking to take advantage of a memorandum of understanding brought about by diplomatic ties between the two countries, which they hoped would lead to extradition."[12] The High Court Judges added, "these remarks could have been even more trenchant."[13]

Defence lawyers and support teams

Defence lawyers in host countries are ambiguous towards the political character of these trials. They are quite willing to stress the danger of political interference in Rwandan trials but are also happy to politicise trials in the Netherlands. In one case, attorneys filed an official request to the Rwandan Prosecutor General and the Dutch Prosecutor to arrest President Kagame as part of their strategy to prevent the extradition of their client, Iyamuremye (Sluiter and Pestman 2014). Their request failed, and their client now faces trial in Rwanda under the heavy political cloud that they created.

Because political opposition against the government in Rwanda hardly exists, it is rooted in the diaspora. The GoR has effectively outsourced the political opposition to other countries. Support groups with good political connections help Rwandans that face extradition. In the Netherlands, Jan Hofdijk and Anneke Verbraeken are key figures in politicising legal issues and organising support for oppositional groups of the GoR (Verbraeken 2017). They have found a political lobby partner in Joel Voordewind, a Member of Parliament for the ChristenUnie. They supported an open letter in a newspaper arguing against the extradition of Mugimaba and Iyamuremye, which was signed by prominent Dutch public figures (van Ardenne 2014).

IBUKA, an organisation representing genocide survivors, filed a complaint against one of the signatories, Prof Ton Dietz, the Director of the African Studies Centre at Leiden University, for lack of academic integrity. This complaint failed. However, IBUKA was successful in its complaint against Anneke Verbraeken, who received an official warning from the Journalist Disciplinary Board for a 'non-veracious and tendentious' article about the Iyamuremye case (Raad voor de Journalistiek 2015).

Legal complexity

In 2018, the field of Rwandan genocide cases is a legal mess. More than twenty years after 1994, it is unclear which are the right procedures and legal venues for dealing effectively and fairly with these cases. I describe four contributing factors to this legal uncertainty that prevent the realisation of the imperatives of international law. I conclude with a worrying recent trend; the use of asylum law to further complicate the lives of Rwandan fugitives outside of Rwanda.

The hybrid Rwandan legal system

Rwanda is proud of the hybrid character of its legal system. The Belgian colonisers created the basis for a civil law system, but since Rwanda became a member of the Commonwealth, the Rwandan government has introduced many common law concepts into its legal system. Matters are further complicated because 'traditional legal values' are also part of the Rwandan legal system.

The downside of this hybridity is that it is not easy for foreign lawyers to make a sound judgment of the Rwandan legal system. For instance, common law observers expect cross-examination of witnesses. By contrast, in the civil law tradition, the judge leads the examination of witnesses. Rwandan legal practitioners are themselves not always sure 'what the law says.'

The judiciary

The UK High Court noticed that there were over 23.000 pages of evidence before the District Judge and her judgment covered 128 pages. The Dutch Mpambara case file consisted of 15.000 pages. The abundance of evidence and facts, testimonies, legal interpretations of treaties, and verdicts of other countries create a rich reservoir of arguments from which national judges can freely choose.

The legal influence of the international courts (ICTR, ECtHR) on national courts was strong in the Netherlands but limited in the UK. The High Court was not impressed by the ICTR's two referrals. The judges argued that the ICTR's decision was not conclusive. For the High Court, there was new information. The ICTR had to close and had a procedure for revocation. The GoR's advocate claimed that "if the ICTR has agreed to transfer cases, who are you to refuse?"[14] The Court rejected that as an "unpersuasive piece of advocacy."[15]

Coordination and streamlining of judicial opinions from different countries are not easy. The differences between common law and civil law jurisdictions play a role alongside the way that national courts respect the decisions of supranational judges.

Witnesses

The reliability of witness testimony is also a rich source of confusion and contradiction. It is not easy for foreign lawyers who do not speak Kinyarwanda to interview Rwandan witnesses. Bouwknegt (2017, 188n4) offers valuable insight from the Akayezu trial at the ICTR.

First up was Dr Matthias Ruzindana, a Rwandan lecturer from the University of Rwanda in Butare. Rwandan witnesses had almost

exclusively been interviewed by investigators or testified in court in their language, Kinyarwanda. Strikingly, in lecturing the court on how Rwandans use language to communicate, Ruzindana touched upon a crucial area: "you have to bear in mind [...] that most Rwandese do not write or read. They hear and report what they hear." "Rwanda," lectured Ruzindana, "is a society run by oral tradition [...] so therefore they do not rely on print, or on radio or television to know facts [...] A saw or heard something, which he or she said to person B, who reported to person C and so on. This is how information was channelled. Ok? In this situation, the tendency is not to question the source, because very often the source isn't there. You get it from D, who got it from C, who got it from B, who got it from A. But C will not tell D how the information travelled. The tendency will be 'I heard this,' or, 'I saw this.'"

"Facts in Rwanda," Ruzindana thus explained, "are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else (hearsay)." When asked how Rwandan witnesses respond when asked questions, he jokingly answered that the witness "was not even answering the [prosecutor's] questions directly." He continued to state that the "Rwandese are rarely straightforward." They are very general, avoid explanations, beat around the bush, or give implied answers, especially when the issue is delicate. Mostly, answers—or Kinyarwanda words in general—have to be 'decoded' to be understood correctly, depending on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.

Later, in its judgment, the judges themselves recognised other cultural constraints in relying on witness testimony highlighting that Rwandan witnesses had difficulty being "specific as to dates, times, distances and locations" and their "inexperience [...] with maps, film and graphic representations of localities." However, the judges had not drawn "any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions."

As time passes, it becomes harder to reliably gather evidence because of the risk of contaminating testimonies and the rapidly deteriorating quality of testimonial evidence. Unfortunately, there are examples of lying witnesses. Furthermore, witnesses are threatened and groups of witnesses abroad sometimes fabricate evidence (Bouwknegt 2017, 171n5; refers to "denunciation-syndicates").

Experts

It is also hard to explain why Witteveen's analysis was not followed by the Dutch Court of Appeal, while it became a pillar of the UK's High

Court decision. Even neutral legal experts do not provide a solid basis for predictable outcomes. The case of Martin Witteveen is a nice example of a prophet that is not revered in his own country and is heeded abroad.

Undesirable consequences

Because official legal routes lead them into an impenetrable legal forest and costly court cases, foreign governments of host countries are looking for alternatives. One possible avenue is following the path of administrative law. For example, the Dutch government has withdrawn Ingabire's spouse's residence permit. In a so-called 1F situation, the residence permit of the accused can be easily revoked with limited judicial control. The person loses his or her social security rights and remains in a legal limbo if the government takes no further initiatives (Bolhuis, Middelkoop, and Van Wijk 2014).

In May 2016, Underminister of Justice Teeven informed Parliament that all Rwandan asylum cases since 2008 had been reviewed on 1F aspects (van der Steur and Dijkhoff 2016). This review had led to ten cases of residence permit revocations and two (unsuccessful) attempts to withdraw the Dutch citizenship of two former Rwandans. These approaches make the Netherlands a very unattractive place for Rwandan genocide suspects. They might decide to leave to other countries, such as Belgium or France. To put them in a legal void is not compatible with decent, rule of law requirements (but it does reflect the changing hostile attitudes towards 'illegal' foreigners).

Towards the domestication of Rwandan genocide trials

In sum, I conclude that the Specialised Chamber for International Crimes of the High Court must become the appropriate legal arena to adjudicate Rwandan genocide cases. Rwandan judges are in a better position than foreign judges to hear witnesses in Kinyarwanda and to assess the quality and reliability of Rwandan oral testimonies.

It is important that one single judicial authority develop coherent opinions about the Rwandan genocide. The judicial decisions in different foreign countries are extremely complex and contradictory. They constitute a lawyer's paradise but have not resulted in clear guidelines on how to deal with these cases.

The GoR has a strong and justified desire to try genocide suspects before its courts. In 2018, most host countries show legal fatigue towards extradition and adjudication. The eagerness to end impunity has diminished considerably in the rest of the world. Therefore, I encourage

the GoR to remove the existing hurdles for fair legal procedures in their country. Rwandan authorities should respect the presumption of innocence and not use denigrating terms about genocide suspects that appear before the court. It follows from the separation of powers principle—guaranteed in the Rwandan Constitution—that Executive representatives should not publicly comment on pending cases. The same principle implies that Rwandan officials must accept certain unfavourable outcomes of court decisions.

It is a worrying situation that the GoR is not able to deal with critical, factual analyses by unbiased experts like Witteveen, who write about the practices in justice sector institutions using inside information. This inability reflects my own experience as Vice Rector Academic Affairs and Research at the ILPD that Rwandan lawyers almost automatically interpret criticism of their legal system as a type of warfare or ambush. In my classes, I have encouraged judges and prosecutors to invent a term in Kinyarwanda for positive or constructive criticism, but have never received a clear answer.

Soft diplomacy

Rwanda is not an easy diplomatic partner, to put it mildly. In 2014, Patrick Karegeya, the former Rwandan Intelligence Chief who had been granted political asylum in South Africa, was murdered. President Kagame denied responsibility, but added, "I actually wished that Rwanda did it." This statement led the US State Department to say it was "troubled by the succession of what appear to be politically motivated murders of prominent Rwandan exiles."

Recently, Rwanda has successfully lobbied for a seat on the UN Security Council for the first time since the genocide. President Kagame was also chosen as Chairman of the African Union. If national interests are at stake, the GoR knows how to play the diplomatic game very well. Rwanda is also willing to change its commercial laws on a very short notice in order to rise in the rankings of the World Bank's Doing Business Report. But as long as the GoR tries to kill opponents of the regime abroad, the chances of international legal cooperation in genocide cases are slim.

Political goodwill and warm diplomatic relations between governments play an important role in realising legal cooperation. Therefore, Rwanda has to adjust its foreign relations strategy in a more subtle and peaceful direction, not only to attract foreign investments but also to make it acceptable for African and Western countries to extradite genocide suspects.

International standards

Because the GoR did not participate in the ICTR, the Rwandan legal community is not yet completely up to date with the international standards of adjudicating genocide suspects. The justice sector should admit that this lack of experience sets Rwanda back. The judiciary, the prosecution, the police, and the bar must make efforts to repair these shortcomings.

Rwanda's withdrawal from the African Court of Human and Peoples' Rights in Arusha in the Ingabire case is a clear sign that the GoR finds it difficult to acknowledge that human rights protections also apply to political opponents. In its judgment, the Court confirmed that Rwanda had violated its obligations under the Charter on Human and Peoples' Rights.[16]

The GoR's reluctance towards upholding the human rights of its critics harms the esteem that foreign governments and judges have for the quality of the Rwandan legal system and hence affects the extradition of genocide suspects and legal cooperation.

The Mpanga prison, situated near Nyanza, meets the international standards for prisons. It is now up to the GoR to take concrete steps to enable the Specialised Chamber for International Crimes of the High Court in Nyanza to reach that same level.

The judiciary

The Specialised Chamber for International Crimes of the High Court must become an African beacon for high-quality adjudication in genocide cases. If the Court succeeds in developing clear, consistent, and fair case law, it might become a good example of an African solution for African problems.

The hardest challenge for judges is to listen without bias to defence lawyer arguments that would qualify as genocide denial outside of the courtroom. One of the arguments against extradition to Rwanda is that Hutu suspects have no real chance for acquittal. The official narrative in Rwanda is that the genocide is against the Tutsi (*jenoside abatutsi*). The GoR has banned the Hutu-Tutsi divide from the public sphere and stresses "that we are all Rwandans now." Therefore, every attempt to defend the behaviour of Hutu suspects is easily linked to genocide denial or divisionism.

For instance, Jean Uwikindi argued that there were Hutu bodies in the church in Kayenzi. On 28 June 2011, the Referral Chamber of the ICTR observed "it is unlikely that a potential witness would be willing to present evidence on the role of the RPF in killings in Rwanda and that it

is equally unlikely that any defence counsel would agree to represent a client putting forward such a politically sensitive defence."

The judges of the Specialised Chamber for International Crimes of the High Court must perform the Herculean task of being neutral arbitrators in a highly polarised, politicised arena. Lifetime appointments would be a step towards minimising the risk of political interference.

It would contribute to the legitimacy of the Court if the Chief Justice invited experienced foreign judges—preferably from African countries—to participate in the adjudication of concrete cases. Furthermore, all judges must be multilingual, so that they can understand the arguments of foreign advocates and witnesses. Finally, experienced and unbiased experts like Martin Witteveen must monitor the trials.

The defence

Rwandan attorneys must develop a more antagonistic attitude towards the government. They must defend genocide suspects against the state in these sensitive cases. The hostile reactions of the Rwandan Bar Association towards the Witteveen reports (Mugeni 2015) showed a worrying state of denial of the real problems regarding defence argument quality by Rwandan attorneys in genocide cases.

Foreign, vigilant lawyers on Rwandan defence teams that dare to raise sensitive political issues—such as RPF involvement in crimes during and after the genocide—are a necessary part of a good defence. Unlike their Rwandan colleagues, they can present these topics before the court without fear of sanctions.

Therefore, it is necessary that rich countries that extradite genocide suspects provide the funds for strong defence teams. That is not only fair but also cheap in comparison with adjudicating genocide cases at home.[17]

Notes

1 Nick Huls is emeritus professor at the Leiden Law School and the Erasmus School of Law. He also is an honorary professor at the law faculty of the University of Pretoria.
2 For opposing views, see Clark (2010) and Ingelaere (2016).
3 Ahorugeze v. Sweden, no. 37075/09, 27 October 2011.
4 The Reports can be accessed at https://bigwobber.nl/wp-content/uploads/osd/2017 1221/6946.pdf.
5 Vonnis in kort geding van 27 november 2015, C/09/494083, NL:RBDHA:2015:13903.
6 Arrest van 5 juli 2016, 200.182.281/01, NL:GHDHA:2016:1924; Arrest van 5 juli 2016, 200.182.412/01, NL:GHDHA:2016:1925.
7 Approved Judgment on 28 July 2017, [2017] EWHC 1912 (Admin), § 288.
8 Ibid.

9 Ibid., § 361.
10 For a serious critique of the report, see https://francegenocidetutsi.org/DutchUniversitySlandersGenocideHero23October2017.pdf."
11 Caroline Buisman wrote to me on April 4 that her review request is almost ready.
12 Approved Judgment, § 141.
13 Ibid., § 142.
14 Ibid., § 235.
15 Ibid.
16 Ingabire Victoire Umuhoza v. The Repubic of Rwanda, Application 003/2014, Judgment, African Court on Human and Peoples' rights [Afr. Ct. H.P.R.], (Nov. 24, 2017).
17 See the conclusion in my valedictory lecture at Erasmus School of Law (Huls 2015).

Other Actors: Widening the Scope

9 Traditional Leadership and Customary Law in Capitalist Liberal Democracies in Africa

J.M. Ubink[1]

Introduction

After independence, many African governments tried to curtail the power of traditional leaders ruling on the basis of customary justice systems. They saw them as remnants of colonial rule, dividing their country into ethnic tribes, and thus as impediments to modernisation and nation-building (Kyed and Buur 2007, 1). While customary law was recognised in many African countries as a source of law, there was a clear tendency in some legal fields to see it as temporary, to be slowly modernised and taken over by state law. This "replacement paradigm" was for instance quite prominent regarding customary land rights. Since the 1990s, this has changed quite dramatically. In a "resurgence of tradition" (Englebert 2002) numerous African states have enhanced and formalised the position of traditional leaders in their legislation and constitutions. Donor organisations have also displayed more and more interest in tradition, increasingly treating chiefs as legitimate local counterparts in development programming and providing grants to traditional funds. In addition, rule of law programming as well as transitional justice programming now became increasingly interested in engaging with customary justice systems (Branch 2014; Sage and Woolcock 2006).

Traditional authority and customary justice systems originated in the pre-colonial era when land abundance and mobility formed a check on the behaviour of chiefs, whose power depended on the number of their followers. Dissatisfied groups or individuals could break away from a

chief and move elsewhere. In the colonial period, these systems have been heavily distorted, largely due to their inclusion in direct and indirect forms of colonial rule. In contemporary Africa, the recent wave of recognition of traditional leadership has led to new "processes of reordering and transformation" (Buur and Kyed 2005, 15) and donor engagement with customary justice systems has been critiqued for increasing inequality through the imposition of elite versions of customary justice.

It is now quite commonly accepted that customary law and traditional rulers are here to stay. In fact, in many countries, they are the main providers of access to justice, and thus of real legal certainty (Otto 2000a) for their citizens. However, traditional authority and customary justice systems now function in very different contexts, characterised by capitalist economies instead of subsistence economies, as part of broader nation states with democratically elected leaders and often democratically elected local government. They are committed to inclusiveness, such as regarding women. They function in a strongly globalised world. This confluence of tradition and modernity leads to all kinds of pertinent questions: How do non-elected traditional authority structures relate to and coexist with elected, decentralised local government structures? Can male-elderly leadership based on ethnicity—which is still the norm in most traditional rule systems—be reconciled with the idea of inclusive democracy? How do customary justice systems that used to regulate communal resources in pre-capitalist societies operate in capitalist societies where access to land and natural resources provide huge money-making opportunities? What role do international entities and norms play in the regulation of customary justice systems? One can think here for instance of the influence of large foreign mining or biofuel companies on land relations, but also of corporate social responsibility norms and international human rights norms on local processes and negotiations.

This article aims to analyse these questions through a study of the continuing relevance and even resurgence of traditional authority structures and customary justice systems in capitalist, liberal democracies in Africa. It is organised as follows. In the next section, the article describes the resurgence of tradition that took place in Africa since the 1990s. It then provides an overview of colonial and post-colonial distortions to traditional rule, the latter resulting from both governmental recognition and donor engagement. Then the article turns to the present-day context in which these 'traditional' institutions are to function, focusing on democracy and capitalism. In its conclusion, the article appeals for a research agenda to more thoroughly explore what role traditional authorities can play in contemporary democratic, capitalist societies.

A resurgence of traditional authority and customary law

Since the 1990s, traditional authority in Africa has experienced a resurgence. Numerous African countries have enhanced or formalised the position of traditional leaders in constitutions and legislation, past kingdoms have been restored, and Councils or Houses of Chiefs have been created. Englebert (2002, 54) sees in these and other union-like structures—that have also forged international links amongst themselves—"the rise of chiefs as a class."

The resurgence of chieftaincy has sometimes been connected to weak or failing states, with traditional leaders seen as "the only remaining and functioning form of social organization" (Lutz and Linder 2004, 4). In reality, however, the level of resurgence of tradition seems to be quite low in weak states. Rather, it is relatively strong states with a functioning state apparatus that have witnessed some of the furthest-reaching restorations, alongside democratic local government institutions (Englebert 2002, 56-8; Kyed and Buur 2007, 5-8). Governments may decide to formalise or enhance chieftaincy for various reasons: (i) to expand and improve the chiefs' role in local service delivery and execution of administrative and governmental tasks; (ii) to better reach the local populace via the chiefs' intermediate position between the government and the local population, and to use its mobilising potential for developmental and democratic projects; (iii) to prevent resistance against state measures from reluctant or antagonistic chiefs; and (iv) to strengthen government by integrating tradition into the space of governmental power as a symbolic, legitimising discourse. In sum, the restoration or enhancement of chieftaincy is hoped to make the state more relevant, legitimate, and effective (Ubink 2008b, 13-15). In addition to these rather benign motives, governments (and political parties) may also pursue chiefs for more political and economic motives (i.e., hoping for help with bringing in the rural vote and gaining access to local natural resources via the position of the chief).

