

Jubilee Conference on Legal Pluralism

September 2011
University of Cape Town

Centre for
Comparative Law
in Africa

National Research
Foundation Chair
in Customary Law

Commission on
Legal Pluralism





Promoting excellent legal and applied research

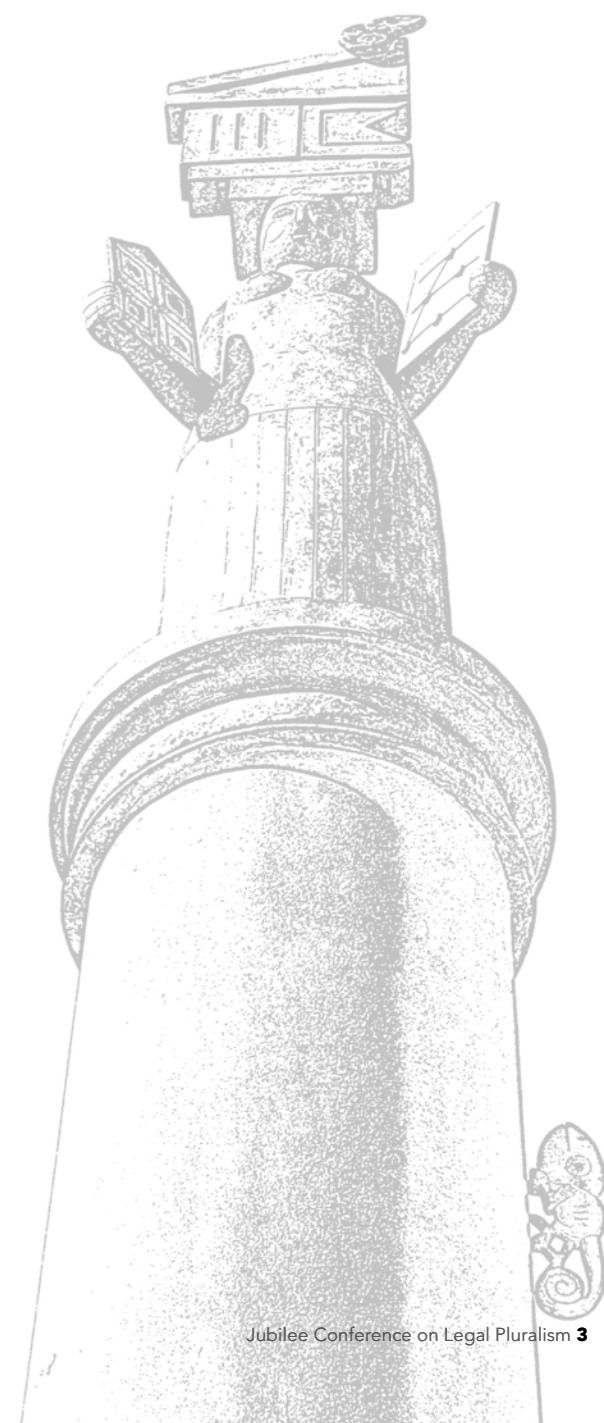
The Research enterprise at the UCT Law Faculty spans various interests, across the different fields of Private Law, Public Law and Commercial Law. It promotes the teaching function of the University, as well as its goals of social responsiveness. It engages with the broader research goals of the University by fostering global partnerships and attracting world-class scholars. It is aware of its value-adding function on local, regional and continental levels.

The research hosted by the Centre for Legal and Applied Research (CLEAR) represent the Law Faculty's flagship projects and demonstrate the extent to which the Faculty is equipped to promote excellent legal and applied research.



Contents

2	Message from the Commission
3	Welcome to UCT
4	Committee
8	General Information
11	Themes
25	Abstracts
130	Map, Kramer Building, Middle Campus





Message from the Commission on Legal Pluralism

On behalf of the Commission on Legal Pluralism I welcome you warmly to this exciting event taking place in the beautiful city of Cape Town, South Africa. This is the Commission's 15th international congress, and it marks a jubilee. The very first conference after its establishment in 1979 as a commission of the International Union of Anthropological and Ethnographic Sciences (IUAES) took place in Bellagio, Italy (1981). Bellagio eventually became one in a series of gatherings that traversed the globe, never to be organized in the same place. This was in line with the Commission's aim to encourage thought and reflection with regard to legal pluralism in various parts of the world. Rather than aiming only for academic discourse, it has always sought a link with the social struggles taking place locally, thereby providing activists with frames of understanding and inspiration. Thus the conferences have paid frequent attention to issues of land rights, dispute management, gender, human rights, and the troublesome relation between customary and state law.

The 15th congress, entitled Living Realities of Legal Pluralism, has been organized in conjunction with the Centre for Legal and Applied Research (CLEAR), the Research Chair in Customary Law and the Chair for Comparative Law in Africa, of the University of Cape Town. The Commission is grateful for the immense amount of work and the fruitful collaboration that has taken place. We are particularly happy to see such a rich mix of participants from different origins. International participants are sure to learn from the experiences of legal pluralism in South Africa, while South Africans will hopefully benefit from an exposure to the international debate.

We wish you a rewarding gathering.

Maarten Bavinck

President, Commission on Legal Pluralism

CLP Conference Committee

Dr Maarten Bavinck	<i>(University of Amsterdam, Chair)</i>
Dr Janine Ubink	<i>(University of Leiden, Secretary)</i>
Dr Bertram Turner	<i>(Max Planck Institute)</i>
Prof Susanne Brandtstädter	<i>(University of Oslo)</i>
Prof Anne Griffiths	<i>(University of Edinburgh)</i>
Dr Yüksel Sezgin	<i>(City University of New York)</i>
Dr Laurens Bakker	<i>(Radboud University)</i>



Welcome to the University of Cape Town

On behalf of the University of Cape Town I would like to say what an honour it is for us to be the co-organisers of the Jubilee Congress. UCT, as we are known, is very cognisant of the fact that our popularity as a learning destination has almost as much to do with our physical location as it does with our intellectual reputation. I hope that you will all have time to explore the pluralist nature of the Mother City's skyline and eateries, fynbos and families, and that this location will provide an added dimension to the discussions over the next three days.

As we explore in the days ahead the theory and interstices of law, religion and custom, property and human rights, we will encounter the topical questions engaging scholars and students of legal pluralism today: the debate around the incorporation of Muslim Personal Law in South Africa comes to mind, as does the rationale of European countries in banning the burqa and niqab in public. What will emerge will be ways of addressing similar issues, and of finding different solutions, within jurisdictional settings which might be internally diverse or structurally rigid.

The Commission's choice of Africa for this Congress could not have been more apposite. UCT, in common with many institutions of higher learning, is talking about the need for an Afropolitan approach to the academic endeavour, not only in research but also in the content of curricula. This focus has been made tangible in our case by the establishment in 2010 of a Chair in African Customary Law, and in 2011 of a Chair of Comparative Law in Africa. Within the context of this audience, these two chairs will make absolute sense. For other audiences however, Africa might have been seen as something of a homogenous entity, which could not be further from reality.

Pliny's statement, *Semper ex Africa aliquid novi*, still rings true today. As the two new Chairs gather momentum, and as interactions with our counterparts in sub-Saharan Africa increase, we are hopeful that there will be a wealth of new material to inform debates not only within our continent but also around parallels with other jurisdictions.

I wish to thank our co-organisers from the Commission for Legal Pluralism for the opportunity to co-host this gathering. Our team included partners from the Commission's members, UCT as well as other African universities. All involved contributed much by the way of time, effort and intellectual capacity to produce this conference, and I would like to express my gratitude to every person and institution who made this conference happen. This includes our sponsors. Most importantly, the success of the conference will be measured by the quality of the academic interaction in our streams and panels; by the bonds struck and friendships created. We hope that the conference will be particularly meaningful for each individual participant.

Best wishes

Hanri Mostert

*Director of Research (UCT Faculty of Law)
Centre for Legal and Applied Research*

Organizers and Coordinators

Local Organising Committee

Prof Hanri Mostert
Prof Chuma Himonga
Dr Waheeda Amien
Prof Maarten Bavink
Dr Janine Ubink

Conference Coordinators

Ms Deidre Raubenheimer
Ms Fatima Saban

Secretariat

Ms Shereen van der Brock
Ms Lamize Viljoen



Stream Organizers and Abstract Reviewers

Theme 1: Reappraising Legal Pluarism - Models and Practices

Anne Griffiths
Tom Bennett
Christa Rautenbach
Bertram Turner

University of Edinburgh
University of Cape Town
North West University
Max Planck Institute for Social Anthropology

Theme 2: Governance

Maarten Bavinck
Kristina Bentley

University of Amsterdam
University of Cape Town

Theme 3: Property Relations

Laurens Bakker
Janine Ubink
Hanri Mostert
Patricia Kameri Mbote

Radboud University Nijmegen
Leiden University
University of Cape Town
Strathmore University

Theme 4: Human Rights and Development

Dee Smythe
Susanne Brandstädter

University of Cape Town
University of Oslo

Theme 5: Law and Religion

Chuma Himonga
Rashida Manjoo
Yüksel Sezgin

University of Cape Town
University of Cape Town
Harvard Divinity School



Introducing the National Research Foundation Chair in Customary Law

The Chair in Customary Law at the University of Cape Town Law Faculty is held by Professor Chuma Himonga. It is one of 92 SARChI (South African Research Chairs Initiative) Chairs in the country funded by the National Research Foundation.

Like other SARChI Chairs, the objectives of the Chair in Customary Law include the advancement of frontiers of knowledge through focused research in identified fields or problem areas in the country. Its vision may be summed up as: the promotion of a serious academic environment for addressing the challenges customary law faces and creates in relation to human rights and its application by the courts in changing social and legal contexts; the creation of greater prospects for the development of research, the generation of knowledge, and inclusion in the intellectual life of the University of Cape Town of an area of law that regulates the lives of millions of South Africans; the creation of new inspiration for the study of African customary law on the African continent and elsewhere through debate and collaborative research; bringing into prominence the important role African customary law plays in the regulation of people's lives in pluralistic African legal systems and within the constitutional frameworks of African countries; becoming a nexus between research, capacity building and teaching in African customary law; acting as a base for building a body of African customary law scholarship and a young generation of scholars in this field in South Africa and the rest of Africa.

The current research focus of the Chair is the actual workings of customary law as a normative system in a legally and culturally diverse society, and on how customary law interacts with other components of the South African legal system, including common law and human rights law. The research encompasses both customary law as it exists within the South African legal system and non-official customary law operating in society outside the official legal system. **This research focus is of critical importance at this stage of the development of customary law and the country's new legal system as the courts and other institutions seek to identify or enforce a form of living customary law that both regulates the lives of many South Africans in various spheres of life and has been recognised by the Constitution of the Republic.**

Prof Chuma Himonga

National Research Foundation Chair in Customary Law



Introducing the Centre for Comparative Law in Africa

The Centre for Comparative Law in Africa is a bold initiative to foster African scholarship and bolster African expertise. It promotes the comparative study of law on the African continent. Recent and ongoing political changes in Africa emphasize the need to address African issues with African solutions.

Embedded in UCT's Afropolitan vision, the CCLA aims to forge links between scholars in and beyond Africa attracting foremost scholars in comparative law to UCT. It wants to contribute to reshaping law in Africa, increasing its international presence and importance. The CCLA is part of the Centre for Legal and Applied Research (CLEAR). It interfaces research expertise with strong networks and consultancies, to respond to the UCT Law Faculty's vision of socially responsible, sustainable justice.

The CCLA provides the link between excellent scholarship and field expertise. For legal scholars, the Centre is the gateway to the multidimensional and multi-jurisdictional terrain of law in Africa. Its objectives include: creating an international Centre of Excellence in Comparative Law; embracing legal diversity in multi-cultural Africa; playing a major role in reshaping Africa; promoting multidisciplinary; focusing on Commercial Law and Development, in all African Legal Systems; employing comparative research to inform legal practice through consultancy services; offering an LLM Degree and Post Graduate Diploma in Comparative Law in Africa; continuing education by running short training courses and workshops.

It is the CCLA's mission to serve the legal and academic communities, as well as the business and non-governmental spheres in Africa and beyond. It is committed to development and understands its role as being supportive of increasing the role and the rule of law in Africa.

Prof Salvatore Mancuso

Chair of Comparative Law in Africa

Dr Ada Ordor

Director: Centre for Comparative Law in Africa

General Information

Registration and Information Desk

Registration will open at 16:30pm on Wednesday (7th September) on level 4 of the Kramer Building and will remain open for the duration of the conference.

After you have checked in at the registration desk please ensure that the following items are in your registration package:

1. Conference Badge (please wear this at all times)
2. Tickets for the Conference Dinner (9 September)
3. Programme Book

Venues

The teas and lunches will take place in the Quad of the Kramer Building. The cocktail evening will also take place outside New Student Admin Building which is next to the Kramer Building.

Presenters

1. Please provide the organizers with a rough draft of your paper upon registration.
2. Please provide your PowerPoint® presentation (if you are using one) to the panel technician 30 min before commencement of your panel.

Session Chairs for Presentations

1. Please be available 15 minutes before the beginning of the session at the designated lecture theatre to check the facilities with the on-site technician.
2. It is absolutely essential that speakers use no more than their allotted time. Please meet with each of them before the session and remind them that they should speak for the time allocated. It is your responsibility, therefore, to ensure that your session stays on time.
3. If you have any technical problems do not hesitate to contact the technician immediately.
4. Ensure that all cell phones are turned off or on silent mode prior to the beginning of each session.
5. It would be a good idea to prepare for your session by studying the abstracts of the speakers in your session. Abstracts are printed in the conference book.

Conference Dinner

Will be held at **Africa Café Traditional Restaurant in the City Centre, on 9 September at 19h30.**

Africa Café is situated at 108 Shortmarket Street, Cape Town. They serve communal feasts consisting of traditional Ndebele, Xhosa and Zulu dishes.

Transport will be provided from the Kramer Building to Africa Café and to your accommodation after the function.

Conference Internet Access

Wireless Internet Access is available for all registered conference delegates in the conference venues.

Username: lawconf

Password: lawconf2011

Transport and Tours

For a scheduled airport transfer, please contact Robin Troup, Mpumalanga Experience

Email: wildsafari@worldonline.co.za

Tel: +27 82 657 3443 or

visit www.wildlifesafari.co.za for online bookings or tours.

Currency and Foreign Exchange

The South African currency is the Rand

Exchange rates in July 2011:

USD 1 = ZA R6.97

EUR 1 = ZA R9.46

Foreign currency can be exchanged at most commercial banks and Bureaux de Change are widely available

Typical Banking Hours:

Monday to Friday: 09h00 to 5h30

Saturdays: 08h30 to 11h00

ATMs are widely available and are mostly open 24 hours a day

All credit cards - Master/Visa/Diners Club/American Express cards are accepted

Electricity

220/230 volts, 50Hz, single phase

Emergencies

Dial 10111 for the Flying Squad (special police services)

and 10177 for an ambulance

Transport

Please note transport will be provided as follows:

Date: 07 Sept 2011 (Registration Cocktail)

From: Upper East Side Hotel to Kramer Building (conference venue)

Time: 17h00

Return: Kramer Building to Upper East Side Hotel @ 19h30

Date: 08 Sept 2011 (Conference)

From: Upper East Side Hotel to Kramer Building (conference venue)

Time: 7h30

Return: Kramer Building to Upper East Side Hotel @ 18h30

Date: 09 Sept 2011 (Conference)

From: Upper East Side Hotel to Kramer Building (conference venue)

Time: 7h30

Date: 09 Sept 2011 (Gala Dinner)

From: Kramer Building to Africa Cafe Restaurant

Time: 18h30

Return: Africa Cafe to hotels / guest houses @ 21h30

Date: 10 Sept 2011 (Conference)

From: Upper East Side Hotel to Kramer Building (conference venue)

Time: 7h30

Return: Kramer Building to Upper East Side Hotel @ 18h30

Airport Transfers & Tours

For information or to book an airport transfer contact Robin Troup, Mpumalanga Experience

Email: wildsafari@worldonline.co.za

Tel: +27 82 657 3443 or

visit www.wildlifesafari.co.za for online bookings.

Cost: From R 175.00 per person - single transfer

If you require transport for the dinner, please contact fatima.saban@uct.ac.za or the **registration desk** and confirm the name of your hotel / guest house.