The resurgence of chieftaincy has been aided by democratisation, decentralisation, and liberalisation. These processes have opened up new public spaces for traditional leaders and their involvement in law enforcement, dispute settlement, service provisioning, and development programming. In addition, these processes distanced the state from the people, which facilitated the resurgence of tradition as an alternative mode of identification (Buur and Kyed 2007; Englebert 2002, 58-60; Ubink 2008b, 14). In some cases, democratisation rather threatened chiefly rule, because of chiefs' ascribed positions and through competition with elected local government. Even then, chiefs' responses to these challenges may raise their salience, as Englebert (2002, 58) shows for Kwazulu-Natal.[2]

Foreign aid was a leading factor in the push for democratisation, decentralisation, and liberalisation. In addition, donor organisations and international institutions started to display a renewed interest in traditional leaders, whom they saw as suitable, legitimate local counterparts with the capacity to mobilise their population. This is visible from the increasing interaction between donors and chiefs, the attention to traditional authorities at donor-sponsored conferences, as well as the actual involvement of chiefs in development programming and the provision of grants directly to traditional funds (Englebert 2002, 60; Ubink 2008b, 11).

A resurgence of traditional rule implies a recognition of customary law, as the normative system upon which chiefs base their administration and dispute settlement. In the 21st century, we also see an increased interest in customary law in legal development cooperation. In the early 1990s, law regained an important role in development cooperation. Rule of law programming first largely focused on state legislation and formal institutions such as the judiciary, courts, prosecutors, and police (Carothers 2006; Trubek and Santos 2006). When it became increasingly clear that interventions in this "rule of law orthodoxy" (Upham 2002, 75) had limited impact on development, the blame was laid, inter alia, on the top-down character of law reform projects, their minimal consideration of local contexts, and donors' focus on state institutions and norms (Van Rooij 2012). Responding to these critiques, legal development cooperation then shifted course and aimed to base rule of law programming on the poor's needs and preferences. This included a focus on the users of justice systems rather than legal institutions—embodied in terms such as 'access to justice' and 'legal empowerment'—as well as an increasing interest in working with customary justice systems.

In the field of transitional justice, we see a similar evolution. Transitional justice interventions are increasingly critiqued for their top-down, externally driven approach, detached from local realities and with limited impact on local populations. This resulted in a search for more participatory, bottom-up strategies responsive to local needs and perceptions (Horne 2014; Lundy and McGovern 2008; Robins 2012; Sharp 2013; Ubink and Rea 2017; Waldorf 2006). This new approach emphasises that the legitimacy and effectiveness of transitional justice mechanisms rest on their embeddedness in and resonance with local norms, values, and rituals (Baines 2010; Oomen 2007). As a result, it advocates the inclusion of customary justice mechanisms in transitional justice approaches.

The above shows that there is an increased realisation among African governments as well as international donors that traditional leaders and customary justice systems will remain relevant in contemporary African

states, with a role in both local governance and national politics, as well as rule of law and transitional justice programming. But these systems, which have their origins in the pre-colonial period, have been heavily distorted in the colonial and post-colonial era, and now function in very different contexts, The following two sections will discuss these aspects. The next section describes the way traditional rule was distorted during the colonial and post-colonial period. The section that follows describes the impact of the context of present-day democratic, capitalist states on the position and functioning of traditional rule.

Colonial and post-colonial distortions to traditional rule

Colonial interaction and interference with traditional rule systems

Traditional rule systems in pre-colonial societies varied widely, but usually, the power of chiefs was circumscribed by a council of elders, representing the major factions of the community, whose support the chief needed to make important decisions. A chief's strength and influence was determined by the number and loyalty of his followers, who would pay tribute in the form of a portion of the first harvest or of hunted or slaughtered animals, who would provide labour for the chief's farm, and who would fight other chiefs or clans with their leader. The abundance of land in the pre-colonial period meant that people dissatisfied with the administration style or decisions of their chief could quite freely move and settle elsewhere, aligning themselves with another chief or chief-less group. While the position of chiefs was in most places hereditary, this often did not entirely eliminate competition between chiefs. Peires (1977) describes how this provided a chief's councillors among the pre-colonial Xhosa with their most important weapon, i.e., the ability to dismiss a chief and have him replaced by a rival.

While careful not to conjure up an imaginary past of equitable, well-balanced, inclusive traditional communities—a version of history convincingly refuted for instance in McCaskie's *oeuvre* (including McCaskie 1992, 1995, and 2000) about the Ashanti Kingdom—it is undisputed that colonial rule watered down the existing checks and balances. Chiefs' positions became dependent on colonial recognition. As a result, the local attachment of the chief and his final accountability to his community gave way to his responsibilities and loyalties towards the government. Colonial governments also distorted the traditional checks and balances in other ways. A case in point is the abolition of the position of Nkwankwahene, the elected representative 'chief' of the commoners, by the Ashanti Confederacy Council—supported by the British—in the

1940s in the Gold Coast (present-day Ghana). In Ashanti, sub-chiefs and elders were restrained in their criticism of the traditional administration due to their proximity to the chief. It was, therefore, the role of the Nkwankwahene to infuse the views of the masses in the traditional government, for instance regarding installation and deposition of chiefs, and to act as a channel for common discontent (Busia 1951, 10, 215-6; Wilks 1998, 159). Worried about the disruptive potential of frequent actions by commoners against chiefs who were abusing their position, the British government supported the abolition of the channel, rather than addressing the causes of the popular discontent (Ubink 2011b).

While under colonial rule traditional leaders lost their independence and found some of their powers circumscribed—prominently among those their 'judicial' powers—they also became more powerful vis-à-vis their subjects. They were given new tasks by the colonial governments regarding labour (the recruitment of contract labourers in countries with white settlers and the organisation of communal labour for infrastructural and other projects), taxation, compulsory crop cultivation, and/or recruitment for the army. Such delegated tasks made the chiefs unpopular and negatively impacted their local legitimacy (Crowder 1978). For instance, in South-West Africa (present-day Namibia), the German occupiers concluded treaties with traditional leaders in the north of the country for the recruitment of contract labour for German-owned mines and commercial farms. This brought enormous material benefits to the chiefs "who employed their absolute authority to maximize their profits" (Keulder 1998, 39-40). Contract labour also contributed to the breaking down of traditional norms and authority because returned labourers, influenced by the European life and with money in their pockets, increasingly questioned the local political, social, and economic order in their home communities (Soiri 1996, 40-42). In the last stages of colonialism, during the height of the struggle for independence in Africa, traditional authorities were mobilised to oppose full independence and the educated African elite fighting for it, which again diminished their local standing and legitimacy.

Another consequence of colonial interference was the marginalisation of women in traditional rule. The colonial rulers' gender ideology was not in consonance with the existence of powerful women. Further, they perceived a strong need to maintain the authority of male elders over women and youth to ensure social order and stability (Merry 1991). This extended to the colonial governments' relations with traditional leaders. Becker (2006, 178) describes how in the Owambo kingdom of Ongadjera (present-day Namibia), colonial tribal authority "evolved into all-male domains," when women leaders were all but purged from the local

traditional arena and women were largely excluded from participation in traditional courts.

Post-colonial interaction and interference with traditional rule systems

Recognition

The above makes abundantly clear that colonial rule had a considerable impact on non-state normative orderings. Also in post-colonial Africa, the regulation of traditional authority structures and customary justice systems is intertwined with questions of political power and state sovereignty, control and subjugation, and integration and exclusion. The increased recognition of customary norms and traditional institutions is informed by political interests. It provides governments with an opportunity to consolidate local power and mobilise votes, to form or strengthen alliances with strategic local actors, and to increase the reach, relevance, and popularity of the state through linkages with the traditional rule system. State recognition of non-state normative orderings never entails a wholesale acceptance of these systems without conditions or exceptions. It is usually partial, conditional, and meant to make the customary order governable, subordinate, and in line with certain normative values of the state. Particularly in weak states, a role for the state in the recognition of chiefs and the determination of the 'real' chiefs can be an important part of the production of the state as a legitimate authority (see, for instance, Buur and Kyed 2005, 19; Kyed 2018; Seidel 2018; Leonardi et al. 2011).

Recognition is not without dangers to the traditional institutions, as alignment with states with limited legitimacy may impact negatively on them, and a role for the state in the determination of the rightful traditional leaders may diminish the flexibility of the position (Buur and Kyed 2005, 26; Ubink 2018b). Nevertheless, non-state actors are often interested in policies of recognition and the forging of stronger ties with the state, which they aim to use to consolidate and expand their power. Opportunities to do so manifest themselves when no attention is given in the recognition process to local checks and balances, i.e., to regulating the relationship between the traditional leaders and the community members. For example, when Mozambique introduced legislation in 2000 (Degree 15/2000) that recognised local leaders as community authorities with a wide range of tasks—including administrative and governmental outreach, nation-building, rural development, civic education, and upholding local customs and cultural values—the Decree stated these tasks should be carried out with participation from community members, but omitted any mention of the terms for the relationship between chiefs

and community members. Buur and Kyed (2005, 15) condemn such oversight as "[b]ased on a social ontology of unproblematic group ties". Another example can be found in the Traditional and Khoi-San Leadership Bill in South Africa. This Bill proposes to give traditional councils wide powers to enter into partnerships with "any person, body or institution" (including mining companies) with no obligation to obtain the consent of, or even to consult, the people whose land rights and lives are the subjects of such partnerships.

The neutral term recognition—which implies wholesale acceptance of existing norms and structures—thus masks state intervention, regulation, and reform, and will inevitably entail a reordering and transformation of authority and power (Buur and Kyed 2005, 15; Kyed 2009, 89; Ubink 2018a; Weilenmann 2005, 5).

Donor engagement with non-state normative systems

We described above how legal development cooperation is increasingly focused on customary justice systems. This engagement, however, often profoundly affects the nature and functioning of these systems. Approaches and expectations of donors and development agencies do not often allow for the amount of research required to gain in-depth knowledge of unwritten customary justice systems, with their geographical variation and local contestation, and local power relations (Harper 2011). Furthermore, development agencies' imperatives of measurable outcomes, quality control, and working at scale leave little leeway for differentiation on the basis of variances in local contexts and their inherent complexities (Sage and Woolcock 2006, 4-9). In addition, donor and development agencies often lack knowledge about the different versions of customary law, the negotiable nature of customary justice, and the power differentials involved in defining customary law (Ubink 2018a). With local ownership seen as an important prerequisite for local legitimacy and acceptance, development programming often works through local actors. Uncritical acceptance of traditional authorities as community representatives and custodians of customary law, however, overlooks contested versions of customary law in the locality and may lead to the adoption of a male-elderly elite representation of customary law (Ubink and Van Rooij 2011). For example, the heavily donor-sponsored Land Administration Programme in Ghana was designed to provide greater certainty of customary land rights for ordinary users (World Bank 2003). However, the programme's focus on chiefs as the administrators of land provided chiefs opportunities to centralise land transactions management and the recording of land rights. In the end, the programme "sanction[ed] their ability to generate substantial profits from the disposal

of land, over which the original land users exert legitimate claims. [...] This [had] the perverse effect that people are disenfranchised rather than empowered" (Ubink and Quan 2008, 210).

Also in the field of transitional justice, reality has proven complicated, and programming that aimed to include customary justice mechanisms has received heavy criticism for operating from a myth of community consensus and ignoring, and as such entrenching and reproducing power differences within communities. Branch (2014) coins the term 'ethnojustice' for this phenomenon when describing the donor and government-sponsored retraditionalisation that took place in northern Uganda through the imposition of a male-dominated version of customary justice.

'Traditional' institutions in present-day society

Several African countries envision a continued role in their contemporary nation-states for traditional authorities and customary law. States' interest in formalising traditional leadership may stem from ideas of state efficiency and legitimacy; from political considerations regarding a class of sometimes quite powerful actors possibly with influence over the rural vote; and from economic considerations about traditional leaders' access to natural resources. Arguments often include that rural inhabitants have little access to state courts and bureaucracy and will thus benefit from a recognition by the government of their local leaders, dispute settlement institutions, and normative systems.

However, as this article describes, traditional authority and customary justice systems originally functioned in a pre-capitalist, pre-nation state era, and have been severely changed and distorted during the colonial and post-colonial eras, and lost much of their legitimacy as a result. This implies that a central role for such institutions in contemporary Africa is not straightforward. The following two subsections analyse two contemporary contextual factors that impact the functioning of traditional justice institutions: capitalism and democracy. This next section studies how customary justice systems respond to large-scale economic opportunities in capitalist countries; the section that follows explores how inclusive democracy relates to traditional authority systems with elderly male leadership based on ascription.

Capitalism

In present-day Africa, there are large economic opportunities connected to access to customary land. For instance in Ghana, where the customary

sector holds almost 80 percent of the land (Alden Wily and Hammond 2001, 46-48), the expansion of urban residential areas and the development of new commercial export agricultural sectors resulted in new land pressures and commoditisation of customary land. The changing value of land has led to struggles to redefine customary land tenure, which have increasingly concentrated control of land revenues in the hands of chiefs (Amanor 2001, Ubink 2008a). Alden Wily and Hammond (2001, 44) speak of the "feudalization of land relations." Kasanga and Kotey (2001, 18) call the displacement of poor and marginalised families from their land "a national disease."

The extractive industry also has a profound impact on customary land dynamics. For instance in South Africa, mining—the country's biggest foreign income generating sector—is largely situated in the former homelands, on customary land. Several studies show how chiefs and elders increasingly control the interactions between mining corporations and the 'traditional communities' they formally represent. They enter into mining contracts and receive and control vast mineral revenues, while community members lose access to land and are confronted with pollution (Manson 2013; Mnwana and Capps 2015, 6).

State law and governance have a profound impact on these local struggles over land and its proceeds. Recent legislation, as well as current draft legislation in South Africa, centralises the position of senior traditional leaders without defining the responsibility and accountability of these chiefs vis-à-vis their people, or checks and balances on their functioning. Furthermore, Black Economic Empowerment (BEE) measures demand as a certain percentage of shares to be held by 'formerly disadvantaged South Africans', which opens up investment opportunities for wealthy South Africans and 'traditional communities' (Claassens and Matlala 2014). Traditional authority in the platinum belt of South Africa is increasingly taking on a formal legal structure, in which 'the community' becomes a BEE shareholder in the mine, and the senior traditional leader and his council act as CEO and management board. This "corporatization of traditional authority" (cf. Comaroff and Comaroff 2009), BEE deals and other lucrative mining deals go a long way to explain the "trilogy of corruption," as Boyle calls it, between "traditional authorities, political elite and mining houses, almost everywhere mining takes place on communal lands in South Africa."[3]

Studies from other areas of Africa describe similar processes of commodification of land and provide mounting evidence of increasingly restricted and insecure access to land for the poor majority and increasing inequity in the face of land shortage and competition (Alden Wily 2003; Bruce 1988; Swindell and Mamman 1990; Boone and Duku

2012). In sum, the literature displays that customary systems often evolve inequitably when large-scale economic opportunities arise.

Democracy

Democratic governance is predicated on the principles of separation of powers and elective representation, in which leadership positions are unrestricted to certain groups or people. This raises questions with regard to traditional leadership, which originally was, and largely still is, structured on the hereditary devolution of male power.[4] Traditional leadership is usually not elected through universal suffrage, nor is it open to everyone to compete for vacant positions, which are most often for life. Some say traditional rule represents an "African form of democracy," with chiefs as the true representatives of rural African communities (Kyed and Buur 2007). They point out that in most traditional institutions there is either direct participation of all adults (or in some cases only of male adults) or a representative system in which each clan or sub-clan is represented in the village council. While such institutions do indeed exist in most communities, the question is how well they function when there are increasing opportunities to profit from traditional leadership positions. Ubink (2008a) describes the breakdown of checks and balances in peri-urban Ghana, where chiefs either ignore or co-opt (buy off) their traditional councillors when these question the chiefs' land administration. Alternatively, they fill the traditional council only with members of the royal family. Mnwana shows that among the Bafokeng and Bakgatla communities in the platinum mining belt of South Africa, the mass community meetings (*kgotha kgothe*) are elite dominated—including often by white experts in charge of community business investments—use highly technical language, and as such have very little room for grassroots voices. In addition, the heads of the clans (*dikgosana*) are represented in the Supreme Council, which convenes "whenever important decisions affecting the entire community need to be made" (Royal Bafokeng Nation 2004). However, they often fail to fully grasp "the highly sophisticated, technical and intellectually demanding decisions that pertain to mining contracts and other business partnerships" (Mnwana 2014, 835). Mnwana furthermore reports (836) that in 2014 among the Bakgatla, *kgotha kgothe* meetings no longer took place at regular intervals because of community attempts to hold their chief Pilane accountable for alleged corruption and misappropriation of mining revenues.

When rural residents in South Africa's platinum belt tried to organise to hold traditional authority to account, traditional leaders and councillors

requested state courts for interdicts against certain groups and people and the police have arrested critical community members. Court decisions have denied commoners *locus standi* to call meetings of the tribe or the village or to mobilise for the removal of the chief, effectively closing off another route of organising resistance. As Claassens and Matlala (2014, 129) point out, this means the traditional leader cannot be held accountable by anyone in the community except for a select few, a statement unsupported by historical and anthropological literature "about the role of councils and interlocking customary structures at various levels in mediating and shaping the exercise of chiefly power" (Delius 2008).

Another challenge in the reconciliation of traditional authority with democratisation arises from the co-existence of traditional authority with local elected government. Logan concludes from the Afrobarometer that most Africans do not draw a very sharp distinction between traditional leaders and elected local government. They rather understand them as "common players in a single, integrated political system." Consequently, their assessments of both institutional actors are closely linked (Logan 2009). This does not deny, however, that the introduction or transformation of new local government institutions can have a strong impact on local governance. In South Africa, where rural elected local government was introduced after its transition to democracy in 1994, the roles and responsibilities of traditional and democratic local institutions were reported to be often unclear, ambiguous, and/or conflicting (King 2005, 12-14; Von Maltitz and Shackleton 2004, 124), which created uncertainty and "titanic struggles" (Ntsebeza 2003, 213). It also resulted in some areas in traditional leaders hesitating to enforce such rules and to sanction violations, out of competition for popularity and local support with local democratic institutions (Von Maltitz and Shackleton 2004, 125). According to Findlay and Twine (2018, 14), these findings could suggest a widespread reduction in compliance with and enforcement of laws and could signify a weakening of local institutional control.

Conclusion: a research agenda

In this article, we have discussed the implications of the resurgence of traditional authority and customary law and how a role for these institutions in the governance of contemporary democratic, capitalist societies in Africa is not straightforward. First, these systems have been severely distorted during colonial and post-colonial eras, with consequences for their legitimacy and their accountability vis-à-vis their people. Second, the context of huge money-making opportunities

resulting from control of the customary system, particularly over the natural resources of the traditional community, asks for new, clear, and strong checks and balances on traditional authorities. Lastly, the context of democracy poses challenges regarding inclusivity of traditional rule and customary entitlements, and the relationship between elected and non-elected structures.

While this article has described the background and some important context factors of traditional governance in modern society, it poses more questions than it answers. The challenge is to devise a system with new and operative checks and balances on its leaders. Leaders who used to be constrained in their conduct by people's mobility, now have to function in an era in which mobility is restricted and land is a scarce good. This article, therefore, ends with a plea for more attention to this question, and a research agenda that thoroughly explores what role traditional authorities play and can play in the provision of real legal certainty in contemporary democratic, capitalist societies in Africa and elsewhere. Since interactions between traditional authority and the state lead to complicated two-way reconfigurations, such research needs to pay as much attention to the state as to the traditional authorities. On the one hand, the revival and resilience of traditional institutions are very much dependent on the changing social, economic and political environment and their own responses to these changes. On the other hand, the resurgence of chieftaincy in most cases also reconfigures that context, particularly the state, whether by its incorporation in the state, its challenge of the state, or the disengagement of some groups from the state (Englebert 2002, 61-2).

Notes

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2 Englebert (2002, 59) also notes that when traditional structures were part of the state before the changes, democratisation was likely to weaken their position.

3 A 'Trilogy of Corruption' Is Tearing a Community Apart; Independent Online, April 08, 2017, at http://pulitzercenter.org/reporting/trilogy-corruption-tearing-community-apart-south-africa-platinum, last visited on 12 Oct 2017. Cf. CALS (2017, 32).

4 Among some groups there is an evolution towards more 'gender-inclusive' traditional authority, see for instance Ubink (2011a) about the Ovambo in northern Namibia, but most traditional authority structures still have an overwhelmingly male bias. Similarly, some communities have introduced elections for traditional leaders. Van Rouveroy van Nieuwaal already shows general elections for traditional leadership positions in north Togo in a 1977 documentary (*Sherea, vorstenrechtspraak in Sansanné-Mango* [Noord-Togo], Afrika-Studiecentrum/Stichting voor Wetenschappelijk Onderzoek van de Tropen).

10 Capacity Development of Civil Society in a Fragile Context: Dutch Donor Interventions in the East of the Democratic Republic of Congo

C. Jacobs[1]

Introduction

International actors usually have a strong presence in fragile and conflict-affected countries, reflected in the presence of both humanitarian actors and development agencies. When a state is characterised as weak, donors often have a preference to work with local civil society actors that are considered stronger and more reliable partners (McKechnie 2003; Leader and Colenso 2005; Rombouts 2006). These civil society organisations (CSOs) are then supposed to serve as society's watchdog, helping to "make government more accountable to citizens and increase its legitimacy" (Government of the Netherlands 2014, 1). Indirectly, parts of CSO efforts are geared towards an improvement of the state's functioning. Yet, in many cases, the capacity of these CSOs needs to be strengthened before they can play their watchdog role.

Many internationally funded projects and programmes aim at capacity development of local civil society. Capacity development was one of three main priority result areas of MFS II, the 2011-2015 grant framework of the Dutch Ministry of Foreign Affairs for Dutch NGOs.[2] Its successor, the current policy and grant framework titled *Dialogue and Dissent: Strategic partnerships for lobbying and advocacy* has an even stronger focus

on "strengthening CSO's capacity for lobbying and advocacy," as this role is seen to be "essential for holding policymakers and companies to account" (Government of the Netherlands 2014, 2). But what is actually done in practice to strengthen the capacity of civil society actors? And can it be expected that these capacity development interventions make CSOs better equipped to fulfil their societal role? Such questions are particularly important in developing countries where it is not self-evident that basic services are provided by the state and where a wide range of non-state actors take up the provision of services, including healthcare, education, but also justice and security (cf. Otto 1987). Local CSOs play a more significant role than just holding policymakers and companies accountable; next to providing services, they can be of help in supporting citizens in claiming their rights, and in navigating the complex service delivery landscape. An example of how this works is a human rights CSO. This CSO provides legal aid to people who are in need of (state) justice; provides conflict mediation itself; publishes educational material on human rights and citizenship used at schools and in police training; and has rapporteurs who monitor legal and judicial procedures. Such a CSO acts as a watchdog of the state, holds state officials accountable, works towards improving the functioning of the police and judiciary, and supports citizens to get access to justice and a fair trial. Indirectly, supporting capacity development of this CSO can be seen as a way to develop the capacity of the state and to increase the real legal certainty of its citizens; a certainty that is often hampered in developing countries, and even more so in fragile states (Otto 2000b).

This chapter explores the capacity development support provided by Dutch NGOs to Congolese civil society organisations between 2011-2015. Based on an impact evaluation commissioned by the Dutch Ministry of Foreign Affairs, the chapter explores the capacity of 19 Congolese CSOs and the contribution of Dutch donors to this capacity.[3] Geographically, the focus of this paper is on the eastern part of the DRC. This is the country's region that receives the bulk of aid. Data were collected between 2012 and early 2015. The chapter explicitly does not cover various types of bilateral cooperation that exist between the Netherlands and DRC.[4]

The following section provides a brief overview of literature on capacity development: what is it and how can it be measured? What is particular about capacity development in humanitarian and fragile settings? The next section describes the methodology used for data collection and analysis. The main body of the paper consists of a presentation and analysis of the case material, with reference to the Theory of Change underlying the interventions (Anderson 2006; Keystone Accountability 2009) and the 5 Capabilities Framework (Keijzer et al. 2011). Both are tools that are widely

used in project planning, monitoring and evaluation. The final section discusses the findings and gets back to the main question of this chapter.

Capacity development

Capacity development has been around as one of the objectives of development agencies for several decades (Hailey and James 2003). In a survey carried out by INTRAC in 1994 among representatives of Northern NGOs (n=101), 93% of respondents indicated that their agency worked on capacity-building with their partners (James 1994). More recently, capacity development still receives lots of attention: Goal 17 of the SDGs specifically addresses capacity building.[5] Organisational capacity development has been an explicit aim of development policy in several Northern countries. Academic papers that look at capacity development in fragile states usually provide rather general accounts of capacity but often lack a more detailed analysis of concrete capacity development efforts directed towards civil society (cf. Brinkerhoff 2010).

There is increasing attention on the complexity of capacity development in evaluations.[6] Yet there is no clear agreement among scholars and practitioners on what capacity and capacity development actually entail, and much less so on how to measure it (Eade 1997; Bolger 2000; Morgan 2006; Fowler and Ubels 2010; Huyse et al. 2012). Roughly, two different views on capacity development can be distinguished; it can be seen as a process, leading, for instance, to better education services, more empowered citizens, or higher agricultural production. As such, the process can be seen as a means to achieve a certain end. Capacity development can also be seen as an objective in itself (Bolger 2000; Eade 1997). In practice, there is a continuum between capacity development as process and as objective, with certain interventions leaning more towards the one, and others more towards the other end of the spectrum. Fowler and Ubels (2010) provide a helpful discussion on some of the assumptions that are usually made with regards to capacity development. They underline that capacity is a multi-faceted phenomenon, taking place in a dynamic context in which power relations between different actors play an important role. There is not a single path, nor a quick-fix towards capacity development (Brinkerhoff 2010; McKechnie 2003).

To allow enough attention on the capacity of organisations in a complex setting, Potter and Brough (2004) emphasise the importance of looking beyond the provision of training as this is often the most typical capacity development effort undertaken and evaluated. Indeed, training is often a relatively tangible activity to monitor. The challenge here is to measure the impact a training has in its aftermath. This chapter looks

not only at what is actually done but also at how staff members perceive their progress in terms of capacity, and how they experience donor interventions.

Fragility and a lack of capacity go hand in hand (Brinkerhoff 2010). Capacity development in fragile states meets different challenges and is characterised by different approaches than capacity development in more stable countries, amongst others because there is a lack of trust and limited social capital, but also because timeframes in fragile states tend to be shorter (Brinkerhoff 2010). DRC is one of the countries that typically ranks high on fragility characteristics. Humanitarian assistance has been prominent in the east of the DRC for some decades, resulting in a comportment among the population that people refer to as *l'esprit d'attentisme* (a wait-and-see spirit). Within humanitarian contexts capacity development often receives limited attention. At the same time, the east of the Congo receives high amounts of development funding. As long as humanitarian and development organisations operate in the same setting, it is difficult to transition from the short-term humanitarian approach to a more sustainable approach. However, a longer-term approach is necessary for organisations to develop their capacities, and to enable them to take over some of the roles that are currently fulfilled by humanitarian actors. This chapter shows that there is considerable tension between the different objectives that emanate from the different fields with humanitarians being much less concerned about capacity development than development actors.

Methodology: collection and analysis of data

This chapter is based on data collected as part of an evaluation of Dutch development aid in the DRC (Bulte et al. 2015). The organisational capacity and civil society components of the evaluation were carried out by three main researchers (including the author) and two assistants. Data collection took place during five research trips between September 2012 and January 2015. During these trips, 19 different Congolese CSOs were evaluated as part of a stratified random sample of civil society organisations, drawn from a list of 87 CSOs. They were funded through 10 different Dutch NGOs and covered a wide range of themes, including human rights, women's empowerment, conflict prevention, agricultural development, education, health, water and sanitation. Activities included—i.a.—monitoring of conflicts, mediation meetings, providing legal aid, monitoring prison conditions, radio broadcasts on empowerment of women, supporting farmers' cooperatives, training

grassroots groups, supplying agricultural inputs, organising savings groups, constructing schools, and providing potable water.

The main focus of the research was the eastern province of South Kivu, where 12 out of the 19 evaluated CSOs were based. Their dominance in our sample is reflective of their dominance in international interventions. The bulk of support is channelled to this province. 40 out of 87 CSOs had their main office in South Kivu. It is one of the provinces that until today has been most severely affected by DRC's internal conflict.[7] The province has a high presence of international organisations, and civil society is generally characterised as active and engaged (Hilhorst and Bashwira 2015). Due to the prolonged conflict, there is also a long-term presence of humanitarian organisations.

The analysis makes use of a Theory of Change about capacity development and the 5 Capabilities Framework (5C framework). A Theory of Change (ToC) is a tool used by programme managers and implementers to map the way in which intended change is foreseen to take place by linking objectives to strategies, outcomes, and underlying assumptions. It is frequently used as a way to plan, implement, and monitor capacity development in international cooperation (Vogel 2012; Stein and Valters 2012; Hunter 2006). Change here is seen as complex and dependent on the context (Keystone Accountability 2009). By looking at the intended pathway (as articulated in the ToC) towards capacity development, attention is paid to actors and factors that are both internal and external to an organisation. The ToC is used here to set out the rationale of interventions and directions capacity development efforts were meant to take. It draws on different Theories of Change that we constructed during interactive workshops with staff members of the Congolese CSOs. Subsequently, these ToCs were validated and discussed with contact persons at the donor agencies.[8] After two years, the ToC was constructed ex post—again, in consultation with the involved actors—to assess the extent to which the foreseen Theories were still valid.

Secondly, this article refers to the 5C framework. This is a prominent tool in targeting, monitoring, and evaluating organisational capacity. It was developed by the European Centre for Development Policy Management (ECDPM) (Keijzer et al. 2011). Within this framework capacity is seen as an "outcome of an open system made up of resources, relationships, purposes and yardsticks for performance" (Ibid., 10). The framework distinguishes five basic capabilities, which organisations are supposed to have to achieve their development goals. They are the key capabilities that are often targeted by donor interventions and will be discussed below.

Constructing a Theory of Change for organisational capacity development

There is obviously no uniform Theory of Change that applies to all the Dutch interventions targeting civil society actors in the DRC in terms of capacity development. Some general characteristics and pathways can nevertheless be distilled from the different ToCs that were composed as part of the evaluation (see Bulte et al. 2015 for more detail). The following is a reflection of these main characteristics.

Generally, Congolese CSOs rarely think about their own organisation in terms of capacity and do not have a clear outlook for the future. Most staff members find it difficult to think critically about their own organisational capacity. When asked about what they wanted to achieve, personnel were much more inclined to think in terms of the direct impact they wanted to have on their beneficiaries, but less clear about the way in which this could be achieved. Secondly, in considering their ambitions for the future, most personnel are inclined to think more ambitiously than realistically. Increasing capacity often seems to equal expanding geographical coverage of activities: from territory level, to district, national, or even sub-national level (the Great Lakes Region). Underlying the ambition to expand is the conviction that funding availabilities will continue to exist. All organisations expressed this to be the bottleneck for their further development. Exit strategies usually did not go much beyond 'finding new donors'.

An element that came up in all ToCs was the value attached to internal organisation development and improving formal procedures and bodies: Boards of Directors, General Assemblies, statutes, and international regulations. This was an element that was not so much imposed by donors, but that is more related to the associational culture that exists in the DRC (Hilhorst and Bashwira 2015); having a Board of Directors, a General Assembly, statutes, and internal regulations is seen as indispensable and as an indicator of well-functioning organisations.

In expressing their needs in terms of capacity development, it was striking to observe that staff members stayed close to the type of training they had previously received. In recent years, for instance, one organisation had received a lot of topical training (on their working themes: human rights, good governance, and conflict mediation). Whereas good knowledge was available on this, staff members still expressed the need to have more training on these themes. Staff from another organisation that had already received quite some training through various donors on project management (M&E, financial reporting, etc.) indicated the need to have more training on this topic. Expressed needs and expectations

were thus often in line with experiences from earlier years, which fed into expectations of what could be demanded from the donor in the future.

Donors usually seem to have a stronger voice than CSOs in deciding which interventions are offered. Especially donors with several partners in the same region tend to offer the same type of capacity strengthening to all partners, with limited attention to specific needs. Most donors focus on capacity strengthening needs of individual staff members in terms of project management skills. Such training does not need to be tailor-made but can be provided to various organisations with different backgrounds at the same time through a one-size-fits-all approach and is hence rather cost-effective. Improving project management skills of CSOs is important for donors, as it makes it easier for them to monitor progress and to report on results. Most CSOs had received such capacity strengthening in the past and in the first two years of the MFS-II funding, but this greatly decreased towards the end of the funding period.

Most donors regularly assess the capacity of their Congolese partners; for instance through organisational scans and SWOT analyses. During the evaluation period, training became less frequent than it had been in earlier years. Towards the end of the evaluation period (2014/15) only one of the major Dutch donors still engaged significantly in capacity development. This was the donor that had the clearest strategy on capacity development and considered this to be an integral part of its projects. This donor worked closest together with its local partners to improve capacities, and had a separate budget line for it in the overall budget. It was also the only Dutch donor that made use of the 5 Capabilities framework for annual monitoring of the performance of its partners. Development plans for each partner were subsequently adjusted. To the best of my knowledge, other donors did not make use of it in a systematic way throughout the evaluation period.

Since 2012, the major Dutch donors increasingly shifted to working with CSOs that already had certain capabilities, to the detriment of weaker organisations. Having less generous budgets available themselves, it became more crucial to show good results. "This is easier to achieve with stronger partners," as a manager at one of the donor offices explained. Partnerships hence become more instrumental, with less room for the capacity development of partners themselves. In some cases, donors started to seek ways in which they could co-implement projects together with local partners: "Partnerships used to be about financing and capacity strengthening. Now we will look into possibilities for co-implementation," as one donor representative explained. One of the reasons given for this is that it is becoming more complex to meet all the requirements for the more limited funding opportunities that are still available, such as EU funding.

Overall reductions in funding are clearly visible in CSO's budgets. Comparing 2012 and 2014 budgets shows that 13 out of 18 CSOs had to deal with considerable reductions, with one CSO not having any funding at all, and with nine CSOs having less than 50% left of their annual budget. Five out of the six holistically-oriented organisations were among the CSOs that saw budget reductions.[9] It strengthens the tendency of CSOs to follow donor agendas rather than the needs of their beneficiaries, and to render upward rather than downward accountability (Kyamusugulwa, Hilhorst, and Jacobs 2018). This risks the sustainability of projects and a lack of coherence when different projects are funded through different donors that all have their own agenda.

Five capabilities

This section discusses the five capabilities that are part of the analytical framework to assess the performance of civil society and the role of the Dutch donors in strengthening these capabilities.

Capability to act and commit

This capability is about an institution's ability to perform its work in a proper manner. This ability is related to leadership, a staff's capacity and motivation, financial security, and the extent to which an institution is able to plan effectively and to turn strategy into operations (Bulte et al. 2015; Keijzer et al. 2011).

Most Congolese CSOs have strong, engaged, committed, yet dominant leaders who are oftentimes among the founding members of an organisation. This was the case for 11 out of 19 organisations in our sample. They are best able to express the organisation's vision and mission, but their dominant positions sometimes leave little room for others to develop themselves: "It is the coordinator who decides," as a staff member explained during a confidential interview. Contacts with donors generally run through the organisations' leaders. Strong and dominant leaders might risk giving the impression that not so much capacity development is needed, whereas other staff members might be less able to act and commit.

CSOs attribute importance to internal management; in organising General Assemblies, in having regular board meetings, etc. Donors are hardly willing to support such institutional-oriented initiatives as they do not contribute to direct project outputs. Yet, failing to comply with internal organisational requirements can lead to a paralysis of an organisation. This was particularly salient in the case of a CSO that

was—for 3 years already—working on organisational reform. Not having board meetings and general assemblies prevented the organisation from making decisions on further restructuring and thus the process kept pending. The donor observed this and made funding available for such meetings, but did not manage to enforce them.

Several CSOs tried to set up income generating strategies, but the money collected usually did not rise above symbolic values. The only CSO with significant revenues was a health care provider. It is easier for such an organisation to generate its own income because a concrete service is provided for which costs can be charged. Albeit not very realistic, donors encourage CSOs to seek their own revenues. Almost all CSOs engaged in redistributing project funding to ensure the most optimal payment of salaries. This meant that if project X provided funding for the salary of officer Y but not for officer Z, payment would be divided as long as officer Z's salary was not covered by another project. "We need to do a bit of financial gymnastics," as one director confided. These gymnastics reduced the transparency of the organisations but at the same time contributed to the continuation of their capability to act.

Overall, Dutch donors contributed to this capability by providing some level of financial security—at least in the short term—to partly cover salary costs, and thus contributed to the motivation of personnel.[10] Donors did not engage in supporting other aspects of this capability.

Capability to deliver on development objectives

The capability to deliver on development objectives is often seen as the most central capability, with the other four capabilities feeding into this one. Basically, it is about being able to deliver what you intend to deliver: What is planned and what is done in reality? How relevant is this for the target group and how sustainable is an intervention? It also leads to the question of work efficiency (Bulte et al. 2015; Keijzer et al. 2011).

The evaluated CSOs carried out a wide range of activities. Most of the projects funded by Dutch donors were close to the core area of expertise of the organisations. The CSOs with a less outspoken thematic focus were more open to shifting their project orientation depending on funding opportunities. An example of this was a CSO working on water and sanitation that upon the donor's request—and without prior experience—started an agricultural project. This project had a duration of eight months. The highly ambitious outputs included setting up a cooperative and savings groups, increasing agricultural production, and constructing a mill to grind manioc. The short duration of the project coupled with the high donor expectations in terms of output forced this CSO to aim for fast and tangible results rather than for the sustainable

development of a stable cooperative. The donor representative did not provide a clear view of why this strategy was chosen and the funding did not foresee any particular capacity development of the organisation. To complement these skills, additional agricultural specialists were hired.[11]

Generally, CSOs report the delivery of planned products and services. It is difficult to verify to what extent this really happens. Planning is usually not adjusted progressively, whereas one would expect such adjustments, especially given the volatility of the context. All CSOs in the east of the Congo had experienced not being able to visit some of their project sites because of insecurity. This clearly impacts the actual realisations, which is accepted by donors as a valid explanation for not realising the intended objectives.

All CSOs are concerned with the sustainability of their organisation, especially of their grassroots structures and they usually aim at strengthening these structures, with or without donor support. There is less focus on strengthening the capacity of office staff and knowledge tends to be concentrated in only a few people. At the moment one of these people leaves, there is no strategy on how to compensate for the loss of knowledge and skills. This happened with one CSO when their only logistics officer left, and with another CSO where a Monitoring & Evaluation officer left. Their departures left voids within these organisations that were not filled up. A positive example was one CSO that smoothly replaced its director. In this case, however, the former director had already been operating from a distance for a longer time and the acting director had prepared her successor.

Most support that donors provide covers concrete project activities. As such, the donors have a clear contribution to the capability of organisations to deliver on development objectives. But the duration of projects is generally limited, and hardly ever exceeds a two-year term. Towards the end of the funding period 2011-2015, projects tended to become even shorter. Such short terms sit uneasily with achieving development objectives that, by their nature, need a longer-term outlook.