Themes and Panels



Themes and Panels



THEMES AND PANELS

THEME 1 REAPPRAISING LEGAL PLURALISM – MODELS AND PRACTICES

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 1 Emma Hayward Lia Nijzink and Giselle Corradi Bryant Greenbaum	CHAIR: KEEBET VON BENDA-BECKMANN University of Pennsylvania - USA University of Cape Town - SA Human Rights Centre, Ghent University, Law School - Belgium Barrister and Solicitor - Canada	LAW FROM A PLURALIST STANDPOINT: DILEMMAS AMID CHALLENGES Legal pluralism and the rule of law The institutional framework for legal pluralism: Lessons from reform initiatives in Malawi, Mozambique, Sierra Leone and Zambia A court case study: Legal pluralism in the sexual offences courts in Cape Town, South Africa
PANEL 2 & 4 Salvatore Mancuso Kaius Tuori Toon van Meijl	CHAIR: CHRISTA RAUTENBACH & TOM BENNETT University of Macau - China University of Helsinki - Finland University of Nijmegen - Netherlands	ENGAGING WITH LEGAL PLURALISM: AFRICAN PERSPECTIVES Africa and the law in the 21st century: Between legal pluralism and legal integration Legal pluralism and modernization: American law professors in Ethiopia and the downfall of the restatements of African customary law Changing properties of Maori property
PANEL 3 Amy Jackson Dorota A Gozdecka and Dominik Kohlhaagen	CHAIR: ANNE GRIFFITHS University of Reading - England University of Helsinki - Finland University of Antwerp - Belgium	LEGAL PLURALISM AT THE CROSS ROADS: INTERSECTING WORLDS Caught between different legal pluralisms: Muslim women as the religious 'other' Looking for the 'legal' amongst 'illegal' immigrants
PANEL 5 Marc Simon Thomas Julie Stewart Keebet von Benda-Beckmann	CHAIR: NAJMA MOOSA CEDLA: University of Amsterdam - Netherlands (SEARCWI) University of Zimbabwe (UZ) - Zimbabwe Max Planck Institute for Social Anthropology, Halle/Saale - Germany	GROUNDING LEGAL PLURALISM: EXPERIENTIAL AND METHODOLOGICAL APPROACHES Daily practice at a Teniente Politico's office: The living reality of legal pluralism in the Ecuadorian andes From women's law to sexed and gendered law and back Studying disputes
PANEL 6 Steb Schaumburg-Müller Ilse Grtek	CHAIR: FRANZ VON BENDA-BECKMANN Aarhus University - Denmark University of Tilburg - Netherlands	CONSTRUCTING LEGAL ORDERS: ALTERNATIVE FRAMEWORKS Legal philosophical pluralism? Norm contestation through mediation: Shifting conceptions of gender among Bhutanese refugees

THEME 1 cont. REAPPRAISING LEGAL PLURALISM – MODELS AND PRACTICES

NAME	ORGANISATION	ABSTRACT TITLE
<p>PANEL 7 Bertram Turner Johanna Mugler Khaled Qasaymeh and Saul Makama Andra le Roux-Kemp Moses Mulumba Courtenay E Parlee</p>	<p>CHAIR: BERTRAM TURNER Max Planck Institute - Germany Max Planck Institute for Social Anthropology - Germany University of South Africa in Pretoria - SA Department of Public, Constitutional & International Law, UNISA - SA Stellenbosch University - SA Center for Health, Human Rights and Development - Uganda University New Brunswick - USA</p>	<p>LEGAL PLURALISM , SCIENCE, AND TECHNOLOGY Introduction On talking numbers and telling a story: Organizing accountability, quantification and criminal justice in South Africa The impact of ICT on the law of evidence in South Africa A question of life and death: Legal pluralism and the dawn of laws scientific age Trips compliance and social welfare: The implications of intellectual property law reform for Uganda's socio-economic development The legal pluralism implications of food traceability</p>
<p>PLENARY SPEAKERS: Anne Griffiths Franz von Benda-Beckmann Tom Bennett</p>	<p>CHAIR: CHRISTA RAUTENBACH Edinburgh University - UK Max Planck Institute for Social Anthropology, Halle/Saale - Germany University of Cape Town - SA</p>	<p>Pursuing legal pluralism: The power of paradigms in the search for meaning The poverty of theory in discussions of legal pluralism The two faces of custom</p>

THEME 2 GOVERNANCE AND THE POLITICS OF ORDER: NEGOTIATING LEGITIMACY

NAME	ORGANISATION	ABSTRACT TITLE
<p>PANEL 1 Johny Stephen Jackie Sunde Jennifer Whittal Merle Sowman Maarten Bavink Oscar Amarasinghe Mafaniso Hara</p>	<p>CHAIR: MERLE SOWMAN University of Amsterdam - Netherlands University of Cape Town - SA University of Cape Town - SA University of Cape Town - SA University of Amsterdam - Netherlands University of the Western Cape - SA</p>	<p>GOVERNANCE OF COASTAL RESOURCES On either side of the fence: A legal pluralistic analysis of Palk Bay Fisheries Customary fishing rights in South Africa: Surfacing living law The Integrated Coastal Management Act 24 of 2008 (ICMA) – A Professional land surveyor's interpretation A new governance regime for traditional coastal fishers in South Africa Bottom-up fisheries governance in the Palk Bay, South Asia: A theoretical reconnaissance Evolving legal pluralist governance in the Palk Bay region: lessons for promoting governance patters and policies in resolving fisheries conflicts Defining fishing rights in public dams and impoundments in South Africa</p>
<p>PANEL 2 Aninka Claassens Benjamin Cousins Severin Lenart Sindiso Mnisi Weeks Mazibuko Jara</p>	<p>CHAIR: BENJAMIN COUSINS Law Race and Gender Unit, University of Cape Town - SA Institute for Poverty, Land and Agrarian Change, UWC - SA Max Planck Institute for Social Anthropology, Halle/Saale - Germany Law, Race and Gender Research Unit, University of Cape Town - SA Law, Race and Gender Research Unit, University of Cape Town - SA</p>	<p>BOUNDARIES OF AUTHORITY Contested power and apartheid tribal boundaries: Recent laws and struggles over land rights The politics of scale: Nested land rights and flexible boundaries in Msinga District, South Africa The politics of order in the South African Lowveld: Locality, legitimacy, and the disputing process Layers of authority, boundaries of decision-making: Controversies around the Traditional Courts Bill Contested boundaries: contradictions of democratic change and reassertion of traditional power in a former apartheid homeland</p>
<p>PANEL 3 Susannah Cowen Wilmiem Wicomb Henk Smit Jason Brickhill Franz von Benda-Beckmann Tom Bennett</p>	<p>CHAIR: WILMIEN WICOMB Island Group of Advocates - SA Legal Resources Centre - SA Legal Resources Centre - SA Legal Resources Centre - SA Max Planck Institute for Social Anthropology in Halle/Saale - Germany University of Cape Town - SA</p>	<p>GOVERNING THE RELATIONSHIP BETWEEN CUSTOMARY AND CONSTITUTIONAL LAW IN SOUTH AFRICA A fourth tier of government? The duality of political systems and contested power relations between state and traditional leadership structures The clash of internal customary governance structures with a positivist external environment as a clash between common law ownership and customary property right Who is the community? Case studies of the Bafokeng (change of ownership regime), Phiphidi (planning approvals) and Pelargonium (intellectual property rights) Individual and group rights under the Constitution in the customary law context: The power of paradigms in the search for meaning The poverty of theory in discussions of legal pluralism The two faces of custom</p>

THEME 2 Cont. GOVERNANCE AND THE POLITICS OF ORDER: NEGOTIATING LEGITIMACY

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 4 Meyer van den Berg Sara Geenen Kumtala Lahiri-Dutt Devanathan Parthasarathy Joris van de Sandt	CHAIR: JORIS VAN DE SANDT University of Cape Town - SA University of Antwerp - Belgium Australian National University - Australia Indian Institute of Technology, Bombay - India University of Amsterdam - Netherlands	MINING AND MINERAL GOVERNANCE The regulation of petroleum in South Africa and the protection of community rights Mining governance and the relation between artisanal and commercial mining in South Kivu, DR Congo Unintended colleries: Rethinking legitimacy in the illegal coal mines of Eastern India 'Indeterminate' property, embedded resources, and telescoping legality: Theorizing the historical evolution of mining governance in India 'Indigenous peoples' resistance against mining and the implementation of the right to free, prior and informed consent – A Guatemalan paradox?
PANEL 5 Bruno Martins Morais Maria Paula Menezes Albert Drent	CHAIR: : MARIA PAULA MENESES (REQ) University of Sao Paulo - Brazil CES - Coimbra University - Portugal Max Planck Institute for Social Anthropology, Halle/Saale - Germany	CONFLICTS, JUSTICE, AND GOVERNANCE Acquitting the autonomy: makushi crime and punishment on the context of Latin-American pluriethnic states Mapping the legal fields in urban contexts: extra-judiciary instances of conflict resolution in Luanda and Maputo (B)ordering commons, creating spatial and temporal legal orders
PANEL 6 Germaïné Viljoen Barbara van Koppen Karar Eiman Duncan Hay Dev Tewari	CHAIR: KARAR EIMAN Faculty of Law, North-West University - SA International Water Management Institute - SA Water Research Commission - SA University of KwaZulu Natal - SA University of KwaZulu Natal - SA	WATER RESOURCES MANAGEMENT Water as public property Roman water law in rural Africa: dispossession, discrimination and weakening state regulation? The legal interpretation of custodianship in the South African water law Common property and water resources Is the permit system a panacea or bed of inefficiency? The case of South Africa
PANEL 7 Amalendu Jyotishi Witness Kozanayi Sophie Nakueira Masami Mori Tachibana	CHAIR: AMALENDU JYOTISHI (REQ) Amrita School of Business, Amrita University - India University of Cape Town - SA University of Cape Town - SA Kyoto Bunkyo University - Japan	CULTURE AND GOVERNANCE Revisiting protected area debate: An Indian context The politics of policy formulation and resource users' reactions: Governance of the Baobab tree using customary and statutory systems in Chimanimani District of Zimbabwe Governance in the mega-events network: The politics of ordering the 2010 World Cup. Reconsidering the meanings and roles of cultures in Japan: The problems and possibilities of Rekishi-Machidukuri Hou: Law of historical heritage and town management

THEME 2 Cont. GOVERNANCE AND THE POLITICS OF ORDER: NEGOTIATING LEGITIMACY

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 8 Ruchi Chaturvedi Armando Guevera-Gil Markus Wellenmann	CHAIR: RUCHI CHATURVEDI (REQ) Hunter College, City University of New York - USA Pontificia Universidad Católica del Perú - Peru Office for Conflict Research in Developing Countries - Switzerland	CLASHING FOR JUSTICE Clashing for justice: Political violence, agency and law in democratic India The implementation of project law in Peruvian irrigation systems Administration of legal pluralism in Sierra Leone
PANEL 9 Marcele Guerra Katrin Seidel Lidwina Inge Nurtjahyo	CHAIR: MAARTEN BAVINCK University of Sao Paulo/ National University of Colombia - Brazil Humboldt University of Berlin - Germany Faculty of Law Universitas - Indonesia	LOCAL GOVERNMENT AND LEGAL PLURALISM Social ownership and community building: the recognition process of community justice in Simiti (Colombia). State-recognised legal pluralism in Ethiopia: An expression of a vertical tolerance conception? 'Desa' to 'Negeri': Changes in local government system in Maluku, efforts to accommodate traditional values or just political rhetoric?
PANEL 10 Zuhairah Ariff Abd Ghadas Letif Tas Francois Venter	CHAIR: FRANCOIS VENTER (REQ) International Islamic University Malaysia - Malaysia University of London - UK North-West University - SA	RELIGION, KINSHIP AND GLOBALIZATION Legal pluralism in division of matrimonial property. The "contribution" test under the Malaysian and New Zealand laws The work of the Kurdish Peace Committee in the UK Globalization, religious pluralism and constitutionalism
PLENARY SPEAKERS: Devanathan Parthasarathy Reetta Toivanen Svein Jentoft	CHAIR: MAARTEN BAVINCK Indian Institute of Technology, Bombay - India University of Helsinki - Finland Norwegian College of Fishery Sciences - Norway	Abandoning 'Rule of Law'? Democracy, domination, and (il)legal pluralism in India and beyond "Global" governance of indigenous peoples' resources, power relations and development opportunities Legal pluralism: what can interactive governance theory offer?

THEME 3

PROPERTY RELATIONS

NAME	ORGANISATION	ABSTRACT TITLE
<p>PANEL 1 Felix Lombe Jon Unruh Olaf Zenker Makanatsa Makonese</p> <p>Tapwa Uchizi Nyasulu - Alex Ferreira Magalhães Laurens Bakker</p>	<p>CHAIR: LAURENS BAKKER University of the Western Cape - SA McGill University - Canada Institute of Social Anthropology, University of Bern - Switzerland University of Zimbabwe - Zimbabwe</p> <p>Centre for Development Research, University of Bonn - Germany Rio's Federal University – Regional and Urban Planning - Brazil University Nijmegen - Netherlands</p>	<p>CONTESTING THE STATE: NATURAL RESOURCE CLAIMS AND DISCOURSES OF RIGHTS Land conflicts and laws in Malawi: a hidden symbiotic relationship Constituencies of conflict: land rights, narratives, and legal pluralism in Darfur Land restitution and the transition to justice in post-apartheid South Africa Legal pluralism and property relations in the context of Zimbabwe's fast track land reform programme (FTLRP) Governance within customary land administration in Awutu-Senya District in Ghana Updating the Boaventura Santos' theory on land property and land management in Brazilian slums Against the state: Land conflict strategies of non-government actors</p>
<p>PANEL 2 Debbie Budlender Aninka Claassens Klara Claassens Benjamin Cousins Helen Dancer Rosalie A.Kingwill Mazibuko Jara Soma Kishore Parthasarathy Sindiso Mnisi Weeks</p>	<p>CHAIR: ANINKA CLAASENS Community Agency for Social Enquiry (C.A.S.E.) - SA Law Race and Gender Unit, University of Cape Town - SA Institute for development policy and management (IOB)(UA) - Belgium Institute for Poverty, Land and Agrarian Studies, UWC - SA University of Sussex - UK PLAAS & LRG - SA Amandla Publishers - SA Department of Humanities and Social Sciences, Indian Institute of Technology - India Law, Race and Gender Research Unit, UCT - SA</p>	<p>RURAL WOMEN AND LAND ACCESS Survey-based evidence Single women, changing customary law and the Constitution The limits of state led land reform in Burundi Traditional councils and women's land rights: contrasting responses to social change in Msinga, Kwa-Zulu Natal Legal pluralism in the adjudication of women's claims to land in Tanzania The living land laws of Rabula Land rights and entitlements of tribal women in Southern Rajasthan, India - A gender perspective on legal pluralism Judging women's eviction cases in Msinga: The uncertainties of seeking justice at the intersections between customary and state laws and courts</p>
<p>PANEL 3 Elimien Du Plessis Ghislain Otis Henk Smit Hennie Strydom Wilimien Wicomb Ngeta Kabiri</p>	<p>CHAIR: ELMIEN DU PLESSIS University of Johannesburg - SA University of Ottawa - Canada Legal Resource Centre - Cape Town - SA University of Johannesburg - SA Legal Resource Centre - Cape Town - SA University of Cape Town - SA</p>	<p>NATURAL RESOURCE MANAGEMENT AND CUSTOMARY LAW Protection of traditional knowledge in South Africa: Does the "commons" provide a solution? Constitutional recognition of indigenous rights to land and resources: What impact on legal pluralism in Canada? Customary law and mining Access to and disposal of natural resources: The case law of the African commission on human and peoples' rights and the Inter-American court on human rights Public trust and customary forms of ownership: fisheries Governing transboundary wildlife conservation under conflicting legal regime</p>
<p>PANEL 4 Sue Farran (IP) Rachel Wynberg Sue Farran presenting for Miranda Forsyth</p>	<p>CHAIR: SUE FARRAN Northumbria University - England Environmental Evaluation Unit, UCT - SA Australian National University - Australia</p>	<p>INTELLECTUAL PROPERTY: ACCOMMODATING PLURAL REGIMES TO PROTECT TRADITIONAL KNOWLEDGE AND ADVANCE DEVELOPMENT Access to knowledge and the promotion of innovations: Challenges for Pacific Island states The governance of traditional knowledge: Is access and benefit sharing a misfit? How can the theory of legal pluralism assist the traditional knowledge debate?</p>

THEME 3 Cont.

PROPERTY RELATIONS

NAME	ORGANISATION	ABSTRACT TITLE
<p>PANEL 5 Lilis Mulyani Keang Sood Teo Jaap Zevenbergen Cheri Young presenting for Sam Amoo Keerthimala Gunasekera</p>	<p>CHAIR: IALTA - LEON VERSTAPPEN Indonesian Institute of Sciences - Indonesia Faculty of Law, National University of Singapore - Singapore University of Twente, ITC - Netherlands University of Namibia - Namibia Terra Institute - USA</p>	<p>LAND ADMINISTRATION SYSTEMS AND PLURALISM The impact of procratination of basic Agrarian law in Indonesia to Agrarian reform initiatives in reformation era Property rights in Singapore strata schemes Tailoring land registration, lessons from history Land administration systems and pluralism. Equity in access to capital through land registration in Namibia Sitting between two stools: Constructing a symbiotic bridge between existing systems of property rights in Developing countries and the new system introduced by donors.</p>
<p>PANEL 6 Sue Farran (IALTA) Olugbemi Fatula Ingo Gentes Dominik Kohlhagen</p>	<p>CHAIR: IALTA – HANRI MOSTERT Northumbria University - England Obafemi Awolowo University - Nigeria Universität Berlin - Germany University of Antwerp - Belgium</p>	<p>THE ROLE AND RULES OF LAND LAW Navigating between traditional land tenure and introduced land laws in Pacific island states Nationalisation of land rights and its implications on individual, communal land ownership and economic Development in Nigeria Payment schemes for environmental services in transition countries: A reconsideration under an equity and justice criteria Formalizing local land rights in Burundi: Way out of crisis or yet another problem?</p>
<p>PANEL 7 Paul Hebinck and Winnie Wairimu Paul D Ocheje Jennifer Whittal and E O Akrofi</p>	<p>CHAIR: IALTA – JAAP ZEVENBERGEN Wageningen University - Netherlands University of Windsor - Canada University of Cape Town - SA</p>	<p>INDIVIDUALIZATION OF LAND RIGHTS IN A COMPETITIVE SOCIETY Beyond cattle and communal land: How the Maasai accommodate changes in land tenure There is no land without an owner: Communal land rights and the African commons in the age of globalization Customary land rights in the context of urbanisation and development</p>
<p>PLENARY SPEAKERS: Patricia Kamari Mbote Juanita Pienaar Zoey Chentiz and Amanda Richardson</p>	<p>CHAIR: HANRI MOSTERT Strathmore University - Kenya University of Stellenbosch - SA Landesa Center Seattle, WA – USA Columbia Law School - USA</p>	<p>Emerging from the shadows of the law: Constitutional and policy protection of community rights to land in Kenya Land claims and national parks: Considerations and implications Individualization of land rights in a competitive society</p>

THEME 4

HUMAN RIGHTS AND DEVELOPMENT

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 1 Giselle Corradi Andrew Harrington and Annika Kovar Alejandro Bendana Evelyne Jean-Bouchard	CHAIR: DEE SMYTHE Human Rights Centre, Ghent University, Law School - Belgium UNDP - Timor-Leste UNDP	WOMEN'S RIGHTS Legal pluralism, women's human rights and legal development aid: Perspectives from the 'demand side' in Pemba city, Mozambique Developing Timor-Leste's justice sector in the context of legal pluralism Women's access to justice and security in Somalia Protecting women's rights in the context of state failure: The Congolese case
PANEL 2 Oliver Ruppel Nkanyiso Sibanda Ravishankar Mor	CHAIR: ADMARK MOYO Faculty of Law, University of Stellenbosch - SA University of Cape Town - SA Faculty of Law, Yeshwant Mahavidyalaya - India	LEGAL PLURALISM IN THE CONTEXT OF CONSTITUTIONAL SUPREMACY Children's rights and legal pluralism in Namibia: Between human rights and customary law? The turbulent rapport between customary law and constitutionalism regarding the parent-child relationship: disciplinary, chastisement and moral counsel Right to development: A subjective right
PANEL 3 Khurram Iqbal Sulistiyowati Irianto Robin Perry	CHAIR: MARLESE VON BROEMSEN University of Agriculture, Faisalabad - Pakistan University of Indonesia - Indonesia Office of International Law - Australia	ACCESS TO JUSTICE AND RULE OF LAW Pluralism, decentralization and sustainable livelihoods: evidences from Pakistan Accessing justice from the third world to global migration Preserving discursive spaces: Poverty reduction strategy, human rights and development discourse
PANEL 4 Moses Mulumba Andre Mbaata Mangu	CHAIR: SUSANNE BRANDTSTÄDTER Center for Health, Human Rights and Development - Uganda UNISA - SA	CULTURE, HUMAN RIGHTS, AND DEMOCRACY: THE INFLUENCE OF THE JUDICIARY Mainstreaming disability into the poverty reduction processes in Uganda: The role of the human rights based approach to the national development plan The judiciary, constitutionalism, and democracy in African Union member states

THEME 4 cont.

HUMAN RIGHTS AND DEVELOPMENT

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 5 Leslie London Damaris Fritz Hanne J Haricharan Leslie London presenting for G Glatstein-Young Moses Mulumba	CHAIR: LESLIE LONDON Cape Metropolitan Health Forum, Cape Town - SA School of Public Health, UCT - SA Center for Health, Human Rights and Development - Uganda	COMMUNITY AGENCY, POWER AND SOCIAL SOLIDARITY: TIME FOR A RETHINK ABOUT HOW THE RIGHT TO HEALTH IS CONCEPTUALISED Social solidarity and the right to health: Oil and water, or just the right octane? Implementing community participation through legislative reform: A study of the Western Cape's draft policy framework for community participation Power: The missing link in meaningful community participation Community health committees as a vehicle for participation in advancing the right to health Participatory approaches to increase community participation in health rights: The case of a prevention of parent to child HIV Transmission Project in Uganda
PANEL 6 Ellen Desmet Gino Cocchiaro Ronald Niezen Ana Beatriz Vianna Mendes	CHAIR: REETTA TOIVANEN KU Leuven - Belgium University of Minas Gerais, Belo Horizonte - Brazil	ON "GLOBAL" GOVERNANCE OF INDIGENOUS PEOPLES' RESOURCES, POWER RELATIONS AND DEVELOPMENT OPPORTUNITIES Natural resources subject to a plurality of legal orders the case of the Güeppi Reserved Zone (Peru) Affirming bio-cultural rights – Community protocols as a bridge between customary and national/international law Constructionism and naturalization in the social study of human rights Environment and struggle for recognition in Amazonia
PLENARY SPEAKERS: Devanathan Parthasarathy Reetta Toivanen Svein Jentoft	Indian Institute of Technology, Bombay - India University of Helsinki - Finland Norwegian College of Fishery Sciences - Norway	Abandoning 'rule of law'? democracy, domination, and (il)legal pluralism in India and beyond "Global" governance of indigenous peoples' resources, power relations and development opportunities Legal pluralism: what can interactive governance theory offer?

THEME 5

LAW AND RELIGION

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 1 Waheeda Amien Francois de Villiers Christa Rautenbach Najima Moosa	CHAIR: NAJIMA MOOSA University of Cape Town - SA University of the Western Cape - SA North-West University Potchefstroom - SA University of the Western Cape - SA	MUSLIM LAW AND CUSTOM IN SOUTH AFRICA A comparative consideration of legal pluralism: A case study of Muslim family law in Canada, India and South Africa Legally relevant pluralisms in South Africa with particular reference to the Nkuna traditional community of Limpopo Province A Zulu festival in celebration of the univeses rites of passage: Towards dealing with a living reality of legal pluralism Review of the progress of a gender equitable, legal recognition of Muslim Personal Law (MPL) in South Africa.
PANEL 2 Julia Sloth-Nielsen Lea Mwambene Ashraf Booley Jacques Louis Matthee	CHAIR: JULIA SLOTH-NIELSEN University of the Western Cape - SA University of Western Cape - SA University of the Western Cape - SA North-West University - SA	RELIGION AND CUSTOM: SOUTH AFRICAN CONTEXTS AND THE CONSTITUTIONAL UMBRELLA A foreskin too far? Religious, 'medical' and customary circumcision and the Children's Act 38 of 2005 in the context of HIV Aids Do sexual delicts under customary law have any room in the face of the Constitution in South Africa? Divorce and the law of Khul': Enhanced protection of women's rights? The cultural defence: Taking the world by storm
PANEL 3 Fatima Diallo Tushar Kanti Saha Craig Lind	CHAIR: YULIA MOKSHINA Africa Studies Centrum of Leiden - Netherlands and Universit� Gaston Berger de Saint-Louis - Senegal National University of Lesotho - Lesotho University of Sussex - UK	COEXISTENCE OF LAW AND CUSTOM IN MODERN SOCIETY God for the marriage and the judge for divorce: conflictual logics around marital conflicts Customary laws of Hindus and Basotho people: Dynamics of differentiation Polygamy in western societies – Legal pluralism coming home?
PANEL 4 Mitra Sharafi Rohana A / Putri H James A Jaffe Eleanor Newbiggin	CHAIR: WERNER MENSKI University of Wisconsin Law School - USA Universitas Indonesia - Indonesia University of Wisconsin-Whitewater - USA School of Oriental and African Studies, London - UK	RELIGION AND CUSTOM IN SOUTH ASIAN LEGAL HISTORY The making of Parisi personal law: Zoroastrians and state law in colonial India Religion pluralism in Indonesia: The implementation of SKB 2 Menteri concerning the establishment of places of worship The customs of the country: Concepts of law and justice in the Panchayats of colonial India Representing family, representing nation, or who 'knows' Hindu law?

THEME 5 Cont.

LAW AND RELIGION

NAME	ORGANISATION	ABSTRACT TITLE
PANEL 6 Yüksel Sezgin and Mirjam K�nkler Mohammed Abdo Gul Ceylan Tok Susanne Dahlgren	CHAIR: Y�KSEL SEZGIN Harvard Divinity School - USA Princeton University - USA Ghent University - Belgium Ritsumeikan University - Japan Helsinki Collegium for Advanced Studies - Finland	RELIGION-STATE RELATIONS IN PLURI-LEGAL SOCIETIES Addressing challenges of religious heterogeneity in nation-building processes: The politics of judicialization and bureaucratization in India and Indonesia Legal pluralism v Human rights norms: Customary and religious laws and human rights concerns under the Federal Constitution of Ethiopia The law of the God or State: The biggest dilemma of veiled women in Turkey Morality discourses in Yemeni legal debates
PANEL 7 Matthias Koetter Ada Ordor/Adenike Aiyedun Sibusiso B Redebe	CHAIR: RASHIDA MANJOO Social Science Research Center Berlin (WZB) - Germany Faculty of Law, University of Cape Town - SA Stellenbosch University, Law and Poverty Project - SA	ACCESS TO JUSTICE & DISPUTE RESOLUTION IN PLURAL SOCIETIES Decision-making on pluralist normative ground: On the governance of disparate traditional, religious and statutory law in pluralist societies Accessing justice within plural normative systems in Africa Ubuntu and the law: Deconstructing and claiming back Ubuntu
PANEL 8 Mrs Annie Chewe-Chanda Goodluck Chuwa Amy Tsanga Lauren Fielder Redman Grace K. Kamugisha Lillian M. Mongella Sakinatou Bello	CHAIR: JULIE STEWART UNZA School of Law - Zambia Tanzanian German Centre for Postgraduate Studies in Law (TGCL), University of Dar es Salaam - Tanzania University of Zimbabwe - Zimbabwe University of Luzern - Switzerland University of Dar es Salaam - Tanzania University of Dar es Salaam - Tanzania BIGSAS - Germany	FAMILY, RELIGION AND WOMEN UNDER RELIGIOUS AND CUSTOMARY LAW Statutory regulation of customary law marriages in Zambia: Myth or reality The legal, the customary and the religious in an Islamic marriage in Tanzania Women and "Lobola" exploring the interface of law, religion and culture in rapidly changing environments Living realities of legal pluralism The interaction of laws and regulation of inheritance in Tanzania Traditional practices, a challenge in the promotion and protection of children's rights in Africa
PLENARY SPEAKERS: Werner Menski Fareeda Banda Amy Tsanga	CHAIR: RASHIDA MANJOO School of Oriental and African Studies, London - UK School of Oriental and African Studies, London - UK University of Zimbabwe - Zimbabwe	Legal pluralism and the search for the 'Right Law': Law as kite flying The gendered implications of struggle for supremacy between law, custom and religion



Theme 1

Reappraising Legal Pluralism: Models and Practices



Theme 1

Reappraising Legal Pluralism: Models and Practices



Panel 1

LAW FROM A PLURALIST STANDPOINT: DILEMMAS AND CHALLENGES

LEGAL PLURALISM AND THE RULE OF LAW

Emma Hayward

Rule of law reformers, working for organizations such as the World Bank, spend millions of dollars planning and putting into effect rule of law programs in developing countries. These efforts, however, are often unsuccessful. One of the most difficult obstacles for these programs is the existence of legal pluralism, the multiple systems of law that exist either officially or unofficially in many of the countries where these programs take place. This paper examines some of the reasons that legal pluralism poses such an obstacle to rule of law development. Case studies of Tanzania, Sudan, and the United Kingdom reveal the different paths that states take in confronting legal pluralism as well as the consequences of their various approaches. These cases show that the presence of citizens who forum shop for the legal venues that best suit their needs, along with a state-local competition for power, creates circumstances in which pluralism becomes extremely durable. When litigants see advantages to utilizing certain courts--state courts or unofficial customary or religious courts, for example--either for the procedures they use or for the content of the laws they administer, they take their suits to those courts. The result is institutional change in both state and non-state courts as they adapt their practices to seek litigants. Institutional adaptation further embeds legal pluralism within the state. Given its endurance, the paper considers some of the implications that legal pluralism may have for rule of law reform and for the concept of the rule of law.

THE INSTITUTIONAL FRAMEWORK FOR LEGAL PLURALISM: LESSONS FROM REFORM INITIATIVES IN MALAWI, MOZAMBIQUE, SIERRA LEONE AND ZAMBIA

Lia Nijzink and Giselle Corradi

In some countries on the African continent proposals for legal reform push for a broader recognition of traditional justice providers or propose modifications of the procedures and institutional structures of traditional justice. This paper is an analysis of recent legal reform initiatives in four African countries: Malawi, Mozambique, Sierra Leone and Zambia. It seeks to answer the following questions: What is the purpose of these legal reforms? Who drives the reform process? What problems are they meant to solve? The paper will systematically describe the similarities and differences between these initiatives and assess the underlying conceptualisation of traditional justice and legal pluralism. It will critically discuss the observation that the legal reform proposals are mainly concerned with solving problems of the formal justice system and regard traditional justice as a part of the solution. In addition, the paper will seek to identify important differences in the extent to which these proposals acknowledge the reality of deep legal pluralism and take a power informed perspective on traditional justice. Finally, the paper will try to formulate lessons that can be drawn from our analysis of the various reform initiatives.

A COURT CASE STUDY: LEGAL PLURALISM IN THE SEXUAL OFFENCES COURTS IN CAPE TOWN, SOUTH AFRICA

Bryant Greenbaum

The author used various criminal court case studies to prove there was gender bias in the criminal justice system in South Africa. One court case study showed how prosecutors and magistrates had to utilize informal untested techniques and processes to accommodate customary law influences in a criminal sentencing proceeding, in relation to a compensation settlement between the victim's family and the convicted offender's family. More specifically, a 30,000 Rand customary compensation arrangement was facilitated by way of informal prosecutorial and judicial assistance and it was a "new start" for the victim as it provided her with financial assistance to assist with her post-assault recovery. The prosecutor and magistrate who facilitated this civil undertaking acted without statutory references or prosecutorial guidelines and provided important customary relief to the victim by way of legal pluralism.

Panel 2

ENGAGING WITH LEGAL PLURALISM: AFRICAN PERSPECTIVES

AFRICA AND THE LAW IN THE 21ST CENTURY: BETWEEN LEGAL PLURALISM AND LEGAL INTEGRATION

Salvatore Mancuso

It is well known that after colonization the attempt to root transplanted European law in Africa failed, and that African native law resisted to the general trend to leave it out of the life of the people thanks to its flexibility and capacity of adaptation. These characteristics gave it the possibility to evolve at the same time, since urbanization and the consequent changes in the relations of the people within their own groups as well as with people belonging to other traditions determined the creation of new rules or the reinterpretation of the old ones. Now African law is facing new challenges. From one side the more frequent recognitions of the value to be given to African legal traditions is emphasizing the role of legal pluralism, from the other side the move to new forms of legal development, especially those based on legal integration, seem to neglect – or at least leave out – the role of the tradition. After a general overlook on the issue of the resistance of African native law towards the attempts of eliminating or reducing it to a marginal role in the period after the colonization, the paper will mainly examine the new developments of African law in terms of legal integration, the reaction of African native law to this new developments of the official law while it is internally struggling between tradition and modernity, urban and non-urban, formal and informal, and how legal pluralism is evolving in Africa considering such development.

THE STATE IN AFRICA AND THE LEGAL REGULATION OF THE TRADITIONAL AUTHORITY. FOR A PROBLEM OF LEGAL PLURALISM

Christian Tshiamala Banungana

The post-colonial Africa remains today one of the liveliest and most creative legal laboratories. Who would have been able to suspect there are another about fifty years when not only the political system would evolve towards the democracy but when the legal diet would offer itself certain number of original solutions the repercussion of which would exceed the borders? Indeed, the traditional social organizations are one of the most elusive in Africa today. Their legibility raises some problems of decoding to the analyst can - belong a little less to the sociologist than to the jurist, accustomed as he is from pre-set categories for understanding the given reality, but none of both seems shielded from approximate interpretations. So, is advisable - it to support that institutions and structures of pre-colonial Africa concocted with the colonial dominion strongly soaked the African political systems because the authoritarian gravities of the colonist or the failure of the process of legal integration of the traditional authorities within the modern state apparatus affected directly the current transformations. And so the legal pluralism clears its road full of resistances stemming from the opaqueness and from the weight of the tradition, still present, but permanently, remodel by the combined effect of the national and international situation of the political actors in presence. Where from; the State in Africa managed to insert into its constitutional building certain customary norms as he does not consider contrary to public policy.