Capability to adapt and self-renew

This capability is about an institution's ability to adjust to changing circumstances, to learn, and to innovate. It is reflected in the effective use of monitoring and evaluation, openness to learning, and an awareness of contextual factors (Bulte et al. 2015; Keijzer et al. 2011).

A strong donor orientation was visible towards CSOs' capabilites to adapt and self-renew: Monitoring and Evaluation (M&E) data were collected, but primarily to render upward accountability, and systematic data analysis did not take place. A CSO officer explained: "We do

monitoring in the field, but not with the appropriate tools. If we had, we could give more relevant information. Secondly, we don't know how to capitalise on the results of monitoring. Maybe because we don't really know how to use the information" (Bulte et al. 2015, 509).

Directions taken in developing new projects and programmes are to a large extent determined by donor prescriptions. In certain cases, this leads to significant shifts in programming, but such shifts are rarely met with the acquisition of new capabilities and donors do little to support such transitions. This was especially problematic for the holistically oriented organisations, as they were the ones most likely to orient their projects towards donor demands but oftentimes lacked the specialised skills to enter into a new field of expertise.

CSOs are generally strongly rooted in the local context through their grassroots structures. Yet knowledge available through these structures hardly feeds into project proposals. More often, context descriptions are put together on the basis of existing documents. A positive exception was an analysis that was carried out jointly by three women's organisations. With the help of an external consultant, these organisations wrote an extensive report based on a survey that they had carried out on the position of women in the Congolese society (SOFIBEF et al. 2013).

With donors becoming more scarce—as confirmed unanimously by our respondents—CSOs put more efforts in finding out which type of projects donors are interested in, rather than in finding out which type of projects beneficiaries would be interested in. Monitoring and evaluation data are primarily used for upward accountability. It can be questioned whether it would not also be a task of a donor to point this out and to demand downward accountability in the set-up of a project. Thus far, this does not seem to be the case.

Capability to relate to external stakeholders

Organisations with a strong capability to relate to external stakeholders are good at building and maintaining networks. Such networks and contacts can consist of donors, state actors, civil society actors, or the private sector. This capability is also about the quality of the contacts that exist within the target group of beneficiaries (Bulte et al. 2015; Keijzer et al. 2011).

Within civil society itself we found several initiatives to exchange knowledge and experiences. Joint activities were mostly undertaken in the field of lobbying and advocacy. This was especially prominent in the agricultural domain and among women's organisations (cf. Hilhorst and Bashwira 2015). Lobby and advocacy efforts towards the state were usually oriented towards the provincial level. Some CSOs did have good

entry points at the national level and would participate in nation-wide efforts to change legislation for instance. Proof of networking strength also lies in the nature of organisations themselves; 6 out of 19 CSOs were networks, made up of between seven to several dozens of member organisations.[12] Since all CSOs work with grassroots structures, they are well connected to stakeholders at the local level.

In recent years, donors have increasingly invested in setting up synergies between their partner organisations, especially when these partners are working in the same thematic area. In our sample, 10 out of 19 CSOs were involved in such a synergy. For donors, such synergies are advantageous in that they facilitate the organisation of joint training sessions. Moreover, it was argued that NGOs could benefit more from mutual learning through these exchanges, also with an eye on future budget cuts. Efforts hardly resulted in joint programming and CSOs often considered exchanges of little use, whereas donors had high expectations of such synergies. An example of this is a synergy set up by a donor in the field of food security. Coordination of the synergy was with one of the evaluated CSOs, as the donor wanted this CSO to take ownership. The donor defined its own role as that of a 'strategic advisor'. The *raison d'être* of the synergy was explained as: "to learn from each other and to strengthen each other," which was supposed to increase food security and people's incomes. To promote further collaboration, the donor provided joint contracts to some of its partners, but this did not lead to further exchanges or joint activities. Each partner reported individually to the donor.

Whereas donors encouraged cooperation between their partners, we found a remarkable absence of coordination among the different donors themselves. Indicatively, none of the donor representatives had a full picture of the funding provided by other donors to their partner organisations. With the current focus of the Dutch Ministry of Foreign Affairs on lobbying and advocacy, the capability to relate is becoming more important as a lot of lobbying and advocacy activities are undertaken as part of a network.

Capability to achieve coherence

This capability shows the extent to which an institution is able to achieve coherence in its activities, vision, mission, and strategy (Bulte et al. 2015; Keijzer et al. 2011).

Generally, CSOs have elaborate strategic and operational plans in place. In most cases, these plans have been drafted with the assistance of an external consultant and appropriation is limited to the leadership. 6 out of 19 organisations have rather generic strategic plans in which

they claim to cover a wide range of themes, based on a holistic approach to development. Three others are also rather general, but do so from a gender perspective. In reality, however, and with funding opportunities decreasing, generic approaches are hardly put in practice and it is difficult to achieve coherence between different projects. Organisations are willing to adjust their project activities to donor demands to the detriment of following their strategic plans. One CSO for instance had formulated a vision that focused specifically on the empowerment of women in different domains (agriculture, education, human rights), but in practice they carried out an agricultural project in which beneficiaries were both men and women. A clear gender component was not discernible, although activities showed some gender-sensitivity; reflected in the participation of women in the executive bodies of their grassroots structures.

In identifying partners for particular projects, donors look for reliable partners, rather than for partners with specific expertise. In one case, the donor's reorganisation urged the Congolese CSO to shift its focus repeatedly. Initially, this CSO was a partner for the donor in the field of gender—with a gender expert as the contact person at the donor's head office, but during various rounds of reorganisation, the CSO was matched with the donor's conflict transformation department, and ultimately with the extractives department. Throughout these shifts, the CSO tried to keep its focus and continued to work as much as possible in the field of its own expertise, but the changes at the donor level inevitably led to changing demands. The donor thus jeopardised the sustainability and coherence of the interventions carried out by the CSO.

Conclusion

Weakly functioning state institutions constitute a worrying feature of fragile states. The basic services that are provided to a state's citizens are therefore often of poor quality. Non-state actors can play a positive role by either taking over part of the service delivery from the state, or supporting the state in improving its functioning. International donors are often reluctant to work directly with fragile state actors and instead provide support via civil society. This chapter explored the contribution of Dutch donors in strengthening the capacity of the Congolese civil society. With less funding available, Dutch development interventions in the DRC tend to acquire a different character: Donors increasingly prefer to seek collaboration with partner organisations that already possess a certain level of capacity and invest less in capacity development of Congolese CSOs. It means that CSOs that benefitted from capacity development

interventions in the past and that have grown into more mature partners are now at an advantage in comparison to younger CSOs. This risks eroding the richness of civil society in a setting in which civil society is an indispensable actor in providing certain services that the state or private sector do not provide, such as agricultural support services, water, or health care. Other NGOs do not act as much as substitutes for the state, but as watchdogs, for instance, by addressing human rights abuses. In indirect ways, this can also be seen as a way to work towards better functioning state institutions, especially when the abuses are committed by state actors. This chapter has shown, however, that Dutch donors invest more in strengthening organisations through concrete skills that make them better equipped to report towards the donor and to improve upward accountability, but much less in strengthening downward accountability or in demanding accountability from state and non-state actors. Whereas CSOs gather a lot of relevant information on the local level, this information is barely translated into lobbying and advocacy purposes on a higher level.

Interventions in the east of the DRC take place within a humanitarian aid setting. This has clearly led to an aid culture in which it is difficult for development NGOs to set up sustainable interventions, not only because beneficiaries are used to short-term, direct relief, but also because donors have a rather short-term outlook in supporting projects. Such a short-term approach sits uneasily with the longer-term objective of capacity development, and is reflected in a lack of clear capacity development strategies and a lack of funding earmarked for capacity development. This was especially the case towards the end of the evaluation period when the committed funding provided by the Dutch Ministry of Foreign Affairs was nearing its completion. Most Dutch donors depended to a large degree on this funding.

In conclusion, it can be argued that interventions and funding provided by Dutch donors to Congolese civil society organisations is mostly oriented towards the 'capability to deliver on development objectives', and to a lesser extent to the 'capability to relate'. Organisational strengthening has been a focus in earlier years but is no longer prominent as donors increasingly prefer to work with stronger partners that are able to deliver. The strengthening of civil society per se hardly seems to be an objective, whereas this might be essential to enable civil society to contribute to the objective of strengthening the capacity of the state and enabling the Congolese state to take over the driver's seat again when it comes to the provision of basic services to its citizens.

Notes

1 I would like to thank all CSOs and donors involved for their willingness to participate in this research and Bart Weijs and Patrick Milabyo Kyamusugulwa for great teamwork in collecting data and reporting.

2 The overall objective was to achieve a sustainable reduction in poverty. The Millennium Development Goals, capacity development of Southern partner organisations, and strengthening of civil society were the three main priority result areas (Bulte et al. 2015).

3 Dutch NGOs represented in the sample were Cordaid, Free Press Unlimited, ICCO, IUCN-NL, Mensen met een Missie, Oxfam-Novib, PAX, Salvation Army NL, Tear, and ZOA.

4 Since March 2011, the Dutch government has ended its development cooperation relation with the DRC. In the Kivu provinces there are still some activities funded, most notably in the field of peace and stabilisation (executed by UN and Congolese NGOs) and humanitarian aid (through the UN Pooled Fund) (see https://www.rijksoverheid.nl/onderwerpen/betrekkingen-met-nederland/inhoud/congo-democratische-republiek, viewed on 23.03.2015)

5 See https://sustainabledevelopment.un.org/topics/capacity-building. This chapter uses the term capacity development rather than capacity building, unless the cited works use the term capacity building. Capacity building is more technocratic and assumes that capacity does not exist prior to the intervention but needs to be built with the help of external experts. Capacity development underlines that capacities already exist prior to an intervention and are developed jointly.

6 See http://betterevaluation.org for current evaluation practices.

7 See https://kivusecurity.org/ for regularly updated mappings of the armed groups in the east of the DRC.

8 Although the Ministry of Foreign Affairs encouraged donor organisations to use Theories of Change to monitor progress, most donors did not have such ToCs available for their partners.

9 NGOs with a holistic approach towards development usually have strategic plans that cover a wide range of activities in different domains, targeting a wide range of beneficiaries. One such NGO, for instance, mentioned in its strategic plan for 2011-2015 to target women, widows, victims of sexual and gender-based violence, youth, internally displaced persons, returnees, repatriates, autochtonous people (the marginalised pygmy people), small peasants, and landless peasants (NGO X, Plan stratégique 2011-2015). With funding for only one or two projects at the time, it was hard to meet all these ambitions. A broad focus enables such CSOs to apply for a wide range of funding, but in practice it also appears that there is a risk of lacking coherence in activities. Without a clear profile, such CSOs are also less interesting for donors. Towards the end of the evaluation period, it seemed donors were increasingly inclined to work with specialised CSOs with a clear profile.

10 When asked about their "motivation" to work, staff members would usually understand this question to be related about the '*enveloppe*' or remuneration they receive.

11 Several respondents explained that the Congolese labour law makes it difficult for an organisation to dismiss personnel. At the moment there is no project funding available, staff formally continue to be contracted, but in practice often do not receive a salary and are sent on 'technical leave'.

12 The minimum number of members in a non-profit organisation is 7 (Law n. 004/2001 *portant dispositions générales applicables aux associations sans but lucratif et aux établissements d'utilité publique, article 6*). A member has to be a legal entity. For a 'regular' CSO this means individuals; for a network organisation, the members are other CSOs.

11 Inheritance Rights and Gender Justice in Contemporary Indonesia

S. Irianto

Introduction

This study aims to provide an analysis of the position of women in inheritance law and practice in contemporary Indonesia. Inheritance cases provide a window through which we can see the contestation and negotiation over jurisdiction of courts and other dispute settlement forums in Indonesia, yet there is relatively little research on inheritance law. About 50 years ago, Daniel S. Lev did ground-breaking research in this field (Lev 1962; 1972), followed by Franz von Benda-Beckmann (1979; 2009; 2013), Keebet von Benda-Beckmann (2012), Mark Cammack (1999; 2007) and John Bowen (2003; 2005; 2013).

For the present research, I collected a set of Indonesian Supreme Court decisions in inheritance cases from 2000-2009. All of them can be accessed at the Supreme Court website. They show that some debates have never changed since the early years of Indonesia's independence. They are all about how women—widows and daughters—are treated in inheritance law, whether they are perceived as inheritors or not, and how big their share is.

In addition, I carried out observations in the Islamic courts in Depok and Cianjur, both located in West Java, in order to learn more about the context in which decisions are made and about the accessibility of the court for women. I also interviewed judges, disputing parties, and their lawyers. By using ethnography of law, an inheritance dispute can

be explained comprehensively (Griffiths 2002), as it sheds light on the social implications of the inheritance law.

Furthermore, field research among religious leaders (*ulama*) in Cianjur, West Java, helped me in understanding how Islamic authorities outside the court play an important role in re-shaping and re-defining inheritance law and the settlement mechanisms outside the court. I also carried out small surveys, focus group discussions, and in-depth interviews among women in Depok as well as in Cianjur.

The research shows that there is pluralism in inheritance law and practice, rooted in the co-existence of different inheritance laws, overlapping court jurisdictions, and diverse interpretations among religious court judges, religious authorities—such as *ulamas* in *pesantren* (Islamic boarding schools)—and village officials. In recent times, pluralism in inheritance law has become even more complex because of the interplay between national inheritance laws and international law on women's rights (Benda-Beckmann, Benda-Beckmann, and Griffiths 2005)

In settling inheritance disputes, the religious court judges have to choose whether to base their decisions on the state law, i.e., the Compilation of Islamic Law, or on Faraid (Islamic inheritance law) and Fiqh (Islamic jurisprudence). When did the judges use Shariah as a reference? In which context did they prefer the Compilation of Islamic Law? Similarly, the *ulamas* have to choose between Shariah or "living Islamic inheritance law." How are the interpretations of Islamic inheritance law negotiated between the principles of Shariah and common practices in society? Which authorities are strictly oriented towards the traditional Faraid and which ones prefer a progressive interpretation?

This work is part of a larger research project which focuses on the development of inheritance cases filed before the court: how the position of women has changed between 1950-1960 (Dan Lev's period of study) and the present. Inheritance issues do not attract much interest from an Indonesian legal audience, although there are many progressive Supreme Court decisions which provide interesting insights. These decisions have promoted the status of women as widows as well as daughters in Indonesian court history.

A brief history of inheritance practices in the 1950s-1960s

The debates among judges during this period were about (a) whether the widow is an heir entitled to her husband's separate property—property brought by her husband into the marriage but separately owned; (b) the position of mother or daughter regarding the inheritance of marital

property, and their respective shares; (c) whether a daughter is an heir of her father's and how much her share is; (d) whether the inheritance right of a widow may be replaced by the inheritance right of a child.

The first Supreme Court judge who fought for women's inheritance rights was Wiryono Projodikoro,[1] a prominent *adat* (customary) judge and the second Chief Justice of the Supreme Court after Independence[2]. He was fighting for the right of widows to inherit the estates left by their husbands, both the marital and separate property. Wiryono also fought for access to the estate for daughters, even though his idea was opposed by many *adat* law judges and judges from the lower courts. They considered the view of Wiryono as too extreme and paying insufficient attention to the reality of justice among *adat* communities at that time.

However, there was some doubt among judges regarding the development of *adat* law, since hardly any research was conducted at the time about the development of *adat* law. The materials available were those collected before the war by Van Vollenhoven and Ter Haar. This situation has remained the same ever since, as we still lack research into the development of *adat* inheritance law in different regions and situations across the country.

Inheritance Adat Law in the Supreme Court[3]

There are a variety of *adat* inheritance laws based on the different kinship systems in Indonesia. Basically, there are two types of property in inheritance: (1) the ancestral property (*harta pusaka*), or separate property, which is brought by the husband or wife into the marriage and remains separately owned; and (2) the marital property, which is acquired during the marriage (*gono-gini*). These are treated differently in the diverse *adat* inheritance law systems.

Firstly, there are the *adat* law systems of patrilineal societies (Batak, Balinese, Sasak, Indonesian Chinese, some Papuans), which do not grant any right of inheritance to the wife/widow and daughters. Under the traditional patrilineal system, ancestral property is not meant for the wife or the daughter and should always go to the male descendant. Marital property is not known in these systems, as all the property acquired during marriage goes to the patrilineal clan of the husband. If the widow cannot be the heir of her deceased husband, the question—already submitted by Daniel Lev—is which part of the inheritance may she be entitled to in order to support herself?

In the early 1950s, many court decisions concerning patrilineal societies did not give justice to widows and daughters. Initially, the Supreme Court tended to confirm such decisions. In 1955 in a case on Bali, according to *adat* law, the widow had to leave her deceased husband's house. One of

the husband's brothers demanded this on the ground that the widow had committed adultery. The Supreme Court then ruled that only the son of the decedent is entitled to the father's house and that the widow has no inheritance right.

In the same year, the Supreme Court decided a case concerning Sasak *adat* on Lombok, deciding that the widow is not an heir of her husband, but that she is entitled to one-third of the marital property plus one-eighth of the separate property because she raised his children. In 1957, the Court determined that on Bali, land that a father has given to his daughter can be reclaimed by the male heirs of the father if she acts in contravention of custom. Such decisions show a conservatism that did not take into account women's experiences and realities.

It was not until 1958 that the Supreme Court started to change its position. In that year, the Supreme Court upheld the decision of the *Adat* Court of first instance in Lombok, which ruled that a girl has the right to her father's land. The Appellate Court had overturned this decision. In 1959, the Supreme Court also ruled that in its development, the *adat* inheritance law of Batak grants the marital property to the widow and children. This is done in the interests of the children who are still young and under the custody of the mother, and not under the control of their father's brother.

On this point, changes have occurred, e.g., among the Batak, so that women can actually inherit marital property after the death of the father or husband. Moreover, in a well-known ruling in 1961, the Supreme Court decided to establish the position of daughters as inheritors their father's ancestral property. In this Djuma Pasar case, the plaintiff was the only child in the family. According to *adat* law, she was not entitled to the ancestral property, which should go instead to the family of her father's brother's line. However, the Supreme Court ruled that Indonesian society had changed and that women generally held a right to inheritance in such cases.

This was only the start of a series of progressive decisions of the Supreme Court on inheritance for Batak women. Between 1961 and 1985, there have been nine decisions on Batak inheritance that recognise and grant the widow the inheritance rights to her husband's property and also recognise and grant the daughters the rights to their father's property. The share of the property received by the daughter is equal to the share of the brother (Irianto 2005).

Second, in societies with bilateral kinship systems such as the Javanese and Sundanese, a widow inherits the marital property, her share being one-third or one-half of the estate. The rest of the estate should be shared among the children or among the husband's relatives. The separate property of the husband will be inherited by the children, and if there

are no child in the family, it will be given back to the husband's family. Similarly, the separate property of the wife will also go to the children.

This had not always been the case. In 1952, the Appellate Court in Surabaya, East Java, upheld a decision from the Blitar Civil Court by determining that: "a child is an heir of its parents (the father), and parents are the heirs of their children." From that statement, we can see that the right of the widow is not recognised.

This decision was not appealed before the Supreme Court, but Wiryono wrote a critical note about it. He questioned whether the reference of the judge to "self-experience" as the basis for the judgment referred to the community's experience or the experience of the judge himself. In fact, the decision of the court went against recorded *adat* law. On that basis, courts in Java and Madura decided that in the case that inheritance was in the form of a plot of land and a house, the widow had to be given the rights over the property, and only if there was some remaining inheritance would it be given to their children. The question is what should happen if there is a large amount of inheritance. The study of *adat* law before the war in Sidoarjo, East Java, showed that the *adat* law practised there determined that the inheritance rights of a widow should be equal to those of the children. On that basis, Wiryono did not agree with the statement that only children are entitled to become heirs of the parents/the father, not the mother/widow.