Panel 3 LEGAL PLURALISM AT THE CROSS ROADS: INTERSECTING WORLDS

ISLAMIC LAW IN EUROPE?

Andrea Büchler

In a number of European countries there are fears that foreign, particularly Islamic family law is becoming entrenched. All parties to this discussion see themselves as under threat. Migrant populations claim their right to cultural identity, while their host countries' domestic population sees a risk to social cohesion. Family law brings the underlying tensions into sharp focus. Cultural and religious identity and family law are inter-related in a number of ways and raise various complex issues. European legal systems have taken various approaches to meeting these challenges, many of which have been apologetic, and few of which have been informed by theory. I propose to examine this complexity and indicate areas in which conflicts may arise by analysing a family law case involving migrants living transnationally. I will include questions of international private law, comments on the various degrees of consideration accorded to cultural identity within substantive family law, and remarks on models of legal pluralism and the dangers that go along with them. I will conclude with an evaluation of approaches which are process-based rather than institution-based.

CAUGHT BETWEEN DIFFERENT LEGAL PLURALISMS: MUSLIM WOMEN AS THE RELIGIOUS 'OTHER'

Amy R. Jackson and Dorota A. Gozdecka

Legal pluralism is a phenomenon defined differently by scholars researching European law and scholars researching issues concerning cultural accommodation. Whereas European law scholars focus on constitutional pluralism (Stone) or many constitutions of Europe (Tuori) and possible theoretical tools of conflict resolution between intersecting European legal systems, scholars focusing on multiculturalism argue that cultural legal pluralism conveys the dynamic relationship between official and unofficial law drawn out by migration and the issues of accommodating primarily Muslim diaspora in Europe (Shah). Yet, seemingly differently defined, these pluralisms have an equally important impact on the understanding of fundamental rights in Europe. They both influence national law and shape the boundaries of rights, such as freedom of religion.

Building upon established notions of legal pluralism, this paper provides a critical analysis of the application of the human rights standards in European legal orders and argues that the rights of the religious 'other' are caught in interplay of various types and forms of legal pluralism(s) in which issues of inclusion often remain secondary. It uses the key example of Muslim women who wear a niqab (face veil) or hijab (headscarf) who were the central focus of cases such as *Dahab v. Switzerland* and *Sahin v. Turkey*.

The paper re-orders and re-constructs certain forms of legal pluralism and focuses on the relationships between them: pluralism of European constitutional orders (horizontal legal pluralism); pluralism of legal orders created by various European institutions legally effective in the member states (vertical legal pluralism); asymmetric position of the European Union versus member states in the ECtHR system (diagonal legal pluralism); pluralism inside European states (internal legal pluralism) including the relationship between legal subjects and cultural/religious groups (cultural legal pluralism), and finally, situations where the legal subjects believe they obligate their behaviour (subjective legal pluralism).

LOOKING FOR THE 'LEGAL' AMONGST 'ILLEGAL' IMMIGRANTS 'REAPPRAISING LEGAL PLURALISM'

Dominik Kohlhagen

This paper focuses on what can be considered as 'law' and 'legal order' from the perspective of migrants labeled as 'illegal' by state law. Fieldwork carried out in Europe and Africa explores the social relations of a group of migrants from Southern Cameroon living in Berlin and having migrated to Europe individually over the past 20 years. All were faced with different situations of illegality with regard to state migration laws, but most have since been able to regularize their presence. Trying to identify the 'legal' in their social interactions, this paper aims to highlight the migrants' involvement in hierarchies and obligations of the African homeland and the importance of community groups in Europe. State law, thus appearing as being only part of a much broader range of legal ties, will be questioned from this pluralistic perspective.

It will be shown that the experience of exclusion and rejection by state law strengthens the migrants' commitment to other social fields. At the same time however, this very specific legal experience also has an influence on the migrants' perception of order and hierarchies and on the way the migrants redefine their position in their country of origin. It will be shown that the difficulty of reconciling this view with social realities has for most of the migrants undermined their initial return project

Panel 4

CREATING LEGAL NARRATIVES: DIFFERENTIAL MODELS AND THEIR EFFECTS

LEGAL PLURALISM AND MODERNIZATION: AMERICAN LAW PROFESSORS IN ETHIOPIA AND THE DOWNFALL OF THE RESTATEMENTS OF AFRICAN CUSTOMARY LAW

Kaius Tuori

The purpose of the article is to explore the “law and development” movement’s controversial impact in Ethiopia through the involvement of American law professors such as A. Arthur Schiller in the struggle between modernization and traditionalism in the 1960s and 1970s. Elsewhere in Africa there were efforts to improve the administration of law by producing restatements of customary indigenous law, but Ethiopia had opted for wholesale modernization of its legal system. Because it was claimed that the Ethiopian law reform had led to the nullification of law, Schiller attempted to produce a restatement of customary indigenous land law in order to show the viability of traditional law.

These two contradictory trends, modernization and traditionalism, are presented against the background of the intellectual currents of normative pluralism and colonialism. Schiller’s work was based on the premise that legal pluralism would be the future of African law. The Ethiopian codification recognized customary law only in the norms of land tenure, which Schiller used as a pretext for his project to demonstrate that law reform based on the utilization of traditional law was possible and would successfully correct the nullification of law in rural areas. In the end, all legal reforms were made redundant by the 1974-1975 socialist revolution in Ethiopia. The legacy of Schiller is in the development of legal pluralism, where he attempted to chart a course between the subjection of indigenous law to the state legal system and its irrelevance by advocating autonomy and development within the traditional legal culture.

CHANGING PROPERTIES OF MAORI PROPERTY

Toon van Meijl

Since the New Zealand government made a beginning with redressing long-standing Maori grievances some fifteen years ago, it has come to light that any resolution creates new problems. The settlement process in New Zealand is hampered for two reasons. First, the government negotiates settlements only with tribal organizations, whereas 80 % of the Maori population is currently living in urban environments in which tribal connections have lost a great deal of meaning. Second, the socio-political organization of Maori society has changed radically since the nineteenth century, which raises the question of the representation for descendants of the Maori who were originally dispossessed. This question is preceded by the more fundamental question about the nature of property rights in the nineteenth century. Who used to own the land and other resources: extended families, sub-tribes, tribes, or super-tribes? Subsequently, the issue of who are the rightful heirs of the original owners may be addressed. In this paper, a legal anthropological perspective will be applied in order to refine the quest for the right balance between categorical and concretized property relationships in past and present, or between historical justice and social justice.

Panel 5

GROUNDING LEGAL PLURALISM: EXPERIENTIAL AND METHODOLOGICAL APPROACHES

DAILY PRACTICE AT A TENIENTE POLITICO’S OFFICE: THE LIVING REALITY OF LEGAL PLURALISM IN THE ECUADORIAN ANDES

Marc Simon Thomas

The present-day paradigm in Latin American scholarly literature on the concept of legal pluralism is strongly concerned with the powers that (have) constitute(d) this phenomenon. Legal pluralism should be understood not as a plurality of separate and bounded normative systems, but rather as a plurality of continually evolving and interconnected processes enmeshed in wider power relations. Legal pluralism in Ecuador serves as a good example.

From the colonial period on, the rural indigenous people in Ecuador – nowadays estimated at one-third of the population – were socially and politically subordinated to the Spanish and mestizo population, and so was the use of customary law. The ways that this subordination has been dealt with differs, from a segregationist model during colonialism, to an assimilationist model, and later by an integrationist model during independence. It was only until the end of the twentieth century that the first steps towards a pluralist model were made. Regarding the use of customary law in relation to national law, we could speak of real (de facto) legal pluralism. In 1998, when Ecuador constitutionally recognized customary law along with national law, a situation of formal (de jure) legal pluralism came into being. In the following Constitution of 2008, Ecuador ratified these indigenous rights once more.

FROM WOMEN’S LAW TO SEXED AND GENDERED LAW AND BACK

Julie Stewart

Women’s law is essentially a methodology for exploring the intersections between laws in their multiple pluralities (including customary laws and practices), governance in its multiple pluralities and interactive tiers, religious norms in their pluralities and divergent practices. One might use the terms intersectionalities to describe what converges on the woman who is the focus of our concerns in developing an eclectic research methodology that explains not only her situation but articulates her development agenda and needs.

Human rights compliance becomes a framework for assessing the efficacy of state and other interventions in providing access to development opportunities. However, we cannot assess the status and the position of the woman (women) alone a careful positioning of the ‘notional’ researcher between the sexes and the genders is required to develop a balanced understanding of who is affected and how by laws, governance paradigms, development agendas, religious norms and rights based interventions.

The presentation will endeavor to develop, based on the women’s law methodology, a framework that enables the researcher to manage a plethora of intersecting regulatory provisions and reglementary norms in exploring the intersections and pluralities that govern individual lives, communities, and, daringly, perhaps even nations.

Through an understanding of the wider implications of sexed and gendered worlds perhaps we can return enriched and emboldened to the task of promoting gender equality through the discipline of women’s law.

STUDYING DISPUTES

Keebet von Benda-Beckmann

The paper will discuss how the study of disputes has developed from a method of collecting rules, procedures and principles of unwritten law, to a sophisticated way of understanding the social working of law under conditions of legal pluralism. Focusing on the critical debates of the study of disputing processes carried on at particular periods in time provides insight in the ways by which disputing lost its position of theoretical centrality in the study of law and came to be seen as one next to other contexts in which law obtains its significance. A broader perspective on disputing processes has paradoxically pointed at the limitations of their scope. Analyses of disputes have provided important insight in the cognitive processes involved and have shown that law is not only a normative system but provides an idiom in which social problems are framed. The paper will discuss how the study of disputing behaviour has opened a window at the increasing complexity of plural normative orders, and to the negotiations of their respective relative relevance. The paper will end with a short reflection on what the insights derived from the relatively small scale disputes that have been the subject of study might provide for large scale conflicts.

Panel 6

CONSTRUCTING LEGAL ORDERS: ALTERNATIVE FRAMEWORKS

LEGAL PHILOSOPHICAL PLURALISM?

Sten Schaumburg-Müller

Legal pluralism (and by this term I mean the label and the academic field) has contributed to legal philosophy or at least to the understanding of law by i.a. pointing out that there is a plurality of legal or normative orders within one legal jurisdiction. To me however, it seems that legal philosophy had already acknowledged pluralism (may be implicitly) in at least two ways: Firstly, European and American legal philosophy has always recognized the existence of a plural international order: Law was the same, only different in the different jurisdictions, or framing it in other terms: The concept of law was universal, the content, however, diverse and plural. Legal philosophy was to a large extent connected to the mainly European system of sovereign equal states (and less concerned with law in the remainder of the world, in which the European states were acting or attempting to act as empires). Secondly, legal philosophy has to a large extent acknowledged a certain kind of internal pluralism: the plurality of legal sources and the plurality of values within one legal system. But legal philosophy did not, to my knowledge, consider whether there ought to be different legal philosophies for different legal jurisdictions. Austin, Kelsen, the Realists and Hart are considered legal philosophers dealing with the same issue. Legal pluralism therefore poses (at least) two problems for legal philosophy: Firstly, does it make sense to conceive European and American legal philosophy as if it deals with the same kind of law, or has legal philosophy to acknowledge the plurality? Is Kelsen not (mainly) dealing with law in a post-Hapsburgian central European state, the American realists with the special mixture of common law, the prominent position of courts and a multiculturalism of immigrants, and the Scandinavian realists with law in an emerging welfare state? Or ought we rather to speak of 'legal philosophical transplants', implying that the philosophy will function differently in a different setting? There is a need for developing a plurality of legal philosophies e.g. in relation to African customary law and in all legal systems which have certain distinct features. And there is a need for developing a concept of law. In this regard, I shall present an attempt of an updated, improved version, taking Hart 1961 as a point of departure.

NORM CONTESTATION THROUGH MEDIATION: SHIFTING CONCEPTIONS OF GENDER AMONG BHUTANESE REFUGEES SUBMITTED

Ilse Griek

Refugee camps are settings characterized by a high degree of legal pluralism, in which formal host country legal systems, international law, camp by-laws and regulations, and refugee-established legal systems interact and/or operate side-by-side. The latter, commonly referred to as 'traditional' dispute resolution mechanisms, are typically run by refugees themselves and are used to resolve the vast majority of disputes – both civil and criminal – that occur in camps. As such, these 'traditional' legal systems constitute a crucial part of the framework through which refugees try to access justice. Literature suggests that around the world, many refugees prefer these systems to other legal options available to them. It is often assumed that this means that refugees settle conflicts according to their 'own' customs and norms. But what does this mean, and how accurate is the underlying assumption that camp and state law are strictly separate? Norms are not static, and refugee legal systems do not exist in a vacuum. By focusing on the Bhutanese refugee camps, I examine community-based mediation systems as a form of neo-traditional dispute resolution and venue of norm contestation. Affected by human rights trainings and awareness-raising, Nepal's turbulent political climate and the world's largest resettlement operation, the Bhutanese camps have become sites of upheaval and social change. These changes play out in dispute resolution processes, particularly when they concern relationships between individuals or social groups, for example as gender roles shift. In these processes, actors are able to draw on a broad arsenal of norms and rules, including camp by-laws and social norms, as well as host country laws and human rights principles.

Panel 7 LEGAL PLURALISM, SCIENCE AND TECHNOLOGY

LAW, TECHNOLOGY, AND THE TRANSNATIONAL POLITICS OF RESOURCE EXTRACTION: THE CASE OF THE MOROCCAN ARGAN FOREST

Bertram Turner

The paper addresses the intertwining and coproduction of normative and technological strands in politics of natural resource extraction. It is argued that processes involving complex interactions between various legal repertoires at various scales (local customary law, religious law, national legislation, transnational legal templates) on the one hand and technological innovation on the other hand are qualified to legitimize the social and economic consequences of technology transfer and resource extraction for the local population. In the process, so the argument continues, such entanglements are induced to transform a local product into an exploitable global commodity. In this context scientific knowledge (protected by the law) providing the necessary framework for resource extraction is produced on the basis of local knowledge (not protected by the law). Thus it is argued that such scientific, technological and legal transfigurations of resource extraction appear configured towards each other.

The case study looks at the emergence of argan oil at the world market. Argan oil, produced in southwest Morocco, is the most expensive nutritional oil worldwide today. It is also used in pharmaceutical and cosmetic industry. Fifteen year ago there was almost no commercialization of this oil out of Morocco. It is produced out of the fruits of the argan tree. This tree is building forests that are endemic to southwest Morocco and constitute a unique ecosystem. Nowadays the argan tree and its oil are endowed with a normative framework that includes besides other regulations a) the legal protection of the resource as a global good in form of a UNESCO biosphere reserve; b) a legal concept that allows the production of the premium product required by the world market, and c) the legal labels of a fair traded eco or organic product with certifications and protected geographical indication (PGI). Such framework positions argan oil in an economy of solidarity and equity which also appeals to the consumer in the industrialized world. It is analyzed in the paper how such configurations of inventories of knowledge, legal repertoires and technologies could have taken place and what social consequences they involve.

ORGANIZING ACCOUNTABILITY, QUANTIFICATION AND CRIMINAL JUSTICE IN SOUTH AFRICA

Johanna Mugler

Accountability is a word infused into the language of contemporary politics and organisational life. Many institutions worldwide increasingly meet growing pressure to demonstrate accountability by relying on quantitative measures. Technologies like rankings, performance indicators and benchmarking, designed to evaluate performances of organizations, have become so pervasive in local and global governance that various scholars now speak of an 'audit explosion'. In this paper, I explore the process of organizing accountability in the South African National Prosecuting Authority and the South African Police Service. I discuss the ways in which the authority and contestability of account giving and decision making is affected through the increasing reliance on performance measurement systems. I show how criminal justice employees, working in a plural legal setting, constantly switch between the various logics and demands of organizational accountability—between accounts as stories, explanations and justifications for conduct on the one hand and accounts as coded, often numerical representations on the other hand. I argue that the two faces of accountability are interdependent and mediate each other. In a second step I show, however, that criminal justice employees' interpretative flexibility in their interaction with numbers is limited. This limitation is one of the main reasons why quantification as a medium of communication is particularly effective in getting communication accepted and producing accepted decisions in the observed organizing processes, but at the same time one of the main reasons why quantification causes tensions, uneasiness and fear, because 'not everything what counts can be counted'.

THE IMPACT OF ICT ON THE LAW OF EVIDENCE IN SOUTH AFRICA

Khaled Qasaymeh and Saul Makama

Information and communication technology have created many ways of doing businesses and many ways of committing crimes. New mode of communications has taken traditional normative rules by surprise and forced the way for a new legislative era intended to accommodate the universal phenomena of ICT into the law. The universality of legal frameworks governing ICT revolution has changed, modified, or abrogated many legal principles governing legal issues, such as, law of evidence, electronic commercial transactions, consumer protection, data protection, access to information, computer crimes, terrorism online, defamation online, jurisdiction, etc.

This paper is intended to explain the impact of technology on the law of evidence in particular, the admissibility of computer evidence. The new mode of documentation had rendered hard copies obsolete and expensive. Electronic documentation became the infrastructure of archiving documentary records. This has created legal dilemma to the courts, because electronic document did not fall within the traditional legal definition of a document. Electronic documents which are formed from 0s and 1s did not find its way into the heart of traditional regulatory frameworks governing evidence. Section 34 of the Civil Proceedings Act 25 of 1965 and Section 221 of Criminal Procedure Act 51 of 1977 deal with the definition of documents. The first is not suitable for computerised records and the second does not define a document widely to include a computed document.

Two cases revealed the uncertain approach of the courts when computed documents were tendered into evidence; namely *Narlis v. South African Bank of Athens* and *S v Harper*. In the first case the court regarded computer printouts tendered by bank of Athens were hearsay and rejected the computer assertion because a computer was not a person. In the second case the presiding judge said that the extended definition of "document is clearly not wide enough to cover a computer". And he advised for the intervention of the legislature to bridge the legal gap created by technology.

The intervention of the legislature was by introducing Computer Evidence Act 57 of 1983 which provided for the admission of computer document in civil proceedings. This piece of legislation was repealed by the introduction of the Electronic Communications and Transactions Act (ECT Act) 25 of 2002. The ECT Act was molded on the UNCITRAL Model Law on Electronic Commerce of 1996 which has offered a legal guidance for all countries. The ECT Act gives legal definition to a data message in a manner does not exclude its admissibility on the bases that it is in electronic form. However, the admissibility of data message may be denied on other grounds e. g. if a data message is irrelevant then it will not be admitted into evidence. This raises questions to whether new normative rules governing evidence have changed the legal landscape of traditional rules, which required a document to be in writing, original, relevant, and authentic.

LEGAL PLURALISM, SCIENCE, AND TECHNOLOGY

Andra le Roux-Kemp

This stream explores the intersection of law, science, and technology and the way this takes effect in plural legal configurations. Scientific and technological innovations challenge legal orders and institutions to an extent never experienced before. Such innovations suggest universal objectivity on the one hand while transforming through encounters with frameworks of diversity on the other. Hence global governance institutions and epistemic communities are increasingly involved in legislative processes addressing the transfer of technology and science and monitoring the effects of technological innovation in various settings. At the same time technological innovation and knowledge production prove to involve normative processes that account for their own inherent logics and combine with the social, the political, the religious and the economic. The stream seeks to explore in empirically and theoretically informed contributions how plural legal configurations and trans-scale legal arrangements reflect such new trends in the nomosphere and in what way actors inscribe their respective agendas in these processes.

A QUESTION OF LIFE AND DEATH: LEGAL PLURALISM AND THE DAWN OF LAW'S SCIENTIFIC AGE

Andra le Roux-Kemp

Science and technology have attained a key role in shaping all aspects of modern society, becoming intertwined with wider socio-political issues, and entering the arena of the court room in both civil and criminal proceedings. While the remarkable advances in science and technology shape and change our daily lives, the law,¹ despite the assistance provided for by expert witnesses and evidence, does not always give adequate recognition to such scientific evidence in proceedings and also does not sufficiently take into consideration the social context and consequences of science and technology in society.

Specifically the law of evidence.

For example, the moment of death has been defined in the National Health Act 61 of 2003 as brain death. This profound shift from somatic death to brain death was effected without any consultation or discussion with interest groups or the general public. The greatest advantage of this new definition for the moment of death is that organs can now be harvested for transplantation – with the assistance of modern technology and medical breakthroughs – before respiration and circulation or heartbeat has ceased. But, the moral, religious and/or cultural beliefs and values of a multi-cultural nation like South Africa may not all be appreciative of the legal recognition afforded to the concept of brain death and the medical advances to artificially sustain life in order to optimise the harvesting organs.

TRIPS COMPLIANCE AND SOCIAL WELFARE: THE IMPLICATIONS OF INTELLECTUAL PROPERTY LAW REFORM FOR UGANDA

Mulumba, Moses

Trade is a powerful instrument, but much of its potential to improve health as a right, to reduce poverty and stimulate development is getting lost. International multilateral trade agreements such the Trade-related aspects of intellectual property rights (TRIPS) agreement have been criticized for the over emphasis on ensuring high profit margins of private entities at the expense of human rights of the world's poor population and the effect has been high prices on essential drugs beyond the reach of millions of people in Africa, no access to educational materials and limited agricultural production. Human rights principles and mechanisms require that trade rules should not stifle access to essential goods for the welfare of society, including access to affordable medicines, educational materials and food in developing countries.

This paper gives an overview of Uganda's progress in complying with the multilateral Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It discusses key pieces of legislation or proposed legislation that constitute the intellectual property law and policy reform process and their implications for social welfare and national development. It specifically highlights gaps in the protection of intellectual property rights in three key areas: plant varieties, pharmaceuticals, and educational materials.

THE LEGAL PLURALISM IMPLICATIONS OF FOOD TRACEABILITY

Melanie G Wiber, Kate Bigney-Wilner, Courtenay E Parlee, Liz Wilson and Donna Curtis

This paper explores the legal pluralism implications of food traceability. Traceability is emerging as a kind of new international business standard of practice, which some people see as a kind of legal pluralism growing out of de facto business arrangements under globalization. On the other hand, traceability can also be seen as another technology of power employed by government to reduce risk. We will explore recent literature on governance to ask questions about the role of power in food traceability programs. In particular, we ask about the role of scientific management in neoliberalism (following Anna Tsing). In a Canadian context it can be argued that this type of 'governing' does not arise from political mandates but rather from processes of negotiation and exchange between social actors, state and non-state, that wish to direct social and environmental relations (Rose 1999). However, some literature on traceability condemns the effects of traceability on the economies of the developing world. Therefore, questions arise as to whom is empowered through traceability and why? Furthermore, what types of legal systems might various international agents (environmentalists, corporate interest etc...) rely on to make traceability happen? Foucaultian notions of everyday forms of power inform the view of governance as the attempt to "shape human conduct by calculated means" (Li 2007:5), a gradual assemblage of practices that educate the population and direct their ways of seeing and understanding. It is this assemblage of objects, knowledge, techniques and events that we wish to explore in the context of traceability and the law (Li 2005).

Plenary Speakers

PURSUING LEGAL PLURALISM:

THE POWER OF PARADIGMS IN THE SEARCH FOR MEANING

Anne Griffiths

What constitutes legal pluralism has been the subject of much debate over the years. For how law is perceived, depends upon the models that are employed with regard to its recognition that play a crucial role in formulating questions of jurisdiction, authority, and legitimacy that are brought to bear on claims that people and institutions pursue. In the past models of legal pluralism ranged from grounding the identification of legal orders from the perspective of the nation-state to a more far reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity. The paper will explore some of the challenges posed by contemporary globalization, with regard to transnational relations and transnational laws, including human rights. It will raise questions about methodology that not only have an impact on conventional legal discourse but that also affect more socio-legal or anthropological approaches to law. For while the latter may provide another perspective on law which differs from that of abstract legal theory, it has also been subject to critique about its claims to knowledge and representation. Anthropological perspectives have promoted ethnography, centered on "the field", as a site of study. The paper will critically assess the advantages and disadvantages of such an approach, including dilemmas posed by contexts in which there may be said to be no "field" to study.

THE POVERTY OF THEORY IN DISCUSSIONS OF LEGAL PLURALISM

Franz von Benda-Beckmann

In my paper I shall critically discuss the increasingly superficial ways in which the concept of legal pluralism is debated. This concerns the conceptual clarification and ever more the methodological and theoretical implication which it has for the understanding of law in society. I argue that there is a number of weaknesses in these discussions. There is a tendency to reduce the wide variety of conceptual usages and theoretical assumptions – which for legal pluralism is as wide-ranging as for "law only" – to a couple of stereotypical formulations. In many discussions authors consciously or out of ignorance to blow up their own view or critique "the legal pluralists", as if there was such a community sharing much more than the conviction that it makes sense to conceptualize law as potentially plural. The selective perception of conceptual-definitional opinions is regularly combined with the more or less complete neglect of empirical studies in which situations of normative and institutional complexity are analysed with a framework that allows for legal pluralism. I shall focus in particular on a number of issues: the reduction of different academic and practical concerns (dogmatic legal science, social science) to one level of discussion; the failure to distinguish analytical equivalence of variable legal forms from their empirical differences in social significance and power; the misleading distinctions between "old" and "new" legal pluralism (global legal pluralism perhaps being the newest); the tendency to see the yes or no to the question of "legal pluralism as the end of the discussion rather than as its beginning. My paper aims to show how such weaknesses can be avoided.

LIVING REALITIES OF LEGAL PLURALISM: THE TWO FACES OF CUSTOM

Tom Bennett

In a recent South African case, *Shilubana v Nwamitwa*, the Constitutional Court had to decide which rule governed succession to an office of traditional leadership, the so-called 'living' or the 'official' customary law. When rejecting the latter, the Court distinguished two species of custom. One was a residual source of rules in the common law, derived from community practices of long duration, while the other was the constitutionally guaranteed law of the indigenous peoples of South Africa. This distinction followed a judicial trend whereby the courts had sought to distance themselves from the 'official' customary law dispensed by colonial and apartheid authorities in favour of a more democratic, living law.

This paper reflects upon these the living and official law, and considers the following issues: first, how positivist jurisprudence and legal anthropology have affected perceptions of custom (specifically the requirement of obligation, which is a particular feature of custom in public international law), and, secondly, how the South African courts are seeking to reclaim customary law from 'tradition' (which by implication is immemorial and therefore has no identifiable agent) and to relocate it in 'history' (which, in oral or written sources, has agents who can be held accountable for their versions of the law).



Theme 2

Governance and the politics of order



Theme 2

Governance and the politics of order



Panel 1 GOVERNANCE OF COASTAL RESOURCES

ON EITHER SIDE OF THE FENCE - A LEGAL PLURALISTIC ANALYSIS OF PALK BAY FISHERIES

Johny Stephen

How can one make sense of transnational legal pluralism in the context of a fishing conflict? How is statutory and customary law invoked and what is the relationship between them? This paper aims to explore these questions in the context of fisheries in the Palk Bay, a relatively shallow and placid sea in the Indian subcontinent that lies between northern Sri Lanka and southern India, keeping in mind that the parties involved on either side of the international maritime boundary share a 'common' culture and language. Historically fishers from both countries have been using these waters for fishing. Fishing on the Indian side grew exponentially since the late 1960s, following heavy investment in mechanisation and trawling. The growth of fisheries on the Sri Lankan side was stunted by the civil war which lasted more than two decades.

The end of the civil war in Sri Lanka has brought centre stage the confrontation between the Indian trawling fleet and the Sri Lankan artisanal fishers mainly as a result of encroachment of Indian trawlers into Sri Lankan waters. Whereas much of the legal pluralism literature has focused on how statutory law undermines customary law, the transboundary context appears to complicate this scenario. Sri Lankan Tamil fishers not only highlight the illegality and the destructive nature of trawling by Tamil fishers in India, but they often endorse statutory laws that privilege the international boundary. On the Indian side, common heritage and historical user rights seem to be the main rallying point among fishers to justify their encroachment.

CUSTOMARY FISHING RIGHTS IN SOUTH AFRICA: SURFACING LIVING LAW

Jackie Sunde, Merle Sowman

For nearly a century traditional, small-scale fishing communities along the South African coast have been subject to the imposition of statutory fisheries laws. In some regions, this system has been used by privileged white capital to exclude these communities from accessing high value resources, whilst in other areas, systems of traditional authority, intertwined with layers of apartheid law, have shaped the contours of the marine commons. The transformation process initiated post 1994 focused on the lucrative, commercially-orientated fisheries sectors and the fisheries legal reforms of this period took the topography of these fisheries institutions and practices for granted, introducing the Marine Living Resources Act of 1998 as the catch all statutory net that would govern South Africa's fisheries in this new democracy. Over the past ten years in South Africa, fishing communities along the South African coast have begun challenging the prevailing governance framework, arguing their continued exclusion as artisanal and traditional fishers, citing international human rights law and customary practice as the basis of their claims to equitable access to marine living resources. This paper traces the surfacing of these expressions of customary law and the layers of colonial and apartheid law that have largely eclipsed these systems of law along the coast. Outlining the challenges involved, this paper argues that the recognition and integration of living customary law is central to the development of a more sustainable and equitable system of governance for small scale fisheries in South Africa.

GOVERNANCE OF COASTAL RESOURCES

Jennifer Whittal

Abstract: The Integrated Coastal Management Act No 24 of 2008 (ICMA) is changing the manner in which land professionals operate in coastal areas. It seeks an integrated response to control development, manage land resources, retain public rights, and manage risk in the coastal zone. This law is likely to be differently interpreted, and possibly contested, by the various professions who will need to operate within the framework it creates – environmentalists, planners, developers and land surveyors. This contribution provides an interpretation of the Act from the perspective of a Professional Land Surveyor.

BOTTOM-UP FISHERIES GOVERNANCE IN THE PALK BAY SOUTH ASIA: A THEORETICAL RECONNAISSANCE

Maarten Bavinck, Ajit Menon, Serge Raemakers and Merle Sowman

The Palk Bay – a large expanse of shallow sea between India and Sri Lanka – is heavily contested by fishers from two nations. This conflict has largely arisen due to an expansion of the trawl fleet during the Sri Lankan civil war. The fact that the Palk Bay is bisected by an international boundary line exacerbates the problems available, as does the fact that marine resources are degrading. Governance of the Palk Bay is the subject of a new project (acronym REINCORPFISH) that is funded by the Netherlands Organisation for Scientific Research (NWO). This paper formulates a framework for investigating and improving our understanding of its governance arrangements. Starting point is the political economy of fishing on both sides of the Bay, and its extension into plural legal regimes. Scholarship in the fields of legal pluralism, interactive governance and conflict resolution subsequently provides us with the basis for a processual model that bridges scale levels as well as various legal systems. The result aims to be useful for approaching complex realities of conflict over natural resources.

EVOLVING LEGAL PLURALIST GOVERNANCE IN THE PALK BAY REGION: LESSONS FOR PROMOTING GOVERNANCE PATTERS AND POLICIES IN RESOLVING FISHERIES CONFLICTS

Oscar Amarasinghe

Defined as ‘the different legal mechanisms applicable to identical situations’, the vast amount of knowledge generated in the discipline of legal pluralism helps to understand the complexities in the behavior of people and their governance systems. Legal systems are not static and they evolve with changes in the context. This dynamism helps one to understand the conditions under which certain legal orders accommodate each other, while others compete and conflict. Such knowledge is of paramount importance in formulating policies which are more appropriate to diverse and complex situations.

This paper draws lessons from escalating fisheries conflicts among South Indian fishers and North Sri Lanka fishers in the Palk Bay region. Both Indian and Sri Lankan fishers were fishing in harmony in the Palk Bay area, where the boundaries of the two countries were extremely close. Community legal systems of the two fishing groups dominated and the legal systems appear to have accommodated each other. These ‘historic waters’ with close ties maintained between the two groups, were divided by an arbitrary boundary line- International Maritime Boundary Line (IMBL), by agreements signed between the two countries in 1974, and thus bringing in the state actors also into the existing legal orders. However, civil war that erupted in 1983 and continued until 2009, allowed the Indian fishers to freely fish in the Palk Bay area and even cross the IMBL because of the fishing bans imposed by the Sri Lankan security forces on the Sri Lankan side. The cessation of civil war in 2009 saw large numbers of northern fishers of Sri Lanka commencing fishing but, confronting massive invasion of Indian trawlers who poach in their waters. The relations between the groups have now become extremely hostile and emerging conflicts are noted between the governance patterns of the two countries. The issue has risen to unmanageable proportions having serious political implications for the long-maintained cordial relations between the two countries.

DEFINING FISHING RIGHTS IN PUBLIC DAMS AND IMPOUNDMENTS IN SOUTH-AFRICA

Mafaniso Hara

Government of South Africa intends to formally extend the use of dams and impoundments to rural communities and other previously excluded users for increased food security, poverty alleviation and also other uses as enshrined by South Africa’s constitution. Although most of these dams and impoundments are legally public property (belonging to the Department of Water Affairs; Department of Agriculture, Forestry and Fisheries; Municipalities; etc), they have been in most instances appropriated (de facto) by irrigation farmers, recreation fishing clubs, anglers and yachting clubs through historical use under apartheid. While the government departments that own such entities mainly use the dams and impoundments for provision of water for domestic, industrial and agricultural use, the Provincial Nature Conservation Departments are responsible for managing the biodiversity and nature that exists in these dams and impoundments. The Department of Forestry is required to ensure that the catchment is preserved.

As part of the Water Research Commission (WRC) and Department of Agriculture, Forestry and Fisheries (DAFF) funded ‘Baseline and scoping study on the development and sustainable utilisation of storage dams for inland fisheries and their contribution to rural livelihoods’ project, this paper looks at how the various revised (post-1994 under the democratic dispensation) regulatory frameworks such as the Water Act, Land Act, the Fisheries Act, Forestry Act and provincial Nature Conservation Acts, over-laid by South Africa’s 1996 constitution come into play in this drive for more equitable access to these dams and impoundments while striving for sustainable use at the same time.