The third type are societies with a matrilineal kinship system, like the Minangkabau. Although inheritance of land is determined based on the mother's line, women lack the power to control its use and management. This control is in the hands of the mother's brother (*ninik mamak*). He determines whether the inheritance is the clan's *Harto Pusako Tinggi* (ancestral property, inalienable clan-owned property, non-inheritable) or *Harto Pusako Rendah* (marital property, inheritable). He also determines who is entitled to manage the family's assets.

Wiryono's promotion of women's inheritance rights here was not always followed by other judges and continued to be debated, including in inheritance cases among the Minangkabau. But he persevered in his approach. In 1957 the Supreme Court under Wiryono came to hear a case originally brought to the Bandung Civil Court, concerning the inheritance of a Minangkabau estate. The case concerned the determination of the heirs of the decedent (Dr Muhtar), a male medical doctor originally from Minangkabau, West Sumatra. The doctor's family demanded that the inheritance would be given to his family following his mother's line. The Bandung Civil Court rejected their claim and determined that the heirs of the doctor were his children, while his widow (Ms Siti Roekasih) was entitled to half of her husband's property because she had supported her husband's career during the marriage.

The case was upheld on appeal but overturned upon cassation. The Supreme Court stated that the Bandung Civil Court had erred in determining only the children as the heirs and not Ms Roekasih. The Supreme Court argued that the term "heirs" should not be used, but instead the term "collectively have the rights." In this manner, Ms Roekasih was also entitled to a part of her husband's inheritance estate.

In summary, during the period of the 1950s-1960s, the Supreme Court determined the following in cases of inheritance: (1) the right to an estate of the widow who has supported her husband during his life, i.e., to the separate property of the husband and the marital property; (2) the right of the widow to both types of the property (separate and marital property); (3) the right of the widow to inherit both the separate property as well as the marital property, at the amount which is equivalent to the rights of the children. Thus, the recognition of a widow as an heir, starting among the Javanese community was then later extended by the Supreme Court to other ethnic groups (Lev 1962, 214-15).

This period is referred to as the transitional period, in which Indonesia went through a process of transformation from a country with Dutch administrative attributes towards a free and independent nation. Wiryono envisioned a national inheritance law suitable for Indonesia in the future, an inheritance law that takes into account a sense of justice considered suitable to the new nation. The main consideration was the principle of egalitarianism, which was supported by the significant role Indonesian women had played in the struggle for independence (Lev 1962).

In general, the courts on Java started to follow the Supreme Court decisions, arguing that they were in line with how *adat* law in Central Java had developed. And if they did not, the Supreme Court would correct them, for instance in a case from Bojonegoro in which the Appellate Court gave only one-third of the inheritance to the widow, and the Supreme Court changed this to half of the estate. The children's part was moreover put under the control of the widow until they had come of age.

A trend of the present time

An examination of the 169 inheritance legal cases filed before the Supreme Court between 2000 and 2009 indicates that the debate in the Supreme Court from the 1950s-early 1960s has not changed much. It still is about whether a widow is entitled to the separate property or marital property and how big her share should be, as well as about whether the daughter is an inheritor of her father's property and how much her share is. This is surprising given the fact that at the time the debate seemed to

have been decided in favour of widows and daughters, as discussed in the previous section.

Why is this the case? Does it have something to do with the lack of a tradition of jurisprudence and precedent in Indonesia? Because it is rooted in the Continental/Dutch legal tradition, many Indonesian judges consider that the legal system does not hold an obligation on them to refer to jurisprudence as an important source of law in handling similar cases (Komisi Yudisial 2017).

Therefore, the Supreme Court decisions hailed as 'breakthroughs' in inheritance cases during 2000-2009 are often not new at all, as similar decisions were made in the late 1950s-early 1960s. They concern decisions to give a widow the right to inherit both the marital property and the separate property of her husband; to give a daughter the right to inherit her father's property. Other decisions are new indeed, such as those to give the inheritance right to fostered and adopted children (including women); and to give the right to the wife and children from a subsequent marriage to inherit the marital property of the husband from an earlier marriage.

The study found contradictions in these 169 decisions of the Supreme Court concerning the position of the widow. Some decisions do not recognise the right of surviving widows to inherit, so all rights of inheritance are given to the children. Others only give the widow the right to the marital property, but not to her husband's separate property.

What about daughters? Here the Supreme Court is more consistent. Its decisions determine daughters as heirs to their fathers, putting them on a par with sons. A daughter here means a female child born to the marriage between a man who is her biological father and her biological mother, regardless whether from a first or subsequent marriage. Like sons, daughters only have the rights to inherit the marital property of their father and their own mother and are not entitled to any share of inheritance from the estates of their fathers from marriages to other women. This is an important issue since several disputes have occurred between the wives and children from another marriage of that deceased man.

Looking at the Islamic court, where it regards the inheritance portion for a daughter, the study shows that in general, she receives less than her brother. Adopted children, both male and female, are recognised as the heirs of their adoptive father or mother, but their share should not exceed one-third of the inheritance. Still, in traditional Syariah law, adopted children are not recognised as inheritors at all.

As far as the separate property of the father or the husband is concerned, the stance of the Supreme Court is ambivalent. Some decisions determine that the wife is the one entitled to the separate property of the

husband. However, some decisions grant the inheritance rights over the separate property to the children, not to the wife. If there is no child in the marriage, the separate property may be given to his siblings or his parents. I will now look more deeply into some of these issues.

The Widow's right to inherit

Gradual development appears to be present in the decisions of the Supreme Court on the rights of widows. Concerning the property of the husband, some decisions gave the widow the full rights to inherit both the marital property and the separate property owned by the husband. In fact, the absence of children did not preclude the right of the wife to inherit her husband's property. Other court decisions only recognise the right of the widow to the marital property, so in those cases, half of the inheritance goes to the widow.

The position of a widow, especially one with offspring from her deceased husband, is acknowledged by the Supreme Court. An example is the following case between a widow and the siblings of her deceased husband. It concerned a case from Sumedang, West Java, between Ms Usih, a widow of a deceased husband named Mr Sapan, who died in 1999. They had only one son, Momo, who was mentally impaired and passed away in 2000, one year after the death of the father. Ms Usih then remarried. The siblings of Mr Sapan filed a case before the court, arguing that Ms Usih did not have any rights to the inheritance because of her new status as a wife of another man. More specifically, they argued she did not have rights to what had passed to her as an inheritor of what her son Momo had inherited from his father. In 2003, the Supreme Court decided that Ms Usih was effectively an heir of her son Momo, no matter whether he had been disabled or not. When the child dies, his mother will become his heir. The decedent's siblings, therefore, had no right over the inheritance.

The gradual development of the Supreme Court's decisions tends to further promote widow's rights, but there are exceptions. One decision ruled that the entire estate was to be divided among the children, without giving any right to the surviving widow. In one other case, the widow likewise did not inherit anything.

In a polygamous marriage, jurisprudence from Lev's period of study from 1950-1960 pointed out that a wife or a widow is not entitled to the marital property from a marriage other than her own. She is not entitled to the separate property brought by her husband to his previous/first marriage with another woman. It seems that this jurisprudence still stands, but with an exception. We found a case from Magetan, East

Java, in which in 2000, the Supreme Court recognised the right of the second wife and the fourth wife to inherit property from their husband. The share of the widow in a polygamous marriage was decided to be one-third of all of the relevant marital property acquired during the marriage of the husband with these second and fourth wives. A similar decision was made in a case from Lumajang, East Java, in 2005.

Inheritance law is also connected to divorce. In one case, a divorced woman became involved in an inheritance dispute after her ex-husband died, with the children of her husband from yet a previous marriage. In 2005, the Supreme Court decided that the divorcee's inheritance right is limited to the marital property acquired during the period of marriage. She is not entitled to any share of her husband's separate property, which should belong to the first wife and the children of the first marriage.

What is the perspective of the Islamic court about the right of widows? According to the Compilation of Islamic law, both widows and widowers have the right to acquire an equal part of the inheritance. Each surviving spouse is entitled to one-eighth of the estate left by the decedent. There are cases in which the wife received one-eighth as a fixed proportion, regardless of the number of children. In addition, her position as an heir with an entitlement to half of the marital property is strictly enforced by the Islamic court. The settlement, according to the Compilation of Islamic law, recognises the wife's right as the owner of half of the marital property in a divorce, which is also in line with Law No. 1 of 1974 on Marriage. A son, who supposedly has a superior position in Islamic law, cannot defeat the mother (the decedent's wife/widow) as the owner of the marital property.

This can be illustrated by a case in Nanggroe Aceh Darussalam. A rich man, Zam Zam Ali, died in 1997, leaving a wife (Nyak Dien), two daughters and one son. The son, named Muhammad Zami, usurped all the belongings of his father. His mother and sisters filed suit before the Islamic Court, which decided to divide the property in two phases. First, the marital property was divided in two, with half for Zam Zam Ali and the rest half for Nyak Dien. Secondly, Zam Zam Ali's separate property was added to his share. From this second share, Nyak Dien got one-eighth, and the remaining seven-eighths were divided among the three children. Muhammad Zami received twice the share of each sister. This decision was confirmed by the Supreme Court in 2008.

In sum, as far as the right of the widow is concerned, both the civil and the Islamic court recognise the right of the widow to inherit from her deceased husband. The inheritance right of the widow includes half of the marital property and a share of the separate property.

The Rights of Daughters

According to the Supreme Court, biological daughters, daughters from different marriages, and adopted daughters are all entitled to inherit property. The Supreme Court recognises that principally, every child, regardless of gender and from which marriage, has the same rights to inherit from his/her parents. The more progressive decisions even grant stepchildren and adopted children a right to inherit. Only in a few cases did the Court not give equal rights to daughters. In these cases, the judges were of the opinion that it is common justice for a daughter to receive a smaller amount than her male sibling.

This study also found a decision that grants the right to inherit the marital property of parents obtained through a different marriage. This concerned a case from a civil court in Central Java about a certain Kadiman, who married twice. He got one son (Sarah) and one daughter (Marminah) from the first marriage with Kartijah. Sarah had no child and adopted Marminah's daughter, named Nakirah. Kadiman held much land, partly as marital property and partly as separate property. All the properties were given to his wife, Kartijah, and children, Sarah and Marminah.

Kadiman then married for a second time, with Karsi, and got one daughter (Peti) from this marriage. This second marriage lasted only three years and then Karsi went back to live with Sarah, the son of his first wife. After Kadiman died, Peti started disputing the lands with Nakirah. The Civil Court stated that Peti was the inheritor of Nakirah's father's property through Kadiman's second wife, while Nakirah was the inheritor in her capacity as a daughter replacing her mother, Marminah (who had died). The Appellate Court in Semarang, Central Java, overturned the decision of the Civil Court, arguing that a daughter from a second marriage has no right to her father's marital and separate property from the first marriage.

However, the Supreme Court in 2007 overturned the Appellate Court decision and upheld the one from the Civil Court. Peti was recognised as an inheritor of Kadiman's property from the second marriage, while Nakirah was recognised as a daughter of Marminah (Nakirah was not recognised as an adopted child of Sarah). Four years earlier, the Supreme Court Judges decided an almost similar case from Jember.

Another complication resulting from multiple marriages concerns the situation where a biological child is entitled to his father's inheritance, but the wife from another marriage with the father is still alive. In such a case, from Probolinggo, the Supreme Court decided that this wife is entitled to benefit from and manage the inheritance and that only after she dies must the property be returned to the decedent's biological child.

The Supreme Court also decided to treat daughters on par with sons in cases concerning *sanggan* land (a village's customary land) related to the positions held as the village head. The case concerned the estate of a

certain Sutorejo, who had three children: two sons, Karto Sandimi and Resodiman, and one daughter, Sodikem. The dispute was between the widow and Sodikem, on the one hand, and the children of Resodiman on the other. It had never happened in the village that *sanggan* land was inherited by a daughter, but in 2001, the Supreme Court decided that a daughter held this as well. A similar case was also decided in favour of the daughter in Klaten (Central Java) by the Supreme Court in 2003.

As mentioned above, the Supreme Court has also started to recognise the rights of adopted children. They still have no rights to their adoptive parents' separate property, but they are entitled to their marital property. This was already decided by the Supreme Court in 1959 but followed through in a case in 2003. It concerned a rich woman called Yasunah, who left 13 plots of land when she died. She was childless despite having been married twice. She adopted a daughter named Wayaniah who had one son (Jaelan) and one daughter (Noraniah). Yasunah had a sister named Yuhaidah who had six children. These filed suit before the Gresik Civil Court to claim the inheritance of the lands left by Yasunah. The judges in the court of first instance rejected the claim, and the Surabaya Appellate Court and the Supreme Court upheld this decision.

Another important recent decision concerning inheritance was not from the Supreme Court but from the Constitutional Court. In its decision No. 46/PUU-VIII/2010, the Court recognised the existence of a civil relationship of children born out of wedlock. This decision derogated from Article 43 of the Marriage Law (1/1974) which states that a child from an illegal marriage only has a civil relationship with the child's own mother. The Constitutional Court decision amended this provision by stating that "a child born out of wedlock has official civil relations with the child's mother family or the mother, and with a man who is the child's father, as long as the evidence can be proved using science and technology or evidence is legitimated by law."

All of this demonstrates how the Supreme Court, as well as the Constitutional Court, have improved the legal position of the inheritance of widows, daughters, adopted children, and children born out of wedlock.

The choices of Court

The small number of inheritance cases appealed before the Supreme Court during nine years (2000-2009) correlates with the small number of inheritance cases filed before the court(s) of first instance. This section discusses the number of inheritance court cases filed before the Supreme Court during nine years. It also reflects the parties' choices of courts, which during this period were officially allowed for Muslims.

The Supreme Court Cases (2000-2009)

The parties' court preferences are a relevant issue to this research, as they indicate the preferences of Muslims to have their cases decided either according to *adat* law or Islamic law. In Central Java, 21 cases were resolved in the civil court and three in the Islamic court. In East Java, 27 cases were decided by the civil court as compared with six cases in the Islamic court. In South Sulawesi, the numbers were closer, with seven cases settled in the Islamic court and four cases in the civil court.

In West Sumatra where the majority of the population is Muslim, all 10 cases of inheritance were settled in the civil court. This is related to the matrilineal kinship system that they follow and their preference for the application of *adat* law, which is enforced through the civil court (Benda-Beckmann and Benda-Beckmann 2009; 2013). The same is found for Muslims in Aceh[4] and South Kalimantan (Bowen 2003). Regarding the choice of court in settling the case, whether it be the civil court or the religious court, can be seen in Figure 1 below.

Figure 1 *The Choices of Court*

No	*Area*	*R*	*c*
1	Bali (Central Indonesia), Nusa Tenggara & Moluccas (East Indonesia)	9	2
2	DKI Jakarta	2	2
3	West Java, including Banten	8	3
4	Central Java	3	21
5	East Java	6	27
6	Kalimantan	5	0
7	Nangro Aceh Darussalam	10	0
8	Central Sulawesi & North Sulawesi	1	2
9	South Sulawesi	7	4
10	West Sumatra	0	10
11	North Sumatra	5	4
12	South Sumatra	4	1
	Total	**60**	**76**

Source: The Supreme Court Register on Inheritance Cases (2000-2009)

The data above is analysed from the data of 136 inheritance cases among Muslims. The total number of cases was 169, with 33 cases concerning Christians or other religious groups.

The First Instance Islamic Court

There are 343 first instance Islamic courts[5] and 29 Islamic appellate courts across Indonesia[6]. Figure 2 indicates cases decided by the Islamic courts in 2009 at both first instance and appellate levels.[7]

Figure 2 *Cases Decided by the Religious Courts in 2009*

Case type	*First Level Religious court*	*% (of total first level)*	*Appeal Level/ High Religious court*	*% (of first level decisions appealed)*
Marriage	241.745	98.25%	1.633	0.67%
Inheritance	1.015	0.41%	260	25.6%
Testament	4	0%	18	450%
Bequest	45	0.02%	12	
Property donation (*wakaf*)	12	0.01%	7	58.3% 26.6%
Alms (*Shadaqah*)	12	0.01%	0	0%
PSHP[1]	1.897	0.77%	0	0%
Syariah Economy	5	0%	1	20%
Other cases	1.301	0.53%	25	1.92%
Total cases decided	246.036	100%	1.956	0.79%
Cases rejected/ withdrawn	11.762			
Total cases	**257798**			

Source: Sumner (2010)

[1] P3HP (Permohonan Pertolongan Pembagian Harta Peninggalan – Request for Division of the Estates).

Only 0.41% of inheritance cases were heard in the Islamic court of first instance, compared with divorce cases, which comprised the remaining 98.25%. Of these inheritance cases, 26.5% were appealed. For the civil courts such data are not available.

Depok and Cianjur

At a more micro level, the above data are supported by the data collected in the Islamic courts in Depok and Cianjur. Generally speaking, inheritance cases were only taken to the court as the last resort. In Depok, only five to ten percent of all cases were brought to the Islamic court between 2004 and 2011 (see Table 1 below). Whilst in Cianjur, inheritance cases brought to the Islamic court numbered only four in 2008, consisting of one inheritance dispute and three bequest cases. In 2009, only one inheritance dispute was settled in the Islamic court (Irianto and Bedner 2016).

Field data gathered from women in Kukusan village may explain why only very few cases were filed before the court. They preferred to resolve the matters in family deliberation, usually led by a male. This would usually be the father or a brother. The mother would only be in charge if the father had died. Filing a case before the court means an embarrassment to the family, or the value of inheritance is so small that

Table 1 *Number of Cases of Divorce and Inheritance as well as the Percentage of Inheritance Cases in Depok Religious Court from 2004 to 2011*

Year	*Cases Received*	*Divorce Initiated by Husband*	*Divorce Initiated by Wife*	*Inheritance Dispute/ Contested Inheritance*	*Percentage of Disputes/GW*	*Determination of Inheritance (PW) and/or Determination of Heirs (PAW)*	*Percentage of PW and/or PAW*
2004	926	299	594	2	0.0022		
2005	1065	345	703	4	0.0038		
2006	1112	342	694	9	0.0081		
2007	1208	349	772	11	0.0091		
2008	1430	490	844	5	0.0035	16	0.0112
2009	2068	565	1253	9	0.0044	45	0.0218
2010	2107	600	1349	4	0.0019	37	0.0176
2011	2741	648	1673	1	0.0004	49	0.0179

Sources: Monthly and Annual Reports on Cases Received by the Depok Islamic Court between 2004-2011

it only requires a simple settlement. According to women we interviewed in Cianjur, the determination and settlement of inheritance cases is mostly done by the local *ulama*.

Although each of the regions is a buffer for a big city—Depok is a buffer for Jakarta and Cianjur is a buffer for Bandung—and the majority of the population is Muslim, inheritance disputes in the two regions are settled in a different manner. Depok is populated by heterogeneous, multi-ethnic residents due to the presence of various universities, which has promoted an urban economy. Whereas in Cianjur, the role of *ulama* is very prominent, because the residents are relatively homogenous (Sundanese), and the paternalistic characteristic of the society is still very strong.

Both in Depok and Cianjur, a number of judges in the Islamic Court acted beyond all legal references when they discussed inheritance matters outside the court. Some judges favoured an equal inheritance share for their own daughters and sons in the family. As a religious authority in the neighbourhood, a judge may settle inheritance disputes outside the court when asked by relatives or friends to help with the settlement of their cases. Islamic law, including the law concerning inheritance, is practised diversely in different contexts in at least in 12 countries, including Indonesia (Otto 2010).

In resolving disputes in the courtroom, judges would encourage the parties to engage in mediation rather than taking the battle into the trial. They usually persuaded parties by raising the word "embarrassed" (*malu*), "maintaining the family honour," or "to allow the deceased to rest in peace." Apparently, in the practice of law, sociological considerations, such as the social situation of those involved were taken into account by the judges. Although adherence to Shariah is considered normatively required, in practice, they take into consideration local ideas about social justice.

Contestation on inheritance jurisdiction in the past and present

At the start of this essay, I mentioned that in inheritance cases jurisdiction is contested. This contestation occurred between the Civil court and the Islamic court or between the *adat* court and the Islamic court. It happened partly because of a 1937 Dutch government policy that minimised the authority of the religious court by removing its authority to deal with inheritance cases and transferring it to the *adat* court. Hence, the jurisdiction of the *adat* court was expanded (Lev 1972).

After independence, the effort to strengthen *adat* law promoted by Van Vollenhoven and Ter Haar ran out of steam. One of the reasons was the urge for legal unification while there were few well-educated judges and researchers with expertise in Indonesian *adat* law. *Adat* law was considered as an obstacle to progress and perceived as a symbol of naivety and the surrender of Indonesians. Many legal scholars and academics assumed that *adat* law was not in line with a modern industrial country. Economic progress required a new law, namely, civil law. The desired social revolution needed a law which was better suited to meet the needs of workers and farmers for a better future. Indonesian people should have new, modern law. Therefore, at that time, the leaders of the state considered that *adat* law was unsuitable and had to be discarded (Lev 2000).

It is not surprising that later, through Emergency Law No. 1 of 1951, Sukarno's regime abolished autonomous courts in some regions. Nonetheless, the Islamic court was maintained. To this day, the jurisdiction of the Islamic court keeps on expanding in fields far beyond inheritance law, including Islamic banking. In 2006, the Law on Islamic courts' Article 49 suggests that there is no longer an option for Muslim litigants in inheritance cases to choose a court and that they are required to turn to the Islamic court.

Three out of the 169 Supreme Court cases studied show that the judge has questioned the issue of jurisdiction of the court. The Supreme Court rejected settling one case on the grounds that inheritance cases among Muslims should be addressed in the religious court. The case was ended without a solution, even though the parties had followed all the procedures in the court of first instance, appellate court, and the Supreme Court.

By contrast, one case was decided in both the Islamic and the civil court (*ne bis in idem*). The two courts produced two different decisions, with the Islamic court deciding in favour of a second wife and her two daughters, and the civil court in favour of the first biological daughter from a first marriage. However, the Supreme Court did not problematise the competence of jurisdiction of the court, and they settled the essence of the dispute instead.

In another case, the parties referred to different bodies of law. The Minangkabau woman who was the defendant referred to *adat* law, which gives women protection by granting them access to the matrilineal inheritance right, whereas the man, who was the plaintiff, wished to apply Islamic inheritance law. The Islamic court followed the plaintiff and used Islamic law as a legal reference, a decision upheld by the Supreme Court both in cassation and upon review.

In the past, the contestation over jurisdictions of inheritance dispute occurred between official institutions (State court, *adat* court, and Islamic court). Today, the conflicting jurisdiction at local levels is getting even more complicated, since it is not limited to the State institutions but also involves many more different local forums and actors. Cianjur is the best example of this. The contestation is between state institutions like the Islamic court and the office of religious affairs (Kantor Urusan Agama/ KUA), and many local forums of *ulamas* (like the Islamic boarding school and village *ulama*).

In Cianjur, a normative system which is not known or perceived as not belonging to the Faraid will be categorised as *adat* law by some *ulamas* or community member—and even by some women. It concerns norms such as granting women a portion of the inheritance which is equal to a man's share, and the recognition of the right of an adopted child as an heir. They perceive these kinds of normative references as *adat* law, even though they themselves do not know what *adat* law is.

It seems that the interpretation of Islamic inheritance law also develops in terms of the time when the inheritance should be divided. According to traditional Islamic inheritance law, inheritance is always associated with death. However, in Depok and Cianjur, people do not always divide the inheritance after the owner of the property (usually the father or husband) dies. The needs of the surviving mother receive some attention from the family so that her needs are prioritised in the use of the inheritance. They do not mind waiting and dividing inheritance after the mother dies. Such social justice is far more common than disputes taken to court.

Concluding remark

This research tried to answer the following questions: to what extent are women's rights taken into account in the various legal debates in inheritance court trials? To what extent are judges concerned about women's access to justice in inheritance cases? Is the women's contribution to the family and to the local society counted in deciding the proportion of women in the inheritance share? As I demonstrated, generally speaking, there has been progress in court decisions, including those of the Supreme Court. Widows and daughters are accepted as inheritors and are given an increasing share of the inheritance, regardless of their status as wife, ex-wife, biological daughter, adopted daughter, or stepdaughter.

The Supreme Court has played an important role in promoting women's inheritance rights. The progressive considerations of the

Supreme Court judges are beyond what has been traditionally regulated in Islamic inheritance law as well as *adat*. Promoting access to justice for women may mean that an *adat* norm is put aside in inheritance law or that the same is done with a religious norm in Islamic law. A rigid interpretation of *adat* as well as Islamic inheritance law, which is not in favour of women, is no longer the norm for judges.

To understand the gradual changing of development in promoting women's right to inheritance, the whole setting of politics behind the court trial and the history of Indonesian judiciary system should be understood. This study points out that inheritance disputes can be a window through which to view the history of the Indonesian law by providing legal data on how others have negotiated the conflicting and different inheritance laws and court jurisdictions. Inheritance cases can also highlight the contestation and negotiation between the state legal institutions and the existing forums outside the court, which exist in the community. Diverse interpretations of the Islamic law, *adat* law, and State law from various actors play an important role in the dynamic constellation of inheritance legal pluralism.

The progress of the Supreme Court's decisions in inheritance is the result of a long historical debate in the Supreme Court, which began in its early days. The debate was an attempt by the judges to accommodate the development of *adat* law in the first place. These efforts to provide justice for women through the decisions of the Supreme Court were legitimised by the consideration that women participated in the country's independence movement, an idea pioneered in particular by Chief Justice Wiryono Prodjodikoro.

Given the history of decisions of the Supreme Court in its early days, judges' current decisions, which provide access to justice for women in the present time, are not something new. If we look at the decisions of the judges and trial sessions in inheritance cases, it appears that the same questions are still raised—whether a woman (wife or daughter) is an heir or not, and how big her share of inheritance is—even if many such matters have been long decided in favour of women.

Gradual change is reflected in some progressive decisions, but there are always also a few conservative ones. This presumably relates to the lack of a tradition in Indonesian law that jurisprudence is an important source of law. Precedents are still not considered binding, meaning that they need not be followed or even referred to. This is quite surprising considering the fact that the legal system of Dutch and Indonesian law have the same root and that in the Netherlands, precedents play an all-important role.

At the local level, the direction of the 'living' Islamic inheritance law is likewise still characterised by debates and different interpretations of

the actors about whether women are heirs and how big their share is. In this case, even though the main reference of the *ulama* is Shariah, there are differences in the interpretation of inheritance rights for women. Different Islamic boarding schools even have different interpretations. Similarly, the *ulama* in different religious organisations or in the structure of the village also provide a variety of interpretations.

Contestation of jurisdiction at the local level also occurs between dispute settlement forums in the community and the State court (the Islamic court). This study shows that the disputing parties see the Islamic court as the last resort in the settlement of inheritance, such as when there is a need to capitalise the estate or when a dispute cannot be resolved at the family level or by the help of *ulama*.

Regarding the actors who play an important role at the local level in determining women's rights in inheritance—which are the *ulama*, or in the family, the father or brother—this research indicates that there is always a possibility of negotiation, which provides more space for those seeking justice for women. Islamic inheritance law and *adat* law may be construed in accordance with the demands of society and women's sense of justice.

Finally, this research left another question to be addressed by the next researchers in this field. In the Supreme Court and the Islamic court, the number of female judges is increasing, which was not the case in the early and pre-reform period. Does the growing number of female judges have any correlation with decisions on inheritance that are likely to provide access to justice for women?

Notes

1 Wiryono Prodjodikoro was the chairman of Landraad, and published several articles on the *adat* law prior to the Japanese occupation. In 1947, he became a judge of the Supreme Court, and later became the chief justice of the Supreme Court in 1952. He was associated with the National Party and was an observer of the issues of social reform (Lev 1962).

2 According to Daniel S Lev (2000, 114), Judge Wirjono prepared a paper entitled: "Efforts to Improve Inheritance Law in Indonesia" for the congress of Indonesian Lawyers Association in 1959. He discussed the basis of the variety of the existing inheritance laws, including civil law from the West, which could be combined with the national inheritance law. He was very clear that he wanted to promote the rights of women in inheritance.

3 The data about cases from 1952, 1957, 1959, and 1960 are quoted from Dan S. Lev (1962; 1972).

4 In Nanggroe Aceh Darussalam Province, the Religious courts are named Mahkamah Syar'iyah (Syar'iyah Courts) and are invested with jurisdiction pursuant to Law No. 18 of 2001, Qanun No. 10 of 2002, and Presidential Decision 11/2003. The jurisdiction of the Mahkamah Syar'iyah in NAD province includes a number of criminal matters.

5 Ibid.
6 Religious courts acquired this jurisdiction pursuant to Law No.7 of 1989 and Law No.3 of 2006 on the Religious Judiciary. Their jurisdiction includes: (1) divorce (included in marriage cases), (2) inheritance, *wasiat* [wills and testaments], and *hibah* [charitable bequests], which are carried out in accordance with Islamic law; (3) *wakaf* [charitable trusts] and *shadaqah* [other forms of alms]; (4) *infaq* and *zakat* [charitable donations/alms]; and (5) syari'ah economy.
7 Profil Peradilan Agama, Direktorat Jenderal Badan Peradilan Agama Tahun 2009. See www.Badilag.net.

12 The Role of Sharia in Lawmaking: The Case of Libya

S. Ibrahim

Introduction

Since the overthrow of the Gaddafi Regime in 2011, Libya has witnessed a heated debate over the role of Sharia in lawmaking: should it be the reference when legislating, in what way, and with what effect on existing legislation? This debate, however, is not new, and the consecutive regimes since independence in 1951 held different positions on it. While the Monarchy Regime (1951-1969) limited this role, the Gaddafi Regime (1969-2011) widened it significantly. Once Gaddafi's regime was ousted in the 2011 revolution, the new authorities thoroughly reviewed its Islamisation initiatives, not because they lacked interest in seeing Sharia implemented, but rather because of their interest. To them, Sharia's role should be expanded, but not in Gaddafi's unorthodox way.

In this paper, I will present and discuss the developments in the role of Sharia and will try to identify the main actors behind them, both national and international. I will focus on the legal history of independent Libya (from 1951 onwards), though I will refer to earlier times when necessary. I will distinguish between three eras: The Monarchy's (1951-1969), Gaddafi's (1969-2011), and the aftermath of the 17th February Revolution (2011-up to now). I will pay special attention to the third era wherein it is still uncertain what role Sharia will have in the future constitution. It is an issue that has not only divided the Constitution Drafting Assembly (CDA), but also society at large, and the paper will make recommendations

as to what could be the best solution given similar countries' experiences and Libya's own particularities.

In doing so, I will go beyond studying primary sources such as legislation and policy documents to examine judicial decisions, and interview key persons such as the head of the expert committee (2014-2016) that reviewed Libya's legislation for compatibility with Sharia. I will also draw on my own experience as a member of a former similar committee (2013-2014). I will also consult relevant literature, which is quite limited concerning Libya.

Sharia in the Monarchy era, marginalised

It is fair to say that the role of Sharia under the Monarchy rule was limited. The regime did not recognise it in the constitution, and confined it in non-constitutional law to family matters, as had been the case under the Ottoman and Italian rules. Admittedly, the Constitution declared Islam "the religion of the state," but this was understood as a mere declaration of the state identity, and was never taken to attribute to Sharia any role as a standard for legislation. This might come as a surprise given that King Idris was at the same time the Head of the Sanusi Order, a prominent religious movement.

The explanation, in my opinion, lies in the circumstances surrounding Libya's independence. After the end of the Second World War and the Italian Occupation, the major powers could not agree on the immediate future of Libya; whether to grant the former Italian colony its independence or to place it under the trusteeship of another country. They, therefore, decided to refer the matter to the General Assembly of the United Nations (GA) and agreed to accept its recommendation. The GA recommended that Libya be given its independence no later than 1 January 1951, and that, prior to that, a constitution shall be determined by the Libyans. To assist them in formulating the constitution, the GA decided to appoint a Commissioner in Libya and a Council to aid and advise him.[1] This commissioner, Mr Adriaan Pelt, and his Council played a significant role in writing the constitution. The Constituent Assembly and its Drafting Committee could indeed voice their opinions and change what the Commissioner and his Council would propose. However, being conscious that whatever they would propose would be reviewed by the UN seemed to make them reluctant to propose changes concerning sensitive issues.[2] For the same reason, it seems, there was no discussion of any role of Sharia when reviewing Chapter One on the Form of the State. It was enough to have the symbolic reference to Islam as the religion of the state (Article 5), despite the remark that Grand

Mufti, Mohammad abu Alisaad al-Aalim, made in the opening speech of the National Constituent Assembly indicating the need "to enact a strong constitution that contains provisions from the Islamic Sharia, is distanced from racism, and guarantees the freedom of religion."[3]

There was then no constitutional recognition of any role of Sharia in lawmaking. As a result, it was constitutionally possible to bring in new legislation on any matter regardless of it being Sharia-compatible; incompatible legislation could not be challenged for being unconstitutional. However, the fact that the constitution did not recognise Sharia did not result in ignoring it completely in lawmaking and enforcement. Sharia was the sole governing law of personal status affairs of Muslims,[4] [5] and remained so until the end of the Kingdom; no legislation was introduced to regulate these affairs (Layish 2005, ix).[6]

Sharia here meant uncodified rulings of the Maliki School, which is predominant in Libya like in the rest of the Arab Maghreb. Since there could be different opinions in this school concerning the matter at hand, Law No. 29/1962 on the Judicial System required judges to apply the *rajah* opinion, i.e., the stronger opinion in terms of evidence, regardless of how many scholars adopt it.[7] Applying Sharia to personal status matters was left to *qadis*, judges trained in Islamic jurisprudence. When *shari* courts were merged with civil ones in 1954, for the first time in the Arab world, those *qadis* resisted the merger and succeeded in 1958 in getting their separate courts back (Metz 1989, 120).[8]

The case was different with regard to non-personal status matters. They were for the most part regulated by legislation derived from Egyptian codes, which were themselves influenced by European models. Still, envisaging that there could be a case of a lacuna, the Civil Code stated that judges shall resort to the "principles of Sharia" to rule in such a case.[9] As to Abd al-Razzaq al-Sanhuri, the Egyptian scholar who drafted Libya's Civil Code, the term "principles" meant Sharia rules that did not differ from one school of thought to another. Hence, disputed ones, which constitute the greater part of Sharia, were excluded. He also added another qualification: the principles chosen must not contradict the foundational principles of the Civil Code. This would result in, as he put it, "the Code's losing its character and legal harmony" (Bechor 2007, 83). As it was accurately noted, the reference to Sharia in such a way limited to a large extent "its practical usefulness," leaving the phrase "the principles of Sharia are almost as nebulous as 'natural justice'" (Bechor 2007, 83).

During the 1950s and 1960s, Sharia's role in Libya's lawmaking was limited, but this was about to change with Gaddafi's *coup d'état* in 1969.

Sharia in the Gaddafi era, uniquely expanded

On 1 September 1969, Colonel Gaddafi seized power in Libya, accelerating the incorporation of Sharia into law. I distinguish between two periods based on the adopted interpretation of Sharia: 1 September 1969 to 2 March 1977 and 2 March 1977 to 17 February 2011. The influence of Gaddafi was eminent in both. The difference was that while he, at first, used classical Islamic jurisprudence to legitimise his political measures, he later reformulated Islamic precepts to fit his own ideology, as contained in the Third Universal Theory (Takeyh 1998, 161-62).

During the first period, the regime gave Sharia a much wider role in national law compared with the Monarchy regime. The Constitutional Declaration of 11 December 1969 only pronounced Islam as the religion of the state, which in itself would not bring about any change. However, on 28 October 1971, the Revolutionary Command Council (RCC), which acted as both the legislature and the executive, issued a decree stating that Sharia was a principal source of legislation. As such, it would have to be considered when enacting any new legislation. Existing legislation had to be reviewed to ensure its compatibility with Sharia. The decree made clear that it concerned "the basic principles" of Sharia rather than Sharia as a whole, and established committees composed of religious scholars, judges, and lawyers to review existing legislation, and if needed, draft alternative legislation. In drafting this legislation, the committees were to select the more lenient solutions, *aisr alhuloul*, from various Islamic schools, *madhabs*, guided by both public interest and custom when doing so, as long as the custom was supported by the Maliki school.[10]

Since Sharia already applied to personal status affairs, the committees' role was confined to reviewing legislation on other matters. One committee reviewed the civil, commercial, maritime, and civil procedures laws, and another examined the criminal ones. The impact of their work was very significant. Upon their suggestions, the RCC enacted a new law (74/1972) to ban *riba al-nasia* (usury) in civil and commercial transactions between natural persons. Also, it introduced new laws on *hadd* offences: theft and robbery (Law 148/1972), adultery (Law 70/1973), unfounded accusations of fornication (Law 52/1974), and finally, the consumption of alcoholic beverages (Law 89/1974) (Peters 2005, 153-154).

The legislature, however, did not fully incorporate classical Sharia's position on these issues. For example, Law 70/1973 on *Hadd al-Zina*, adultery, did not prescribe different punishments in accordance with whether the perpetrator was married or not; it prescribed a hundred lashes to all. Similarly, Law 74/1972 to ban *riba al-nasia* (usury) in civil and commercial transactions was limited to natural persons; if the transaction involved a legal entity, e.g., a bank, charging interest was still

permissible. When asked to rule on the constitutionality of this law, the Supreme Court said that the legislature was still studying whether or not to prohibit such transactions.[11]

The changes concerning personal status affairs were limited. These affairs continued to be regulated by uncodified rules from the Maliki school. However, in 1976, the opinion implemented became the *mashour*, the popular or mainstream opinion, rather than the *rajah,* the strongest in terms of evidence.[12] Interestingly, according to the Supreme Court, judges were required to identify the scholars adopting the supposed *mashour* opinion so that such a claim could be verified.[13] This led to considering the Maliki school books to be a formal source of law, as some writers rightly pointed out (Duwi 1989, 161).

The changes the RCC introduced resulted in both personal and non-personal status affairs becoming, to a considerable extent, Sharia-conform. Thus, there was no longer a need to preserve the separation between *shari* and civil courts, and the regime merged them by virtue of Law 87/1973 on the Unification of the Judiciary.[14] The *qadis* were transferred to the new courts where they could adjudicate—being graduates of law faculties like their colleagues—on all disputes. Law 87/1973 envisaged a new civil procedure law that would take into account the particularities of personal status-related lawsuits into account; until then, these lawsuits would be subject to the Shari Procedures Law of 1958. The envisaged law, however, has never materialised, leading to two procedures laws being applied before the civil courts in accordance with whether the lawsuit concerned was related to personal or real status matters.