Panel 2 BOUNDARIES OF AUTHORITY

CONTESTED POWER AND APARTHEID TRIBAL BOUNDARIES: RECENT LAWS AND STRUGGLES OVER LAND RIGHTS

Aninka Claassens

The paper examines conflicting interpretations of the content of land rights and the scope of chiefly power over land in affidavits by rural litigants and traditional leaders in a court challenge to the constitutionality of the 2003 Communal Land Rights Act in South Africa. Statements by traditional leaders (who support the new laws) and rural applicants (who oppose them) are described in the context of the contestations over authority that gave rise to the legal case. Disputes over control of land are central to these contestations. The applicants argue that the new laws will tilt the balance of power in rural areas in favour of apartheid-created traditional leaders and jeopardise recent hard-fought victories by poor people in obtaining land rights and challenging autocratic power.

The paper argues that chiefs lobbied for the new laws precisely because ongoing contestation in rural areas illustrates the precariousness of their authority. The new laws are similar to their colonial and apartheid predecessors in setting apart protected realms of sovereign authority for traditional councils within ethnically delineated tribal boundaries. Contestation over these boundaries, of both identity and space, is central to the litigation described.

Also contested is the centralization of land administration powers to the apex of imposed "tribes". The applicants argue that layered decision-making forums are an intrinsic feature of existing land rights and that most land administration decisions are, in practice, taken at "lower", more consultative, levels.

Similar issues arose during apartheid and colonialism. In focusing on the impact of fixed boundaries on layered systems of authority and indigenous accountability mechanisms, the paper will review historical literature about the impact of European concepts of territorial sovereignty during colonialism. It will also discuss the impact of the requirement that both the identity of the owner and the boundaries of land be delineated when registering ownership under South African law.

THE POLITICS OF SCALE: NESTED LAND RIGHTS AND FLEXIBLE BOUNDARIES IN MSINGA DISTRICT, SOUTH AFRICA

Ben Cousins

This paper describes land tenure in the Msinga district of KwaZulu-Natal, South Africa and explores issues of scale, boundaries and nestedness in 'communal tenure' regimes. Key features of the tenure regime include flexible (internal and external) boundaries between user groups, and multiple and nested layers of social identity, land rights and land administration. The district has a history of violent conflict over tribal territory and land resources, and recent national policies and legislation aimed at transferring private title to these 'communities' has the potential to spark yet more conflict. The transfer of title approach embodied in the Communal Land Rights Act of 2004 would involve the imposition of fixed rather than flexible boundaries between resource user groups, centralize land administration in traditional councils at the expense of local land users, and undermine mechanisms for the downward accountability of institutions to rights holders. Additional complexities arise as a result of land reform in the district, which has seen the transfer of ownership of farms to groups of former labour tenants. These groups retained their 'tribal' affiliations over decades of labour tenancy, but are anxious that they should not lose effective control of resources on the transferred farms through the centralization of land administration. The paper argues that cross-scale relationships in land tenure and resource use are inherently political, and that accountability of institutions to rights holders is a key issue for law and policy.

THE POLITICS OF ORDER IN THE SOUTH-AFRICAN LOWVELD: LOCALITY, LEGITIMACY, AND THE DISPUTING PROCESS

Severin Lenart

In this paper, I discuss the production and maintenance of order in a siSwati-speaking community in South Africa. The focus is on the traditional leaders' aspiration to extend their legitimacy and authority over land and people by creating a specific locality. Thereby, they aim to impose and strengthen their notion of order in a pluralistic setting where it interacts with other political and religious conceptions. Despite the fact that core aspects of chiefly power broke off or proved elusive under conditions of land dispossession and governmental 'retribalisation' in the last century, the locality of the eMjindini chieftaincy continued to exist as a politico-cultural value for the construction of identity beyond the geography of apartheid. In the 1990s, with the establishment of a land trust, scopes of influence such as land allocation and dispute resolution were regained. Today, the trust serves as the basis for the traditional leader's aspiration to extend their influence whereby they construct the identity of eMjindini and its people in historical terms as subjects of a transnational Swazi monarchy. One locale, that is, the setting for action where notions of locality and order are most prominently produced and negotiated is the disputing arena of the chief's court. Here, the relationship between traditional leaders and the people of eMjindini appears to be of mutual interest. While the former long for power and authority, the latter can also manage their disputes and thus enable traditional leaders to legitimise their endeavour of strengthening their particular notion of an orderly society.

LAYERS OF AUTHORITY, BOUNDARIES OF DECISION-MAKING: CONTROVERSIES AROUND THE TRADITIONAL COURTS BILL

Sindiso Mnisi Weeks

This paper focuses on traditional courts and the impact of imposing fixed jurisdictional boundaries for them within the context of deeper disagreement about the nature of traditional identity, boundaries and authority, particularly as this relates to dispute resolution. It describes the Traditional Courts Bill of 2008 and controversies over its key provisions. The imposition of territorial boundaries by colonial and apartheid governments, and complementary legislation of distorted and oppressive powers assigned to traditional leaders, had many negative consequences for rural people. But this approach is perpetuated by the present government. Policies and legislation that entrench fixed boundaries and authoritarian notions of traditional leadership continue attempts to define social identity, dictate jurisdictional limits and map a centralised system of dispute resolution onto the indigenous systems in operation. By giving primacy to controversial territorial boundaries (especially macro-communal ones) and refusing people the right to 'opt out', the Bill distorts the flexible, layered and nested social organisations and dispute resolution processes prevalent in customary communities. It also undermines means by which traditional institutions might be kept accountable. Arguably, contests over institutionally supported definitions of boundaries signify similarly deep concerns about power relations, and the tensions around authority and accountability – particularly in dispute resolution – brought about thereby. This paper interrogates these governance issues relative to the Bill and living customary law: Who can make the rules that govern the commons? Who has power to decide disputes arising from non-compliance? Who else can participate in dispute resolution? Whose disputes are they empowered to decide?

**CONTESTED BOUNDARIES: CONTRADICTIONS OF DEMOCRATIC CHANGE
AND REASSERTION OF TRADITIONAL POWER IN A FORMER APARTHEID HOMELAND**

Mazibuko Jara

This paper will review the role of the Traditional Leadership and Governance Framework Act (TLGFA) of 2002 in resuscitating defunct tribal boundaries and authorities in four villages (Ndlambe, Ngqumeya, Prudhoe and Rabula) in a former apartheid homeland (Bantustan), the Ciskei. Apartheid-era legislation imposed tribal boundaries and authorities without consultation and consideration of actual practices and realities on the ground. In certain parts of the former Ciskei this imposition led to dissent and resistance that over time led to the eventual collapse of the tribal boundaries and authorities. By the time of the transition from apartheid to a democratic political dispensation these were replaced by diverse, community-based systems, rules, structures and mechanisms of local governance, justice, management of common property and customary law. These regimes were also shaped by post-1994 legislation on rural local government and traditional leaders. Legislation on rural local government made it possible for former homeland rural areas to be incorporated into democratically-elected municipal systems and structures. On the other hand, the TLGFA together with the Communal Land Rights Act of 2004 have re-enacted apartheid-era tribal boundaries and authorities. Based on continuing research in the mentioned four villages, the paper will trace the impact of the TLGFA in resuscitating tribal boundaries and authorities, and on local experiments with community-based systems, rules, structures and mechanisms. The traditional councils seem to be an emerging terrain of struggle. Key questions addressed in the paper are: what is the relevance and implications of contestations over rural governance in the former Ciskei to meanings and debates on boundaries of authority, identity, common property and space? What are the implications of changing landscapes of rural governance, tribal boundaries and traditional authorities in the former Ciskei for the management of common property resources?

**Panel 3
GOVERNING THE RELATIONSHIP BETWEEN CUSTOMARY AND
CONSTITUTIONAL LAW IN SOUTH AFRICA**

**A FOURTH TIER OF GOVERNMENT? THE DUALITY OF POLITICAL SYSTEMS AND CONTESTED
POWER RELATIONS BETWEEN STATE AND TRADITIONAL LEADERSHIP STRUCTURES**

Susannah Cowen

The Constitution creates democratic government in three spheres: national, provincial and local government. It also recognises the institution of traditional leadership. The Constitution says little about what the role is of traditional leaders or the reach of their power and to date, the legislature has failed to define, at least sufficiently, a role for traditional leadership. In this pluralist context it is inevitable that struggles and contests will emerge about the reach of power and the protection of rights affected by the exercise of their power. The nature of these struggles will, furthermore, be informed by the history of traditional leadership in South Africa and its intimate connection with the history of indirect rule through the tribal system and its evolution into the homeland system under grand apartheid. For poor rural communities, this means that the protection of basic human rights must be fought out in a governance context where the relative powers of government and traditional leadership are at best blurred and where power can readily be manipulated and abused. The vulnerability of these communities, who already have insufficient access to justice, is acute. The paper will explore the constitutional and legal framework within which power of traditional leaders is exercised to show that power is insufficiently defined and easily manipulated. It will explore the history of indirect rule in South Africa and the ways in which this history still presents challenges for rights protection today. Recent litigation which has sought to protect rights in the current legal context will be explored to highlight the particular vulnerability of a very sizeable and largely poor rural citizenry

**THE CLASH OF INTERNAL CUSTOMARY GOVERNANCE STRUCTURES WITH A POSITIVIST
EXTERNAL ENVIRONMENT AS A CLASH BETWEEN COMMON LAW OWNERSHIP AND
CUSTOMARY PROPERTY RIGHT**

Wilmien Wicomb

The public trust doctrine as propounded by Joseph Sax in the 1970's, played a central role in earlier environmental movements in the US. When the principle made its arrival on the scene of marine living resources management (as it did in the USA, amongst other countries), it represented a departure from the common law principle that understood the fisheries to be *res nullius*, but indeed capable of private ownership. The public trust doctrine rather finds its basis in the Roman law principle that classified certain property as not being capable of private ownership but 'belonging to the people' (as *res universitas*).

The post-democratic legislation regulating fisheries in South Africa oddly makes no mention of either principle (despite the fact that the new Acts regulating water, the environment and minerals all explicitly incorporate the principle of the public trust), but if read in the context of the preceding White Paper, an argument for the incorporation of the principle of *res universitas* seems convincing. In addition, the Act propounds as its central objective, the transformation of the fishing industry. This undeniably raises the issues of restitution and redistribution.

Within this context, this paper investigates the uncomfortable alliance between the principle of the public trust and the customary forms of 'ownership' (of marine resources) prevalent along the South African coast. It is argued, however, that a proper acknowledgement and understanding of customary forms of ownership negates the fears of private (communal) ownership as being in conflict with the principle of the public trust, and rather unlocks the potential of effective community based resource management.

COMMUNITY MEMBERSHIP UNDER LIVING LAW AND UNDER STATE LAW

Henk Smith and Sayi Nindi

In Africa, state law largely ignores the practice and experience of communities. Relational models of pluralism recognize that communities create cultural meaning by strategically selecting indicators of difference. The process whereby a local community is generated is a “positioning” that builds upon custom and experience, ranges of meaning and emerges through interaction, engagement and struggle.

The Endorois decision emphasizes the following criteria to identify a “people” or community: a) the voluntary perpetuation of cultural distinctiveness, b) self-identification as a distinct collectivity, and c) recognition by other communities. By contrast the relevant Namibian statute law governing recognition of a traditional or customary law community insists on the presence of indigenous, homogenous, endogamous and common ancestry features. South African land reform law similarly requires commonality, historic connection and shared rules of access to resources. Formalized customary law governance institutions resort to the imposed discretionary boundaries and powers of state appointed traditional chiefs.

The way in which a group describes itself in cultural terms relative to other communities are expressed as formal membership rules. The social boundaries of community are culturally produced. State law fails to recognize the markers provided in the Endorois decision and in living law practices. The institutional imperative is this: What matters is not that things be done in the old ways. It is that things be done in ways – old or new – that win the support, participation and trust of the people, and can get things done.

INDIVIDUAL AND GROUP RIGHTS UNDER THE CONSTITUTION IN THE CUSTOMARY LAW CONTEXT

Jason Brickhill

In customary law and the context of traditional leadership, the relationship between individual and group rights is a vexed issue. The Constitution recognises fundamental rights in respect of culture and religion and also recognises customary law and the authority of traditional leaders. When it does so, it places emphasis in some provisions on the individual, and in others on the group. This paper will examine the extent to which the Constitution confers rights on individuals and groups – in particular, customary communities – and how it resolves the tension between these rights. This analysis is important not only because it makes a difference to the moral basis of these rights but also for legal reasons. These may include enabling one to identify the right-holder with precision and to understand analogies and differences between different rights, and guiding the resolution of concrete cases by determining whether relief is directed primarily at vindicating the interests of the individual or the group. The recognition of group rights also raises difficult questions in respect of coercion and the ‘right of exit’ of individuals.

Panel 4

MINING AND MINERAL GOVERNANCE

THE REGULATION OF PETROLEUM IN SOUTH AFRICA AND THE PROTECTION OF COMMUNITY RIGHTS

Meyer van den Berg

The petroleum industry is one of the largest global industries in the world. It shapes countries, influences politics, determines economies and consumes the lives of millions of people worldwide. It is an industry characterized by rampant human rights violations and environmental destruction. The effect that the petroleum industry has on communities is an international concern. There is dire need for domestic and international petroleum regulation to regulate this. The South African petroleum industry is a recent industry. There is increasing international interest in the South African petroleum industry. As a result of past lack of interest, the petroleum industry was either unregulated or fell under the regulation of the minerals industry. The nature of the petroleum industry, however, requires separate regulation. The Mineral and Petroleum Resources Development Act 28 of 2002 deals with petroleum in a separate chapter, although the major focus remains on the minerals industry. The role of communities in the exploitation of the minerals industry recently received constitutional attention. The question remains, however, whether the South African regulatory framework for petroleum takes communities into account and whether it provides the necessary protection for community interests. This contribution will evaluate the South African regulatory framework for the petroleum industry and will determine if it is suitable for the protection of communities. It will draw on comparisons with the global petroleum industry, as well as the domestic treatment of the minerals industry, in order to evaluate the existing framework and to provide recommendations for improving the regulatory framework for petroleum in South Africa.

MINING GOVERNANCE AND THE RELATION BETWEEN ARTISANAL AND COMMERCIAL MINING IN SOUTH KIVU, D R CONGO

Sara Geenen

This paper looks at conflicts and coexistence of industrial and artisanal mining in South-Kivu, Democratic Republic of Congo. Using a case-study approach, we analyze different local trajectories (Kamituga, Lugushwa and Luhwinja), where the specific institutional and historical context shaped the struggle over mineral resources (gold). In the current ‘post-conflict’ context, the struggle over minerals has intensified again and produces different outcomes in these three mining sites. The actors involved are multinational and national mining companies, the Congolese State, and local mining communities. First, a multinational gold exploration company is trying to consolidate its concession by negotiating over resource management with the local communities. This process involves discussions over property rights, access to resources and local livelihoods. Second, the Congolese State is taking more and more initiatives in order to ‘formalize’ the artisanal mining sector; initiatives of which the miners themselves often don’t see the benefits. Third, local artisanal mining communities actively engage in these negotiations and struggles, using a rights- and livelihood-based approach. By addressing the three cases from the perspectives of three different groups, we aim to make a contribution to the understanding of mineral governance at the local level, in a (post-) conflict environment.

UNINTENDED COLLIERIES: RETHINKING LEGITIMACY IN THE ILLEGAL COAL MINES OF EASTERN INDIA

Kuntala Lahiri-Dutt

Commonly presented as arising from poor policing and corruption, and as raiders of environmental commons, 'illegal' production and marketing of coal is a significant aspect of everyday life in eastern India. The negative representations of illegitimacy hide unpleasant social realities of the coal mining tracts: poor environmental performance of large mining projects of the state-owned mining sector, social disruption and displacement in both physical relocation and occupational changes of farming and forest-based communities, and a general decay in traditional subsistence bases of peasant and indigenous communities. What constitutes illegal mining in this dynamic social and political context? This paper reflects on the insights gained from the ground where a large number of people's livelihoods depend on what is generally seen as illegal mining. To unveil legitimacy in mining and its various illegal forms, this paper digs through the layers of complex mining laws and investigates whether they can promote justice and equity and protect the interests of the disadvantaged. In doing so, it offers a rethinking of legitimacy in mining.