Though incorporating Sharia into the legal system continued in the second period, the process differed in significant aspects. It became heavily influenced by Gaddafi's own thought about Sharia. The 2 March 1977, when Gaddafi issued his Declaration on the Establishment of the Authority of the People (DEAP), signalled the beginning of this period. This declaration outlined the general constitutional framework for Libya: changing the country to Jamahiriyya, i.e., the state of the masses, basing its ideological stance on a form of Islamic socialism, and more importantly, stating that the Qur'an was the law of Libyan society. In this way, the DEAP was the first step towards transforming Gaddafi's so-called Third Universal Theory into law. This theory was his alternative to both capitalist and communist ideologies. In its political expression, it provided for the organisational framework within which direct democracy was to be exercised. At the most basic level, this framework created Basic People's Congresses, in which every citizen who attained the age of eighteen was a member. Amongst the powers granted to these congresses was that of lawmaking; any congress member could propose a law and when discussed and adopted by his own congress, and

subsequently by other congresses, it would be made into law (Otman and Karlberg 2007, 64).

In this system, Gaddafi was supposed to have no authority apart from that enjoyed by any other congress member. However, in practice, Gaddafi had a huge impact on the process of lawmaking, e.g., by setting the agenda for Basic People's Congresses' annual meetings, and giving instructions about how these agendas could be discussed. Later, on 11 March 1990, the Bill of Revolutionary Legitimacy was issued, and, in Article 12 it clearly stated that any directives issued by the Leader of the Revolution, i.e., Gaddafi, were mandatory and had to be enforced.

The impact of this on the role assigned to Sharia in lawmaking should be clear when considering that Gaddafi had a particular understanding of Sharia, which he transformed into laws he claimed to be Sharia-based. One significant feature of this approach is the denial of the authority of Sunnah, i.e., the Prophet Mohammed's sayings and acts, which is considered to be the second source of Sharia, after the Qur'an (Takeyh 1998, 161-62; Martin and Tayob 2004, 557). Another feature was his call for opening the gates of *ijtihad*: free reasoning on Sharia (Martin and Tayob 2004, 557). He gave himself the liberty to practice it, and this led him to deny that the pilgrimage to Makkah, *hajj,* was one of the essential pillars of Islam (530).

Gaddafi's interpretation of Islam affected Sharia incorporation in Libya considerably. Various examples could be cited to show how, but due to space limitations, only one will be mentioned. Whereas polygamy was not a common practice in Libya, Gaddafi spoke out against it (Pargeter 2010, 11). Law 10/1984 on Marriage and Divorce and the Effects thereof[15] allowed polygamy only with prior judicial permission and on the grounds of the spouse's financial and physical ability. Later, it added a further restriction. According to Law 22/1991, it became necessary to get the written, formal (*rasmi*) consent of the first wife. Failure to meet any of the conditions would result in the annulment of the second marriage along with all of its effects. Subsequently, Law 9/1994 required the husband to present "serious reasons" for wanting to marry a second wife and to get either the written consent of the first wife before the competent court or the permission of the court after a successful lawsuit by the husband against her. Failing to meet these conditions would result in the voidness of the second marriage and the entitlement of the first wife to initiate a lawsuit, orally or in writing, for the divorce of the second wife.[16]

This trend of increasing women's rights seemed to come to a halt, however, in 1998, when the GPC enacted a law removing the requirement of the first wife's consent. Gaddafi then, in a move plausibly described as being of "dubious legality," annulled the 1998 law (Welchman 2007, 31). This is undoubtedly a very clear indication of his role in lawmaking: both

in form and content. Hence, it can be concluded that Gaddafi, with his own understanding, largely affected the interpretation and incorporation of Sharia. While he limited Sharia to the Qur'an, he practised free *ijtihad* to determine what Sharia meant in this interpretation. His influence on the process has been the main driver of the calls made since 2011 to review legislation, again, for compatibility with more conventional understandings of Sharia.

Sharia in the aftermath of the February Revolution, reviewed

In February 2011, following the steps of neighbouring Tunisia and Egypt, Libya witnessed a revolution that ended Gaddafi's rule. Since then, a heated debate has started on what role to assign to Sharia in the legal system. The main parties to this debate are Islamists, religious scholars (*ulama)*, and nationalists. In the first four years, the responses of state authorities—legislative, executive, and judicial—were more in favour of the Islamists. The divide between these authorities and institutions since July 2014 can, to a considerable extent, be described as one along the side of this Islamist-nationalist dichotomy. This debate has also influenced the CDA when drafting the constitution's stance on the role of Sharia. The UN, which has once again been involved in Libya, has played a rather limited role, compared to its earlier involvement, in this debate. Now that, under the guidance of the UN, there are efforts to end Libya's political divide, a question arises as to what role Sharia is actually going to have in the new arrangement.

Islamist groups are not new in Libya, but their rise in post-Gaddafi Libya is unprecedented. The presence of some groups, i.e., the Muslim Brotherhood (MB), can be traced to the Monarchy Era, but they grew under Gaddafi's rule despite his fierce war against them, a war that the regime seemed, at that time, to have won. Those who survived the war were either in jail or in exile. Later on, as part of the reform efforts largely conducted under the auspices of Saif al-Islam, Gaddafi's son and presumptive heir (Fitzgerald 2015, 117-204), many members of the MB returned from exile, and those imprisoned were released. The leaders of the Libyan Islamist Group (LIFG) that fought against Gaddafi and almost succeeded in assassinating him, reviewed, in jail, their position to conclude that correct interpretations of Sharia do not actually justify *jihad* against him and his regime. They all seemed to accept the regime's authority and seemed to give up their ideas and plans to install Sharia in Libya by force. When the February revolution started, however, they joined in and resumed their efforts to implement Sharia.

Libya's Islamists are not a monolithic group. While they all, of course, see Sharia's implementation as an ultimate goal, they differ, a.o., over how to see this happen. There are those who seek democratic means: forming political parties and running for elections so they can get to power and bring a top-down change. For example, the MB established a party called Justice and Construction, *'adala wa al-bina'*, and the LIFG formed the Homeland Party, al-watan; both ran for the GNC's elections. There are, however, those who aim to get to power to bring about the required change through *jihad*. They do not recognise democracy in the first place and believe that *jihad* against infidel regimes, those adhering to democracy, is the way to see Sharia realised. Ansar al-Sharia and the Libyan branch of Islamic State are obvious examples (Friedrich Ebert Foundation 2015).

Finally, there is an interesting group: Madkhali Salafism. It is a strand of Salafism known as scientific Salafism, *al-salafia al-'ilmia*. As such, it is supposed to reject involvement in politics, discourage political dissent, and focus on changing society from below through missionary preaching. It is known for its intolerance toward other Islamist groups (Friedrich Ebert Foundation 2015). As expected, it did not join the revolution against Gaddafi, but when in 2014 General Heftar waged his war against the other Islamists in the eastern part of the country, Madkhali Salafists were amongst the first to join him. Now, their influence in the area Heftar controls is evident. They control the Ministry of Awqaf, Islamic Endowment, and voice their demands for more Sharia recognition in public life. Such demands are increasingly granted. For example, on 16 February 2017, because of their pressure, the Military Governor in the east issued Decision No. 6/2017 preventing Libyan women from travelling abroad without a male chaperone. A few days later, on 20 February, they issued a statement praising this decision and demanding the Military Governor fulfil his promise to issue another decision preventing women from driving without a male chaperone. Their statement was entitled: *It is us who are more entitled to implement Sharia* (Afriqiyah News Gate 2017).

In addition, in Libya there are groups composed of conventional religious scholars, *ulama,* and Islamists. An influential one is the Council of Libya's Religious Scholars (CLS), hay'at ulama Libya. It was established on 18 May 2011 by religious scholars, e.g., Ghaith al-Fakhri, Associate Professor of Sharia at Benghazi University, who is also the Deputy Mufti, and Hamza abu Faris, Professor of Sharia at Tripoli University.[17] The CLS is closely connected to Islamist groups, notably the Muslim Brothers with their transnational ties. This distinguishes it from another group: the League of the Religious Scholars of Libya (*rabitat ulama Libya*) (LUL), established on 6 February 2012. The LUL disassociates itself

from political parties' affiliations and external agendas, identifies with the Maliki School, and has spoken out against what it deems Islamist extremists.[18]

Besides the Islamists, there are also nationalists who do not necessarily object to assigning Sharia a role in lawmaking, but they surely oppose the Islamists' views about this role. Those nationalists vary in their political affiliations, but they are united in their opposition to the Islamist groups. One clear example of their unity is the Coalition of National Forces (CNF) (see, e.g., Juma'a 2016).

It is against a background of interaction between, and within, these groups that I will examine the development of the role of Sharia in lawmaking. I will trace this interaction and its effect on the subsequent authorities since February 2011: the National Transitional Council (NTC), General National Congress (GNC), and the House of Representatives (HoR). I will also study this interaction vis-à-vis the ongoing the constitution process.

The NTC

Under the NTC, the self-appointed leadership of the revolution, Sharia's role in lawmaking increased significantly, thanks to the Islamists' efforts. They were helped, to a large extent, by their ally, Mustafa Abdualjalil, President of the NTC. Abdualjalil, who was not an Islamist himself, followed a "strategy of incorporating Islamist demands before the Islamists could mobilise against the NTC" (Sawani and Pack 2013, 527). For example, in the speech he gave on Liberation Day on 23 October 2011, he announced that, "any law violating Islamic Sharia is suspended with immediate effect, including the one that restricts polygamy." He also added that the new Libya would establish an Islamic banking system wherein *riba* (usury) would be prohibited (BBC 2011). He later revealed that just before the Liberation Speech, the militant Islamists asked him to publically announce the application of Sharia; in return, they would hand over their weaponry. They, however, defaulted on this promise (Al-Jafil 2015).

Legally speaking, Abduljalil could not in his capacity as the president of the NTC annul or even alter any law, and the changes he promised did not take place in the NTC's term. Still, this term witnessed the setting up of the foundation of these, and similar changes, i.e., the recognition of Sharia in the Interim Constitutional Declaration (ICD). The ICD declared Islam to be the religion of the state, and Sharia the principal source of its legislation. This way, the ICD formed the basis for challenging the constitutionality of any legislation perceived to be incompatible with Sharia. The Supreme Court could then strike it down.

The NTC's term also saw the issuing of Law 15/2012 on the Establishment of Dar el-Efta, the state office for religious advice, which proved instrumental in pushing for assigning Sharia an even more important role in lawmaking.[19] This law restored the position of the Mufti as the state's official religious adviser, an office that Gaddafi's regime had abolished (Abu Raas 2017). It required all society members to respect *fatwas* of Dar el-Efta, and prohibited discussing them in any media avenues. Dar el-Efta, through its *Shari* Research and Studies Council, was also tasked with advising state institutions on draft laws.[20]

In addition, the NTC issued Law 29/2012 on the Regulation of Political Parties, which banned parties from circulating or publishing any thoughts violating Sharia. There was, however, no need for such a ban as all political parties participating in the election of the GNC called for Sharia to be considered in lawmaking. Even the National Coalition Forces Party, which is not an Islamic party and is very often described as being liberal, published a manifesto that Sharia should be recognised as a principal source of legislation (Majdi 2012).

These were all indications of the prominent role that Sharia would enjoy in the GNC's term.

The GNC

In July 2012, the GNC succeeded the NTC as the first democratically elected parliament. Just before the end of its term, the NTC made it a point to remind the GNC of the importance of Sharia. According to the NTC's spokesperson: "We remind [the GNC] that the Libyan people holds to Islam as a creed and law, and the Assembly [NTC] advises the constituent congress [GNC] to consider Sharia the principal source of legislation, and not put it to any referendum" (France24 2012). Resorting to a referendum, the NTC seems to suggest, would imply that the Libyan people may object to constitutionalising Sharia, which is unacceptable. The GNC turned out to be a body largely dominated by Islamists and so did not need the NTC's advice.

Later, the advice became irrelevant. When it was given, the GNC was indeed the body responsible for (1) selecting the Constitution Drafting Assembly (CDA), (2) reviewing its draft, (3) putting it to a public referendum, and (4) promulgating it once accepted by the voters. However, later amendments of the ICD resulted in reducing the GNC's role in the third and fourth tasks. The CDA became a body directly elected by the Libyan people, and the GNC no longer had any review power over the draft the CDA would produce (Ibrahim 2017). On 4 December 2013, the GNC voted in favour of a statement calling for Sharia to become "above the Constitution" and the "only source for legislation in Libya,"

with any laws contradicting it deemed null and void (Russia Today 2013). However, given that the GNC had no power over the CDA, this statement was deemed only advisory.

The GNC then had no say on the constitution-making, but what about non-constitutional lawmaking? Here, the GNC would have full control, and considering how prominent the Islamists and their allies were, one would expect that an acceleration in Sharia's role would take place. This, however, was not always the case, and a distinction needs to be made between two periods of the GNC: 2012-2014 and 2014-2016.

Initially, the ICD provided for the GNC to preside over the entire transitional period. It would it dissolve once a new constitution would be adopted and a new legislative assembly would take over. This process was thought to take 18 months, till 7 January 2014. It became clear, however, that more time was needed, and the GNC decided in December 2013 to extend its mandate for another year (Elumami 2013). This angered many who blamed the delay on the GNC itself and called for it to end its term. The GNC gave in and amended the ICD so a new House of Representatives (HoR) would be elected. When elected in July 2014, the HoR turned out to be a body in which the Islamists would have little say. Consequently, the GNC declined to hand over power for this very reason, leading to the situation of having two legislative assemblies: the HoR in the eastern part of the country and the GNC in the western part (Otto 2018).

During the first period, 2012-2014, the GNC's performance in terms of Sharia incorporation was limited. The Islamists' dominance was not absolute. As the Mufti, Sadiq al-Ghariani, described it with irritation, they were busy discussing with their opponents (the CNF) "regulatory issues, legal matters, theoretical debates, verbal quarrels, political parties' agenda, allocation of jobs, and regional preferences; and only Allah knows how much time they will need to finish with all these issues" (Al-Ghariani 2012).

Amongst the Sharia-based laws that the GNC passed is Law 1/2013 on the Prohibition of Transactions Involving Usury.[21] This law came as a step towards the Islamisation of the banking system. While the Central Bank was cautious about the draft of this law, Dar el-Efta, the state office for religious advice, and the Ministry of Endowment supported the immediate conversion of the banking system and lobbied the GNC to adopt the draft (Abu Ghrara and Algheitta 2015, 70-78). Still, the GNC suspended the application of the law on banks and institutions till 2015, a step that Dar el-Efta heavily criticised, for it showed that the GNC was not serious enough about eliminating *riba* (Al-Ghariani 2012).

The influence of Islamists was not limited to the legislature; it also affected the judiciary. The ruling of the Supreme Court on polygamy is

a clear example. When a wife discovered that her husband had married another woman without taking her consent, as Article 13 of Law 10/1984 on Marriage and Divorce required, she filed a lawsuit demanding the annulment of the second marriage as Article 13 stipulated when the required consent was not obtained. In response, her husband argued that Article 13 was actually unconstitutional. It indeed required the consent of the first wife, but, as he argued, this consent was hardly possible to get. Thus, it made polygamy, at least in most cases, unattainable. This made the article inconsistent with Sharia that knows no such restrictions. Since Sharia was, according to Article 1 of the ICD, "the principal source of legislation" in Libya, the inconsistency of Article 13 with Sharia made this provision inconsistent with the Constitution as well.

The claim came to the Supreme Court, and given that any decision about it would have significant impact not only on the parties involved but also on the legal system in general, as similar claims would be expected to arise about other laws, one would expect the highest court in the country to address all relevant issues. There is an argument that restricting polygamy is acceptable under Sharia, and there are Muslim countries relying on this argument in regulating and limiting polygamy, including Egypt, Morocco, Pakistan, and Indonesia (Otto 2010, 99). However, as it appears from the half-page-long reasoning, the Supreme Court did not really address any of these questions. It simply cited verses from the Qur'an on polygamy and did not mention any opinions which could have been expressed by the defendant. In a political environment wherein calling for incorporating Sharia became the norm, it would demand great courage from the Supreme Court to analyse traditional interpretations of Sharia, and assess their validity for the current time and place. Judged by its ruling, the Supreme Court failed to rise to such challenge.

Taken together, the GNC's legislative changes were rather limited during this first period when considering its potential as a body dominated by Islamists with ambitious plans to implement Sharia. Wider changes only took place in the second period.

The GNC's second period started in August 2014 and was marked by a significant expansion in Sharia incorporation into law. "The greatest work," according to the GNC's own description, was the 9th amendment of the ICD on 24 May 2015, by which Sharia came to enjoy a much stronger recognition as a source of legislation. After the amendment, Article 1 read: "Libya is a Muslim independent state, [...] its religion is Islam, and the Islamic Sharia is the source of all legislation (*kull tashri'*), and it is deemed void any legislation, work or act done in violation to its rulings and objectives." This text, the GNC proudly announced, "is the best constitutional text enacted in all constitutions of Muslim countries, without exception."[22]

Furthermore, on 18 March 2015, the GNC issued Resolution No. 25 to form an Expert Committee (EC) headed by the Deputy Mufti, Ghaith al-Fakhri, to review and amend legislation for compatibility with Sharia. The term 'experts' suggested that the EC members were not necessarily religious scholars. The truth, however, is that the EC was composed of religious scholars, some of whom also held law degrees: "they were all from the people of the knowledge of Sharia" (*ahl al-'ilm bi al-shar'*), as the head of the EC told me (Al-Fakhri 2015). In fact, the Resolution itself explicitly stated that the committee would be formed "of experts in the Islamic Sharia." This way, the committee would be immune from the shortcomings of a similar former committee, the head of the EC said (Al-Fakhri 2015).

The Minister of Justice established this former committee on 9 November 2013 to review existing legislation for compatibility with conclusive determinations and basic rules of Sharia.[23] A Supreme Court judge headed it, and fifteen others sat on it: five representing universities, including two Islamic universities, three named by the Dar el-Efta, four named by civil society organisations, and three named by the Ministry of Religious Endowments (Awqaf). I represented the University of Benghazi. We had only two meetings, and it became clear during the discussions that appeasing extremist Islamist groups was the rationale behind establishing the committee; these groups, e.g., *Ansar al-Sharia,* were at their height, and there were fears that they would resort to violence to Islamise what they deemed an infidel state. The Minister of Justice wanted to assure these groups and those sympathising with their discourse that Libya was Muslim enough and its laws were Sharia-conform; if not, the state would make them so, and the committee at hand was its means of ensuring that. I recall that the committee selected criminal legislation as the first item to review; this legislation was, a member argued and the committee concurred, the most deviant from Sharia in these groups' eyes.

The earlier committee, however, failed to even start. The failure could in part be attributed to the deterioration of the political and security situation at the time it was formed, but it is fair to say that there was also a feeling amongst its members that what it promised was not good enough to the target audience. The committees established in the 70s had already conducted a thorough review of legislation for compatibility with Sharia's conclusive determinations and basic rules, and their recommendations had found their way into legislation (Muhsin 2004, 313-316). It would be highly unlikely that the new committee would 'discover' any new contradictions to Sharia; even legislation influenced by Gaddafi's particular understanding of Sharia would not contradict these conclusive determinations and basic rules. This would be different

for the EC, according to its head. In addition to being composed of Sharia specialists, the EC followed stricter criteria in "filtering" legislation, to use the GNC's term.