INDETERMINATE' PROPERTY, EMBEDDED RESOURCES, AND TELESCOPING LEGALITY: THEORIZING THE HISTORICAL EVOLUTION OF MINING GOVERNANCE IN INDIA

Devanathan Parthasarathy

Conflicts and struggles over the location of mining projects have been an increasing feature of India's post-economic liberalization political landscape. Frequently these struggles have taken place in areas inhabited predominantly by indigenous adivasi groups whose lives and livelihoods are largely forest based. The location of vast mineral deposits in forest areas and the consequent attempts to displace local populations constitute an instance of embedded resources but also of the telescoping of colonial and post-independence laws and notions of legality; the struggles and conflicts illustrate both contestations over the definitions of 'resources' and 'property', as well as the characterization of laws and legality. Drawing from a theoretical exposition of the early Marx on the 'indeterminate' property character of certain 'elemental' objects of nature, this paper attempts a theorization of the historical evolution of mining laws and legality in India from the colonial period to the present. Choosing certain 'moments' in this history, the paper argues that an understanding of the present struggles cannot be gained without a simultaneous comprehension of the embedded nature of resources and environments, and of the overlapping character of notions of legality and laws relating to minerals and mining. A political understanding of the current struggles must comprehend the 'illegal pluralism' that characterizes the mineral extraction sector, especially in addressing the challenges of awkward and problematic legislative and juridical approaches to the issue. The fuzziness of embedded resources and indeterminate property against a background of economic globalization provides the ground for theorizing the telescoping of multiple legal enactments and designations of legality in the mineral sector in India.

INDIGENOUS PEOPLES' RESISTANCE AGAINST MINING AND THE IMPLEMENTATION OF THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT – A GUATEMALAN PARADOX?

Joris van de Sandt

The social resistance against large-scale mining in Guatemala since 2005 has focused mainly on the issue of indigenous peoples' right to participation and consultation. In response to the State's failure to comply with its international human rights obligations, numerous indigenous communities have organized their own "consultations", thereby creatively invoking national and international legal norms, interpreting them from the standpoint of their own normative convictions. Without exception, the populations involved pronounced themselves against mining on their lands with an overwhelming majority of votes. These developments have led to an intense political and legal debate on the validity and legal effect of community referenda, a debate in which the struggle over the definition of the concept of "consent" is central. This paper is based on field research, literature study and participation in various national and international forums on indigenous rights in the context of emerging extractive industries. It contrasts the current "juridified" political discourse of organized indigenous communities with ongoing normative discussions – in Guatemala and in other Latin American countries (Peru, Colombia) – on the interpretation of indigenous peoples' right to free, prior and informed consent/consultation (FPIC). In doing so, it makes clear how the discussion on mining and consultation in Guatemala's polarized political context has resulted in the seemingly paradoxical situation in which indigenous communities have come to reject international legal norms for the protection of their human rights as indigenous peoples. Finally, the paper suggests a number of essential preconditions – which are currently lacking – for the meaningful consultation of indigenous peoples.

Panel 5 Conflicts, Justice, and Governance

ACQUITTING THE AUTONOMY: MAKUSHI CRIME AND PUNISHMENT ON THE CONTEXT OF LATIN-AMERICAN PLURIETHNIC STATES

Bruno Martins Morais

In 1986, amid a swirl of land disputing conflicts, a makushi indian commits a murder in the extreme northeast of the Brazilian Amazon; twenty-four years later, he is acquitted by the jury not for being innocent, but because he fulfilled the sentence of exile imposed by his peers. Studying the conditions of this case – the only one in Brazilian jurisprudence to recognize the indigenous people's justice autonomy –, this article aims to explore not only the political dimension of this statement of legal pluralism within the Makushi context, but place it in the history of the movement for the decolonization of the Amerindian justice that has taken part in Latin America over the past 30 years. The intention, therefore, is to see the importance of assertion and recognition of local authorities, under the International Law combined with the Constitutional experience, in the context of dispute over construction of social rights in the Pluriethnic Latin American States.

MAPPING THE LEGAL FIELDS IN URBAN CONTEXTS: EXTRA JUDICIARY INSTANCES OF CONFLICT RESOLUTION IN LUANDA AND MAPUTO

Maria Paula Meneses

This paper seeks to discuss the implications of the presence of plural instances involved in conflict resolution in contemporary African urban contexts, taking as references Maputo and Luanda – two major cities in southern Africa, building on the concept of heterogeneous state (Santos, 2006). The diversity of political and legal cultures translates itself in a complex form of legal pluralism filled with spontaneous development and kept alive by social demand and creativity. Indeed, the research on the specifics of both Mozambique and Angola led to the characterization of the state as being composed of a very heterogeneous set of institutions in which different political and legal cultures, practices and institutions coexist with little overall coherence. Rather than basing the analysis on the opposition of 'customary' vs modern legal institutions, this paper argues for a broader interpretation of the justice systems present, where multiple instances coexist, and where legal plural orders are accommodated, resist or are ignored by 'formal' state agents, at different scales. With a focus on urban settings, the paper analyses the performances of various institutions that are, through the eyes of ordinary citizens, seen as playing a key role in conflict resolution. The paper will address the relationships between the extra-judiciary instances in granting access to rights and justice, contributing to a more refined analysis of the instances (and actors) present. Are these institutions granting a more democratic justice, promoting access to rights, and thus strengthening the idea of citizenship or are they rather accentuating the reproduction of social inequalities? These different institutions – come to symbolize the presence of a 'official' state justice that cannot answer, for various reasons that will be analyzed, to many local conflicts and problems. As this paper aims to show, the coexistence of different institutions and different philosophies with similar competences does not necessarily lead to conflicts among them; rather, their differences may be an asset to be capitalised, opening up the discussion on the centrality of a monolithic official state justice.

BORDERING COMMONS, CREATING SPATIAL AND TEMPORAL LEGAL ORDERS

Albert Drent

Through their specific practices, farmers and transhumant pastoralists in the Far North Province of Cameroon have different ways of bordering and ordering their shared resources in time and space.

In the rainy season, farming practices create permanent physical borders between cultivated land and bush land, while transhumant mobility creates fluent, shifting borders on the surface of the landscape. Borders of transhumance are only temporarily and spatially mobilized through pastoral activities and the physical presence of the huts. Both practices thus involve different understandings of borders, in a normative-legal, temporal and physical sense. This different interpretation of borders according to practices might then become a source of conflicts. Immigrant farmers tend to ignore the cognitive borders of transhumant pastoralists in the absence of the latter, arguing that according to state law unoccupied land can be transformed into agricultural fields. Transhumant pastoralists therefore often find their pastures transformed into agricultural fields upon their seasonal returns, which creates frustrations and occasional disputes. Out of concerns of degradation and increasing conflicts, development projects, NGOs and the state have tried to order these practices by translating the flexible and dynamic borders between transhumant pastoralism and agriculture into permanent and legally defined borders.

This paper will show how actors continuously negotiate the legitimacy of borders with a reference to different "bundles" of normative and legal bodies in the context of specific socio-political and ecological dynamics. This process of bordering results in evolving temporal and spatial logics of ordering (temporally) competing practices for the exploitation of shared common resources.

Panel 6 WATER RESOURCES MANAGEMENT

WATER AS PUBLIC PROPERTY SUB-THEME: WATER RESOURCES MANAGEMENT

Germarie Viljoen

The National Water Act 36 of 1998 (NWA, section 3) broke new ground by introducing a novel concept in realising the right to have access to sufficient water, that of public trusteeship. Due to the uniqueness of the concept of public trusteeship, scholars hold different views on its origin, content, meaning and the scope of its implications. This research-paper is aimed at analysing the concept of public trusteeship, for it can guide the interpretation and application of the constitutional right to have access to sufficient water.

In scrutinising the German property law, it seems that the German property law may assist in developing the South African concept of public trusteeship as entrenched in the NWA. It comes to the fore that the German legal system has established a framework of 'Öffentliche Sache' in order to conceptually describe the interplay between private ownership rights in natural resources and restrictions on their exclusive use for the benefit of the public. Further, a current trend in German natural resources law and jurisprudence seem to recognise the importance of the public's use of water to such an extent, that the law positively assigns natural resources to the public.

It seems as if in the German context the idea of public trusteeship is entrenched in the concept of 'public property'. This evolving trend in the German public property law may reveal new insight into the nature of the concept of public trusteeship and resulting in the realisation to the right to have access to sufficient water.

ROMAN WATER LAW IN RURAL AFRICA: DISPOSSESSION, DISCRIMINATION AND WEAKENING STATE REGULATION?

B van Koppen, P van der Zaag, E Manzungu, B Tapela and E Mapedza

The recent water law reforms in Africa, Latin America and elsewhere strengthen permit systems. This water rights regime is rooted in Roman water law. The European colonial powers introduced this law in their colonies, especially in Latin America and later also in Sub-Saharan Africa. By declaring most waters as being public waters, they vested ownership of water resources in their overseas kings. This dispossessed indigenous peoples from their prior claims to water, while the new formal water rights (or permits) were reserved for colonial allies. At independence, ownership of water resources shifted to the new governments but the nature of the water laws, including the formal cancellation of indigenous water rights regimes as one of the plural water rights regimes, remained uncontested. This colonial legacy remained equally hidden in the recent reforms strengthening permit system. Based on research on the new permit systems in a context of legal pluralism in Tanzania, Mexico, South Africa, Ghana, Mozambique and elsewhere, this paper addresses two dilemmas. The first is: how can the dispossession and discrimination be reverted by recognizing and even encouraging informal water self-supply since time immemorial to meet basic livelihood needs by millions of small-scale water users? The second dilemma, which prevails in Sub-Saharan Africa, but less in Latin America, is: can permit systems become effective regulatory tools to combat water over-use and pollution, collect revenue, and, where historical justice warrants, to re-allocate water from the haves to the have-nots, as South Africa's water law aims? The paper provides evidence and best practices on, first, how the state can recognize legal pluralism and informal water rights regimes, and, second, how state regulation can only become effective through lean and targeted measures, so without nation-wide permits.

THE LEGAL INTERPRETATION OF CUSTODIANSHIP IN THE SOUTH AFRICAN WATER LAW

Karar Eiman and E van den Schyff

During the period after the first democratic election in 1994 considerable effort was applied to redress the lengthy history of conquest, expansion and exclusion of people from access to water and importantly, in the governance context, the exclusion of people from the actual management of the resource. This resulted in the promulgation of the National Water Act (36 of 1998). The three main central principles enshrined in the NWA are; equity, efficiency and sustainability encapsulated in the slogan; "some for all for ever".

The main instrument for this to happen is a new legal concept to South African natural resources jurisprudence.⁴ The concept of public trusteeship formally entrenched in sections 2 and 3 of the NWA. Compared to other common pool resources governance regimes; the single corresponding characteristic that lies at the heart of the concept of public trusteeship and that will be intrinsically part of any legal construct founded upon the concept, is that the „public trustee“ is cloaked with a fiduciary responsibility in respect of certain specified natural resources. A fiduciary responsibility exercised on behalf of the „people“.⁵ This concept of public trusteeship as it is found in the NWA was the subject of a study funded by the WRC6 to determine [1] the roles, responsibilities and obligations of all the role players in decentralized water management and governance and [2] the legal implications that the concept holds for water governance and water users in order to facilitate the development of the visionary "doctrine of public trust which is uniquely South African and is designed to fit South Africa's specific circumstances."

THE CONTRIBUTION OF PROPERTY RIGHTS TO COOPERATIVE APPROACHES IN WATER RESOURCE MANAGEMENT IN SOUTH AFRICA

Abraham Nkhata, Charles Breen and Duncan Hay

This research is embedded in the southern African Insaka Programme – Benefit Sharing in Social-Ecological Systems. It recognises that water and associated ecosystems are common property/pool resources. Cooperative approaches to aquatic ecosystem service management are being pursued to increase water security and improve benefit sharing. So, as we are dealing with common property resources we need to be familiar with common property rights regimes in order to promote and refine cooperative approaches.

The research examines local and international examples of property rights regimes, particularly those that sustain cooperative approaches over long term, identifies knowledge gaps, analyses the extent to which common property rights have been integrated into national policy and legislation, and develops a collective understanding of how common property theory influences aquatic resource management.

IS THE PERMIT SYSTEM A PANACEA OF INEFFICIENCY? THE CASE OF SOUTH-AFRICA

Dev Tawari

Although South Africa has adopted a most modern permit/license system to control access to water as a resource, the attainment of the lofty objectives – efficiency, equity, and sustainability– of the National Water Act (1998) depends upon two critical factors: 1. Institutional efficiency of the water management system, 2. Development of water markets and their efficient functioning. Since licenses are not issued in perpetuity, this has repercussions for investments in the water sector and the behavioral response of water users hence becomes an important variable affecting the development of the water infrastructure. The panel discussion is aimed at listing and specifying factors which will enhance the institutional efficiency of the system and enable water markets to function efficiently.

Panel 7

CULTURE AND GOVERNANCE

REVISITING PROTECTED AREA DEBATE: AN INDIAN CONTEXT

Amalendu Jyotishi

Revisiting Protected Area Debate: An Indian Context Amalendu Jyotishi Abstract Protected Areas like Reserve Forest, Sanctuaries and National Parks have been created for ecological services accrued from these forests. However, due to presence of multiple stakeholders with conflicting interest make functioning of Protected Areas a complex system. There are different viewpoints that come forth based on stakeholder interest. In this review paper, we attempt to understand the protected area debate considering different stakeholder viewpoints. We do so, on the basis of a review of pertinent literature in Indian context. Besides, we also attempt to question some of the constructs, especially the role of colonial government in deforestation, with a few important counter indications. The paper concludes with a few cases, where apparently appearing conflicting viewpoints can have possibilities of reconciliation. Key Words: Protected Area, Conservation, Forest Right, Forest Policy, India

THE POLITICS OF POLICY FORMULATION AND RESOURCE USERS' REACTIONS: GOVERNANCE OF THE BAOBAB TREE USING CUSTOMARY AND STATUTORY SYSTEMS IN CHIMANIMANI DISTRICT OF ZIMBABWE

W Kozanayi, R Wynberg and F Matose

Governance of communally owned resources has been the subject of many policy interventions. In sub Sahara Africa, customary systems and statutory instruments are the main methods used, and these fall under the rubric of legal pluralism. The relevance and impacts of these two systems of governance on the resource use has been a subject of debate among researchers. Missing though is a critical review of the real motives of the policy makers, the impact of the policies on the environment and resource users and the reaction of the resource users to either customary or statutory systems. An understanding of these issues will enable alignment of policy with resource users' needs and aspirations. We argue that governance of natural resources is not neutral as policy makers involved in shaping it either have an altruistic or egoistic intent. Further, we argue that the resource users who are impacted upon by the policies are neither powerless nor passive- they have subtle ways of extricating themselves from their plight due to disabling governance systems, be they customary or statutory. To understand the above issues, we use resource users' everyday experiences with statutory and customary systems in the use of the revered baobab tree in a rural area in the Chimanimani district of Zimbabwe.

**RECONSIDERING THE MEANINGS AND ROLES OF "CULTURES" IN JAPAN
THE PROBLEMS AND POSSIBILITIES OF "REKISHI-MACHIDUKURI HOU":
LAW OF HISTORICAL HERITAGE AND TOWN MANAGEMENT"**

Masami Mori Tachibana

In the time of globalization, the importance of the local cultures has been reconsidered in present Japan. As a symbolic change in law and governance related to this reconsideration of cultures, new national law called " Rekishi-machidukuri hou: Law of Historical Heritage and Town Management" was codified in 2008. This law is proposing the new concept of cultural properties and the balanced manner of preservation that includes the city planning perspective. The dichotomy of the tangible/ intangible cultural properties is not enough to vitalize the local society that faces the aging and declining birthrate.

In the national level, the Agency for Cultural Affairs, Ministry of Land, Infrastructure and Transport, and Ministry of Agriculture, Forestry and Fisheries jointly codified this new law. In the local level, in the process of implementation, the stakeholders contest and struggle the priority of preservation, livelihood, city planning and landscape rights. Local government is required to design the most appropriate plan for each local unit, however it is truly difficult to realize. In its difficult process, customary, local, national, and global concepts on the elements and roles of cultures are conflicted.

The paper presents the case studies from some local areas in Japan and discusses the problems and possibilities through the transitional implementation of " Rekishi-machidukuri hou: Law of Historical Heritage and Town Management".

**Panel 8
CLASHING FOR JUSTICE**

**CLASHING FOR JUSTICE POLITICAL VIOLENCE, AGENCY AND LAW IN
DEMOCRATIC INDIA**

Ruchi Chaturvedi

This paper puts anthropology to work with the goal of highlighting the tense relationship between competing notions of justice. It is set in Kerala, South India where more than four thousand workers of the Marxist Left and Hindu Right have been tried for political violence since the 1970s. Their prosecution and convictions have been regarded as important aspects of governing and managing the party workers' violence. Drawing on my ethnography of trials and amongst the local workers of the two groups, I examine how law's understanding of violence and culpability are repeatedly challenged not only outside but also inside the courts. Conflict between the Left and Right in Kerala has come to be fought not only on the streets, through violence, but also in the courts via supporters and sympathizers who appear as witnesses. I argue that for these supporters of the two groups, their testimonies become a way of exercising their political agency. Such testimonies are guided by the witnesses' affiliation to their respective political communities, and their multifarious understandings of justice. What does this clash between judicial justice and politically informed views of justice tell us about law as a tool for governing violence in democracies such as India? That is my central question here.