Over eight months, the EC conducted its legislative review, and 'discovered' many violations to Sharia, even in Sharia-based laws. It then recommended amendments based on this review that the GNC incorporated into law without any change. Due to the space limitations, I will only list the most prominent of the new laws. Amongst these is Law 14/2015 that amended Law 10/1984 on Marriage and Divorce to, among other things, abolish restrictions on polygamy. There is also Law 6/2016 that amended 40 articles and ended 16 others of the Civil Code, including Article 1 that listed the sources of law in the following order: legislation, principles of Sharia, custom and rules of equity and natural law. According to the amended article, the sources are now limited to legislation, subject to not contradicting Sharia and the rulings of Sharia. Another new law is Law 20/2016, that amended the Penal Code to end provisions incompatible with Sharia and added new ones, including a provision prescribing capital punishment for apostasy. Likewise, Law 22/2016 amended Law 70/1973 on the Hadd of Adultery to introduce death by stoning as a penalty for when the condemned is married.[24]

I should mention here that, legally speaking, the validity of the laws that the GNC introduced in the second period is seriously questioned. Its rival, the HoR, was widely recognised as the only legitimate legislature. Even the UN-sponsored Political Agreement (PA) that the two rivals signed in December 2015 to end the divide echoed this recognition.[25] Still, given that the GNC's laws were implemented in the territories subject to its authority, which included the capital Tripoli, they would be too important to ignore. Besides, the PA's recognition of the HoR as the only legislature will not necessarily translate into invalidating the GNC's laws. The PA allows for sustaining such laws after a review by a committee of experts.[26] The GNC's rival, the HoR, is, however, likely to oppose such laws; as such, this legal possibility may not translate into actuality.

The HoR

While the GNC was, especially in its second period, an Islamist-dominated body, the HoR was to a large extent the opposite and acted as such. The acts of the HoR could, in many cases, be seen as responses to the GNC. For example, while the GNC introduced Law 1/2013 on the Prohibition of Transactions Involving Usury to Islamise the banking system, the HoR decided to suspend it till 2020.[27] Also, the HoR enacted Law 8/2014 to annul Dar el-Efta and transfer its powers and assets to the Ministry of Religious Endowments (Awqaf). This law was clearly

in reaction to the role that the Dar el-Efta, especially its head, Sadiq al-Ghariani, played in supporting the GNC. This would be another reason to doubt that the HoR would consent to any laws based on this institute's advice.

It is fair to conclude that the role of Sharia in lawmaking is an issue on which the GNC and HoR disagreed. The question would then be on the position of the CDA, the body entrusted with writing the constitution, on the same issue.

The CDA

On 20 February 2014, the CDA was elected to write Libya's draft constitution. Adopting this draft in a yes-or-no public referendum and electing a new legislature accordingly would mark the end of the country's transitional period. This task was, however, far from easy, and the role assigned to Sharia in lawmaking was one of the issues that the CDA struggled with from its start. On 24 December 2014, eight months after its first meeting, the CDA published drafts of its Thematic Committees, establishing two different positions on Sharia. On one hand, the Committee on the Form of State and its Corner Stones opted for a wider role for Sharia. According to Article 8 of its chapter, the Committee stated that:

1. Islam shall be the religion of the State, and provisions of the Islamic Sharia shall be the source of all legislation. Any legislation in violation thereof may not be enacted. All legislations enacted in violation thereof shall be null and void.

2. The State shall be committed to enact the necessary legislation to prevent propagating and spreading beliefs contrary to the Islamic Sharia and practices contrary thereto.

3. The State shall be committed to enacting legislation that criminalises aggression against Islamic holy places or offenses against God, Holy Quran, Sunna, Prophets, Prophet Mohammed (PBUH), Mothers of Believers [Wives of the Prophet Mohammed] or Prophet's Companions, may God be pleased with them.

The committee added a provision to this article providing for non-adjustability. Article 17 of the same chapter put international conventions and agreements in supremacy over the law but below the constitution, and provided that these conventions shall not violate any Sharia provisions. This chapter declared that "the state shall issue the required legislation

to amend all laws and regulations currently in force which violate the provisions of Article (8) of this constitution, provided this legislation will be issued with the necessary gradualness as per the legislator consideration."

On the other hand, the Committee on the Rights and Liberties opted for an understanding that would limit the role of Sharia. The relevant chapter referred to Sharia's legal objectives, general rules, and conclusive texts. For instance, it provided that "rights and freedoms are the basis for governance and the state shall have them established and shall ensure the values of democracy, human dignity, equality and freedom within the frame of the Sharia's legal objectives and conclusive [undisputed] texts." Also, this chapter required that any interpretation of the articles on rights and liberties, which are distinctive of democratic societies, must be done within Sharia's objectives and constants; this would exclude detailed and changeable rulings, which constitute most of Sharia.

What if a conflict arises between certain basic rights and freedoms and Sharia provisions? According to the rights and liberties chapter, the preference should be given to the former: "It is prohibited to interpret any article [...in a way] that aims to have constitutional rights and liberties damaged or restricted beyond the extent it was provided for." Consequently, it would not be allowed to rely on the article constitutionalising Sharia in order to restrict any rights and freedoms protected by the constitution.

As such, the outcomes of the thematic committees, as a whole, pleased neither camp in Libya. The more religious group saw them as insufficient, especially the chapter about rights and liberties. This was clear in the statement that the Council of Libya's Religious Scholars (CLS) issued. While it supported the understanding of Sharia as detailed provisions, which the Form of State Committee opted for, the CLS called for changing Article 1 of the rights and liberties chapter so the reference would be to Sharia's provisions without limiting it to conclusive ones. The CLS also asked for amending the article concerning the interpretation of the rights and liberties' provisions to refer to 'Libyan society' instead of 'a democratic society' and 'objectives and provisions of Sharia' instead of 'ojbectives and constant elements of Sharia.' Additionally, it proposed to deem the article constitutionalising Sharia superior to other articles of the constitution so that it would prevail in case of a conflict between provisions. To the same end, the CLS called for erasing the article which prioritised provisions on basic rights and liberties over other articles, including those concerning Sharia (Hay'at Ulama Libya 2015).

Less religion-oriented groups also had their reservations about the outcomes of the thematic committees. In their view, Article 8 that constitutionalised Sharia "establishes a religious theocratic state which does not recognise public will as (interpretations of) religious disputable

texts [...] are determined by a group of religious men in accordance with those men's understanding and interpretation of those [disputable] texts. As such, this article practically demolishes the concept of a constitution by laying the foundations for a state guided in all aspects of life by fatwas and interpretations of religious men" (Sanusi 2015).

The second outcome of the CDA was the draft of the so-called Working Committee. The CDA formed this committee in June 2015 from amongst its members to prepare a first draft for the entire CDA's consideration. In October 2015, the Working Committee announced a draft in which it opted for a role of Sharia in lawmaking stronger than that envisaged in the drafts of the thematic committees (CDA 2015). The Working Committee's draft recognised Islam as the religion of the state, and Islamic Sharia as the source of legislation and the basis upon which "the provisions of the constitution are to be interpreted and restricted." The Working Committee also proposed the establishment of a Council of [religious] Senior Scholars (CSS), an autonomous constitutional institution composed of fifteen experts chosen by parliament, among others, to advise state authorities on religious aspects of public affairs, to provide Sharia-based opinions, and to conduct religious inquiries to address emerging and current problems. The opinions of the CSS would be advisory, and there would be no specific obligation on state authorities to seek them.

The draft did not please many. The United Nations Support Mission in Libya (UNSMIL) expressed its reservations on it (Libya Prospect 2016). In its view, the draft contained provisions that were contradictory to international standards and Libyan laws, and others that were incompatible with international best practices, or were otherwise difficult to implement in Libya. Similarly, members of the CDA publicly criticised the draft, for it, in their opinion, "neglects political and ideological consensus, and excludes women, youth, media professionals, liberals, and proponents of the Gaddafi regime." Also, they added, the role of Sharia as envisaged in the draft would open the door to "dark interpretations" and could be used "to infringe on rights and liberties" (Wakalat Akhbar Libya 24 2015).

When it reviewed its draft in February 2016, the Working Committee largely retained the provisions concerning Sharia. Nevertheless, the new draft removed the requirement that provisions of the constitution would be restricted by the Sharia. The draft also replaced the CSS with the Council for *Sharí* Research, with fewer powers to conduct religious inquiries on public issues of religious nature. The advisory nature of the recommendations was also underscored.

The CDA later amended the Working Committee's draft, but it maintained the Sharia-related provisions in the draft it announced on 19 April 2016. Still, the east-based Institute for Islamic Endowments

and Affairs criticised it. In a statement published on 29 July 2016, the Institute said that it had formed a committee to communicate with the CDA about producing a constitution compatible with Sharia and Libya's customs; yet, the CDA ignored the comments and suggestions, and produced a draft that contained violations to Sharia. The Institute ended its statement by advising against approving the draft constitution until it would be reviewed and amended by relevant entities, such as the Supreme Council for the Judiciary and the Supreme Commission for el-Efta (in the east) (Libya al-Mostakbal 2016).

The CDA indeed reviewed its draft and approved an amended one on 29 July 2017, but this draft too did not please religious groups. In its statement dated 1 August 2017, the Supreme Commission for el-Efta praised the draft for deeming Sharia the source of legislation; still, it accused the CDA of proposing numerous explicit violations to Sharia. Examples of these violations, as to the Commission, included establishing: unqualified freedoms of thought and expression, formation of political parties and civil society organisations, and equality between men and women. At the end, the Commission advised the Libyans, both the rulers and the ruled, to discard the draft constitution.[28]

Indeed, this draft will be subject to a public referendum and will need the approval of two-thirds of the voters to pass. This is indeed a high threshold that the draft will unlikely be able to achieve as the issue of Sharia is indicating. While there will be voters opposing the draft for the same reasons that the Supreme Commission for el-Efta advocated, there will be also others who reject it for completely the opposite reasons. When declaring Sharia the source of legislation, the draft could risk influencing Libya towards becoming a theocratic state.

Apparently, the CDA has no easy way out of this. The question is whether there is a way out at all?

Conclusion

I have shown in this paper that the role of Sharia in Libya's lawmaking has gradually increased. From being confined to personal status matters under the Monarchy's rule, Sharia developed in Gaddafi's era to also regulate other affairs. Criminal, civil, and commercial laws were either derived from Sharia, or, in most cases, reviewed to become compatible with Sharia. Gaddafi himself had a big impact on the process, and this explains why his Islamisation efforts have been under review since the overthrow of his regime, not by secularists aiming to limit Sharia's role, but rather by Islamists who see these efforts as lacking proper Sharia foundations. Since 2011, those Islamists exerted an immense influence

on the consecutive governments, namely, the NTC and GNC, and their lobbying resulted in a wave of Islamisation of laws that even reached laws that were supposed to be Sharia-based, e.g., *hudud* laws.

Admittedly, things have changed, and the Islamists no longer enjoy that considerable dominance over the political scene. In fact, the HoR in the east, which is, according to the UN-sponsored Political Agreement, the only legitimate legislature in the country, could be fairly described as anti-Islamist. Still, it is too early to predict the impact of these developments on the role of Sharia in lawmaking. First, Islamists are still influential in other parts of the country, including the capital. It is in these parts that the Dar el-Efta, despite the HoR's law that abolished it, is still very much alive and active in pushing for more recognition of Sharia in lawmaking. Its efforts even led to including in the Political Agreement a provision on the supremacy of Sharia. Second, even with regard to the area that the HoR actually controls, there are clear indications of the rise of other Islamists, i.e., Salafists. While they appear to be different from those associated with the GNC, they share the same belief in the wider recognition of Sharia. As I mentioned earlier, Salafists bitterly criticised the latest draft constitution based on conservative interpretations of Sharia that are even stricter than those held by Dar el-Efta.

Ideally, any rethinking about the role of Sharia should take into account Libya's own experience. When Sharia-based laws were introduced in the 70s, Libya was among the first countries to do so. The committees that reviewed the existing laws and proposed introducing new ones were composed of experienced Libyan and Arab academics and practitioners of Sharia and law. They performed their task in accordance with criteria that, while assigning a special place to the *Maliki* School predominant in Libya, were flexible enough to bring about changes fit for modern times. Admittedly, since the late 70s, Gaddafi's influence on the efforts to incorporate Sharia into law became undeniable; still, that was not necessarily bad. Women in particular, as evident in Law 10/1984 on Marriage and Divorce, benefited greatly from such efforts. Besides, many of these efforts could be accommodated if people followed less restrictive interpretations of Sharia than those enshrined in the draft constitution.

Notes

1 UN General Assembly, Question of the disposal of the former Italian Colonies, 21 November 1949, A/RES/289, available at: http://www.refworld.org/docid/3b00f08c18.html [accessed 10 November 2017]

2 For example, when discussing the type of majority required for taking decisions in the House of Representatives, a member of the Drafting Committee proposed to opt for two-thirds instead of absolute majority, as Mr Pelt recommended. He stated that he would have agreed with Mr Pelt's recommendation had Libya been ready for a democratic system in the fullest sense, but since it was not, the recommendation would be invalid or even harmful. Another member, however, disagreed with him. He said: "Your comments would have been welcomed had we been drafting our constitution in the way we like and are satisfied with, but we are drafting a constitution that will be presented to the UN that will examine it against what it [UN] deems satisfactory in democratic systems." In the end, the Committee could not agree, and decided to postpone the decision to another session (*Al-jam'ia al-watania al-libiya. Majmo'at mahadir al-jam'ia al-watania and lajnat al-doustor 1950-1951. Mahdar al-jalsa al-thalitha wa al-'ishrien*, [The Libyan National Assembly, the compilation of the reports of the Assembly and the Constitutional Committee 1950-1951, the 23rd Report] 15 September 1951, 194-195). Similarly, defending an article that would allow Parliament to consider as official a foreign language, in addition to Arabic, a member said: "We must not forget that our constitution will be subject to discussion in the UN, and there are countries to whom the interests of the communities living with us are important, and if we decide to not include this article that might affect [negatively] the international public opinion." (Ibid, the Report of the Constitutional Committee' Session. No. 20, dated 27 August 1951, 186).

3 Ibid., the Report of the 1st Session of the National Assembly, 25 February 1950, 2.

4 The distinction was introduced in Libya first by the Ottomans and then by the Italians. Personal status affairs are those related to familial relationships such as "marriage, divorce, succession, guardianship, wills and the very important topic of waqfs or religious endowments." See Qasem (1954, 135). This distinction was inherited from the Italian occupation that preferred to leave the former to the indigenous peoples' law, which happened to be Sharia. See Gazzini (2012, 746-770).

5 Personal status affairs of non-Muslim Libyans were regulated by their own religious rulings. As to Article 192 of the 1951 Constitution, "the State shall guarantee respect for the systems of personal status of non-Muslims." See also Qasem (1954, 136) who mentions the existence of the Rabbinical courts.

6 According to Layish (2005, ix), "Until Qadhdhafi's coup in 1969, no codification of shar'i law pertaining to personal status, succession and waqf had been attempted."

7 *Mada 17, Qanun raqam 29/1962 bi shan Nidam al-Qada* (Article 17, Law No. 29/1962 on the Judicial System). The Official Gazette. Special issue, No. 12, 11 December 1962.

8 In an interview with Mohammed Khaleel al-Qumati, the first Libyan president of the Supreme Court (3 November 1954), he said that one of the reasons behind abolishing the merger of *shari'* and civil courts was the refusal of *shari'* judges to join civil circuits, as these circuits decide on cases not according to what Allah has ordered, *taqdi bi ghair ma anzal Allah* (Al-Muhami 1990, 2).

9 Article 2 of the Civil Code.

10 *Qara Majlis Qiyadat al-Thawra bi shan Tashkeel Lijan li Muraja'at al-Tahsri'at wa Ta'diluha bi ma yatafiq ma' al-Mabadi al-Asasiya lil al-Sharia al-Islamia* (Decree of the Revolutionary Command Council on the Formation of Committees to review and

amend Legislation in Accordance with the Basic Principles of Islamic Sharia). 10 February 1972. Official Gazette, No. 6, 241-245.

11 Decision of the Supreme Court, Civil Appeal No. 3/36, dated 2 December 1990, the Technical Office, No. 25, part 1, 139.

12 *Qanun raqam 51/1976 bi shan isdar Qanun Nidam al-Qada* (Law No. 51/1976 on the Issuance of the Judicial System Law). The Official Gazette, issue 45, dated 15 August 1976.

13 Decision of the Supreme Court, Personal Status. Appeal No. 3/18, dated 30 May 1971, the Technical Office, No. 8, part 1, 87.

14 *Qanun raqam 87/1973 bi shaen Tawheid al-Qada* (Law 87/1973 on the Unification of the Judiciary). The Official Gazette, issue 48, 15 December 1973.

15 *Qanun raqam 10/1984 bi shaen al-Ahkam al-Khasa bi al-Zawaj wa al-Talaq wa Atharuhuma* (Law No. 10/1984 on Special Provisions concerning Marriage and Divorce and the Effects thereof). The Official Gazette, issue 16, 3 June 1984, 640-664.

16 *Qanun raqam 9/1994 bi shaen ta'deel ba'd ahkam al-Qanun raqam 10/1984 on al-Zawaj wa al-Talaq wa Atharuhuma* (Law No. 9/1994 on Amending Some Provisions of Law No. 10/1984 on Marriage and Divorce and the Effects thereof). The Official Gazette, issue 5, 23 March 1994. 122-124.

17 See "an interview, in Arabic, with Ghaith al-Fakhri about the establishment of the Council of Libya' Scholars." 2011. YouTube video, 7:04. Posted by "Almanara Media" on 24 May 2011. https://www.youtube.com/watch?v=AYSLiYG3X1E, last accessed 29 November 2017.

18 See the League's webpage: http://www.libyaolama.org/

19 *Qanun raqam 15/2015 bi shaen inshala Dar e-Efta* (Law No. 15/2012 on the Establishment of Dar el-Efta). The Official Gazette, issue 3, year 1, 16 April 2012.

20 The establishment of Dar el-Efta in this way provoked a bitter criticism from the League of the religious Scholars of Libya (*rabitat ulama Libya*) (LUL). The LUL criticised the mufti being appointed by the NTC rather than being elected by Sharia scholars, not explicitly stating the non-binding nature of *fatwas*, and giving the mufti the status of the prime minister. See al-Manara (2012).

21 *Qanun raqam 1/2013 bi shan mani' al-Mu'amalat al-Ribauia* (Law No. 1/2013 on the Prohibition of Transactions Involving Usury). The Official Gazette, issue 5, year 2, 21 March 2013.

22 *Al-Moutamar al-Watani al-'am, biyan bi jihoud al-moutamar al-watani al-'am fi tahkim al-sharia wa iqrar al-qounin bima la youkhalif ahkamouha* (A Statement on the Application of Islamic Sharia and Enacting Laws Compatible with its Provisions). 19 April 2016.

23 Decision No. 1621/2013.

24 Several of these laws were published in Arabic in the Official Gazette, issue 5, 17 November 2015. Available online: http://itcadel.gov.ly/wp-content/uploads/pdfs2013/add05-2015.pdf, last accessed 29 November 2017.

25 The Political Agreement is available at the website of UNSMIL: https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20AR%20-%20w%20Signatures.pdf, last accessed 29 November 2017.

26 According to Article 62 of the Political Agreement, "The Presidency Council of the Council of Ministers shall form a committee of specialists to consider laws and decisions issued by relevant entities from August 2014 until the adoption of this agreement, which resulted in legal, financial and administrative commitments to the Libyan state, with the aim of finding suitable solutions."

27 To this end, the HoR enacted Law No. 7/2015. See al-Khamisi, Ahmed. 2015. "Al-foaed al-Ribauia fi Sharq Libya, Hall am Azma? (Al-Ribauia Interests in the East of Libya: a

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28 Al-Lajna al-Ulia lil Efta (the Supreme Commission for el-Efta). "Bian bi shan Musudat Mashrou' al-Distour (a Statement on the Draft Constitution)." 2017. Available online: https://www.aifta.net, last accessed 15 March 2018.

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