THE IMPLEMENTATION OF PROJECT LAW

Armando Guevara-Gil

In this paper I describe and analyze how "project law" is designed and enforced in a development intervention aimed at improving a small-scale irrigation system in the central highlands of Peru (Achamayo River Basin). It is widely accepted that "project law" is a new legal domain introduced by development agencies into local legal fields as part and parcel of their efforts to induce (positive) social change. But its form and content have not been thoroughly explored or understood, yet. My goal is to provide a thick description of one case in which a Catholic Church NGO, funded by USAID, cooperates with a small peasant Water User Association to improve its irrigation infrastructure. By analyzing the legal record that channels and shapes their interactions I shall contribute to a better understanding of how "project law" is devised, negotiated and finally enacted by the parties involved in the development intervention.

ADMINISTRATION OF LEGAL PLURALISM IN SIERRA LEONE

Markus Weilenmann

For most development agencies, "informal justice", "traditional justice" or "non-state justice systems" are considered as handy umbrella terms referring to all those institutionalised entities which settle conflicts outside of the officially accepted and formally legitimized state order. When designing projects or programmes for the promotion of justice and human rights most development agencies do not however refer to an analytical model allowing comparison of the post-colonial state law of developing countries with other legal concepts.

Instead, a dichotomizing and hence often over-simplified approach is preferred. In most cases, this approach is characterized by legal and state centralism and by the application of distinct governance techniques, which form the run of projects and can be subsumed under the heading "project law".

In my paper I will outline such processes and the resulting consequences which typically characterize the project and programme production of many bi- or multilateral development agencies. Hereby, I will refer to a restatement plan for local customary laws in Sierra Leone. This case is particularly striking as it shows the limits of a coherent project planning given the (unexpected) complexity of the envisaged task.

Panel 9 LOCAL GOVERNMENT AND LEGAL PLURALISM

SOCIAL OWNERSHIP AND COMMUNITY BUILDING: THE RECOGNITION PROCESS OF COMMUNITY JUSTICE IN SIMITI (COLOMBIA)

Marcele Garcia Guerra

In the evidenced context of Latin American Constitutions, the Constitution of Colombia (1991) presents a characteristic feature: the preview of Community Justice that undertakes a different notion of court and a new relationship with state normativity. This constitutional preview leashes institutionally the local particularism by recognizing and legitimizing the local jurisdictions, or rather, the community ways of social ruling for the solution – and why not say “dissolution” – of conflicts. This way, community ways of conflicts solution may be recognized and converted to a valid legal decision. There is thus the emergence of what is considered ‘social norm’: originated from a process of instruments construction through education and community empowerment based on self-identification and self-recognition of social norms that ensure the community coexistence. This article examines the process of social restructuring in the city of Simiti, south of Bolivar State in Colombia. That process is executed by the project of the National University of Colombia – School of Community Justice and focuses on giving recognition and strengthening (through conflict management) the community justice processes driven by the State and the Constitution to empower the community dynamics in face of the intense experience of massacres, murders and oppression that the region lived through by being for years one of the major operation centers of violent groups and rights violators.

STATE-RECOGNISED LEGAL PLURALISM IN ETHIOPIA: AN EXPRESSION OF A VERTICAL TOLERANCE CONCEPTION?

Katrin Seidel

The legal reality in multicultural societies such as Ethiopia contains different normative orders. In order to reflect this de-facto legal pluralism, the development of a policy of recognition,² in the sense of mutual and equal recognition, may be seen as an appropriate approach to overcome huge ideological gaps between various value systems and different legal ‘sensibilities.’ This approach appears to resemble the historic conflict between the politics of universalism and the politics of difference³. As both forms of recognition politics are reflected in the new Federal Democratic Constitution of Ethiopia, a continuous political process of negotiating procedures regarding the legitimate enforcement of law seems to be required.

This case study on Ethiopia shows a process of transformation in the thinking about law from a monistic state-centred perspective to a legal-pluralistic perspective. In order to mediate the relations of the various legal systems, Ethiopia has developed its own understanding of state recognised legal pluralism and secularism. The new Constitution establishes legal pluralism and secularism as fundamental principles of the pluralistic state and recognises local and religious judicial authorities along with state jurisdiction in regard to family legal matters. By officially allowing inter alia Sharia courts to function within and as a part of the Ethiopian legal system, more than one third of Ethiopia’s population has been offered the choice of utilising Islamic Family law and its diverse mechanisms of dispute resolution.

FROM ‘DESA’ TO ‘NEGERI’: CHANGES IN LOCAL GOVERNMENT SYSTEM IN MALUKU, EFFORTS TO ACCOMMODATE TRADITIONAL VALUES OR JUST POLITICAL RHETORIC?

Lidwina Inge Nurtjahyo

Since the enactment of Act No. 5 of 1979, the system of government that is unique in every region of Indonesia turned into a uniform structure defined according to the New Order government rule. Changes in governance structures not only affect the form and system of village administration, but also brought the damage to the people’s lives. The damage is realized, among others, when there is conflict between groups in Maluku. ‘Pela’ values are proud to be tight binding between villages, even between villages of different religions, were not able to play much in the event of conflict. The traditional leaders, especially the ‘raja’ (the district head) and ‘dewan adat’ or ‘saniri negeri’ (the district council), no longer has the authority to manage the conflict using the traditional values. Post-conflict, community leaders in Maluku, Central Maluku in particular see the importance to restore the customary rules (e.g. pela) which is considered to be effective tools of control. The interesting thing is the restoration of the customary rule is supported by the local government regulations. However, there are also new problems due to the dualism of governance mechanisms. On the one hand there is the structure of the village, on the other hand there are countries, working in the same time. In addition, problems occur because of lack of the traditional leaders capacity to fill the role required in the new form of ‘negeri’. In addition to these problems, suspicions arise also in public, whether the regulation about ‘negeri’ is indeed an effort to accommodate local values or just political rhetoric.

Panel 10

RELIGION, KINSHIP AND GLOBALIZATION

LEGAL PLURALISM IN DIVISION OF MATRIMONIAL PROPERTY. THE "CONTRIBUTION" TEST UNDER THE MALAYSIAN AND NEW ZEALAND LAWS.

Zuhairah Ariff Abd Ghadas

In Malaysia, the family law is governed by two separate legal systems, one for the Muslim and the other is for the non-Muslim. For the non-Muslim, applications for division of matrimonial property are dealt by the civil courts with reference to the Federal Legislation of Law Reform (Marriage and Divorce) Act 1976(LRA) whilst for the Muslim, matrimonial property claims are the state jurisdictions and under the Shariah courts. In New Zealand, the matrimonial property issues are regulated by the Property (Relationships) Act 1976 (PRA). The PRA mainly regulates division of property of married couples; civil union couples and couples who have lived in a de facto relationship when they separate or when one of them dies. Both LRA and PRA contain provisions which emphasized on the "contribution" of the divorced party in the claimed matrimonial property. However, it is observed that the courts in both countries have different approaches in interpreting and applying the term "contribution" in determining division of matrimonial property. This paper discusses the approaches of the courts in Malaysia and New Zealand in interpreting and applying the "contribution" test. Main objective of this paper is to highlight the legal pluralism behind one legal principle. Research methodology applied in this paper is statutory and doctrinal analysis.

GLOBALIZATION, RELIGIOUS PLURALISM AND CONSTITUTIONALISM

Francois Venter

The effects of globalization increasingly cause state citizenries to be characterized by religious pluralism. Where justice and equality are striven for, legal dilemmas constantly crop up regarding the need to allow or to prohibit religious conduct which offends against or disturb citizens professing different religions. Representative examples of such occurrences and the manner in which they were dealt with in various countries will be considered and commented upon. Against the background of demonstrable national and transnational inconsistencies in this regard, the question arises whether the global community can sensibly pursue the crafting of global constitutional norms for dealing with religious pluralism. This question will be confronted with reference to globalization, its meaning and relevance regarding respectively religious pluralism and comparative constitutionalism, the emergence of supra-national and international norms for dealing with religious pluralism and the difficulties of finding the balance between professed state secularism, majority religious sentiment and minority religious interests.

Plenary Speakers

ABANDONING 'RULE OF LAW'? DEMOCRACY, DOMINATION, AND (IL)LEGAL PLURALISM IN INDIA AND BEYOND

Devanathan Parthasarathy

Radical critics of liberal approaches to 'rule of law', have tended to use 'elite capture', 'state capture', or 'state as an agent of the ruling class' arguments to discredit modern 'democratic' strategies of law-making and order-maintenance, to debunk liberal criminal justice norms and theories, and / or to demystify notions of individual freedom and empowerment. While recognizing the limitations of both liberal and radical approaches to 'rule of law' frameworks, this paper seeks to develop on attempts in classical perspectives to redefine notions of legality and legitimacy by using a socio-legal co-evolution perspective. Such an approach would account for struggles around domination that does not privilege just class or capital, but instead also focus on evolving social formations in which social fields related to gender, ethnicity, resource management, governance, and business regulation are observed to implicate law making processes, implicate in fact the very definitions of legality and legitimacy.

Using illustrations from India and a few other national contexts, the paper seeks to expose the multiple ways in which 'rule of law' is valorized by powerful interests and dominant social groups in either resisting democratizing and pluralizing tendencies in society, or to sustain their authority and supremacy in diverse social fields. Such strategies involve processes of legalizing the illegitimate, and illegitimizing the legal, so that substantive legal-illegal distinctions become blurred, and discussions centre more on juridical and 'rights' frameworks with significant implications for equity and democracy, for individual and group life chances. The multiple and plural strategies of illegality – including legal methods of achieving illegitimate ends – have not been as well theorized as issues of legal pluralism. The paper is essentially historical-theoretical in nature and addresses these issues by taking up cases related to institutional strategies of maintaining order, liberal criminal justice norms and practices, the area of personal law, governance of extractive resources, and market regulation. Arguing that 'rule of law' approaches may further disadvantage the already marginalized, an alternative formulation rooted in deliberative democracy principles is articulated.

ON "LOCAL" GOVERNANCE OF INDIGENOUS PEOPLES' RESOURCES, POWER RELATIONS AND DEVELOPMENT OPPORTUNITIES

Chair Reetta Toivanen

Indigenous peoples in many parts of the world are in the process of renegotiating their relations with states on the one side and with new private actors (multinational and national companies) on the other side. One of the main goals for the indigenous groups in these processes is to get access to the natural resources in their living areas, either in order to protect them or to use them in a manner, which would benefit what is called the "indigenous way of life". They are emphasizing their right to free, prior and informed consent as expressed through the organisations and institutions representing the indigenous groups in dealing with the many external interests. The global efforts to lay down legal and political frameworks to guarantee the rights of indigenous people in the global scale requires not only own (indigenous) experts with specific skills to deal with the international law's and state politics' and private companies' demands but also an effective basis to exchange of information on experiences and advices. The UN Permanent Forum for Indigenous Issues has been established in order to offer this kind of forum for the exchange among different indigenous movements and support the cooperation with international human rights bodies. It aims also at finding new ways for the groups to become recognized by international and national laws and systems of decision-making. At the same time, the internationally expressed goal is that the indigenous people would be supported in protecting their own values, cultures, languages and ways of gaining livelihood and defining their own mode of development.

LEGAL PLURALISM: WHAT CAN INTERACTIVE GOVERNANCE THEORY OFFER?

Svein Jentoft

Fisheries and coastal ecosystems are often characterized by legal pluralism. This same is true for the institutions that seek to govern them. Not only would governors therefore need to find ways to account for the legal pluralism that exist within the systems-to-be governed, they must also address the legal pluralism that exist within the governing system which they themselves represent. Neither task is easy from a governability perspective. Governance theory would generally stress that focus should be on the interaction between the two systems and the importance of crafting institutions that are suited to represent and resolve inter-legal system differences within and between the two systems. But these interactions also involve in major governability challenges as they would require designs that are hybrid, flexible and dynamic. Drawing from real life examples in fisheries and coastal zones, this presentation discusses how interactive governance theory and the legal pluralism perspectives should learn from each other. The former offers a conceptual framework for investigating legal pluralism whereas the latter provides insights into multiple normative orders that governance theory should benefit from.

Theme 3

Property Relations



Theme 3

Property Relations



Panel 1

CONTESTING THE STATE: NATURAL RESOURCE CLAIMS AND DISCOURSES OF RIGHTS

LAND CONFLICTS AND LAWS IN MALAWI: A HIDDEN SYMBIOTIC RELATIONSHIP

Felix Lombe

Economies of many countries in Africa's Sub-Sahara region are heavily dependent on agriculture. With rising unemployment rate, subsistence agriculture still remains the single largest source of livelihoods. Coupled with high rates of population growth, land is consequently a hotly contested resource and as a result, a strong factor in many causes of conflicts. Thus as long as land is scarce and its access is made intricate and difficult (either deliberately or unintentionally), occurrence of land conflicts in predominantly agricultural economies is inevitable to some extent. That notwithstanding, land conflicts can cause undesirable and devastating consequences. It is therefore of paramount importance that land conflicts are managed and handled in such a way that they do not bring forth undesirable outcomes. Unfortunately, the dynamics of land conflicts in the empirical world are not so often easily amenable to theoretical prescriptions of conflict management tools. Conflict management tools such as negotiation, mediation, conciliation and facilitation face different challenges, depending on the nature, profiles and the actors in each land conflict. The paper analyzes one of the myriad land conflicts in Malawi.

CONSTITUENCIES OF CONFLICT: LAND RIGHTS, NARRATIVES, AND LEGAL PLURALISM IN DARFUR

Jon Unruh

Land tenure in an armed conflict context presents particular variations of legal pluralism. In Darfur the land rights aspect of the conflict is acute and a driving force of instability. The case is illustrative of armed conflicts where constituencies which embrace specific mixes of narratives and institutions produce sets of collective action regarding land that come to be set against one another. A specific interpretation of events, along with confusion and lack of information combines with rumor and highly emotive grievance to produce narratives of injustice which then serve to justify certain actions or non-action. Such narratives can then harden, become more acute and widespread, or more vitriolic as news of armed encounters spread. In Darfur there is a widespread belief that certain political elements are adept at playing off narratives, to exacerbate perceptions of rivalry, opposition, and ill-will, for specific purposes. While complex, a central issue in the Darfur conflict is that the primary way of legitimately accessing land (the hakura tenure system) is open to some, but only partially open to others, and is largely ignored by the government able to use statutory law to pursue large land acquisitions thus prompting resistance. The hakura tenure system originally emerged among sedentary agriculturalists. Current use of the term hakura however essentially means claim to exclusive or mono-ethnic land rights and hence political power, with the two not separable. This claim includes higher level political participation and is aggressively sought by certain groups (pastoralist, Arab) previously without such a claim as a way to facilitate greater land and political access to due to population growth, rangeland degradation, drought and economic opportunity. However the failure to obtain such access through the hakura system has resulted in a robust search for alternatives. Such alternatives include the pursuit of Islamic and statutory law, and being easily recruited by government promises of land rights in exchange for conducting a conflict against the original hakura landholders. Nevertheless there are latent opportunities in such environments that allow for the emergence of forms of collective action which can mitigate the oppositional nature of such sets, constituting a spatial socio-political avenue more conducive to achieving progress toward peace. This paper will examine the role of land rights narratives and constituencies which hold these in the Darfur conflict, and will describe certain nascent narratives and collective action which may be able to contribute to resolution of the conflict.



LAND RESTITUTION AND THE TRANSITION TO JUSTICE IN POST-APARTEID SOUTH AFRICA

Olaf Zenker

The concept of “transitional justice” has recently gained prominence as a crucial means to account for past human rights violations in order to enable a transition towards (more) justice in the future. Scrutinising South African land restitution, in which the state compensates former victims of “racial” land dispossession, in terms of “transitional justice” allows investigating it as a transitory phenomenon, in which “the justice” of the new South Africa is continuously contested and renegotiated. The paper first traces the emergence in the 1990s of the new constitutional provision for both the protection of private property and the obligation for land restitution and then sketches the concrete institutional set-up based on the Restitution of Land Rights Act (1994). Against this backdrop, the “justice” of the actual land restitution process is explored with regard to conflicting interpretations by various actors involved in an exemplary land claim on the so-called “Kafferskraal” farm in Limpopo. Here, a focus on divergent understandings of what historically constituted valid rights in land as well as corresponding forms of compensation reveals continuing discrepancies regarding the legitimacy of various property regimes. Given that the legal framework for land restitution does not encourage intensive engagements between opposed parties, possibly furthering mutual understanding and “common-sense”, this reductionist processing has thus contributed little towards “racial” reconciliation and a sense of working together towards a new state of justice – a fact that is possibly reflected by the telling absence of any significant discussion of South African land restitution in terms of “transitional justice”.

LEGAL PLURALISM AND PROPERTY RELATIONS IN THE CONTEXT OF ZIMBABWE'S FAST TRACK LAND REFORM PROGRAMME (FTLRP)

Makanatsa Makonese

Land reforms in Zimbabwe like in many former colonies have been premised on the concept of correcting historical injustices. Rules, laws and norms that have been used to implement the land reform programme in the country therefore have a long history and transcend many generations of law and rule making with various actors, players and structures being used either concurrently or separately to achieve various outcomes. The expected outcomes range from political, social and economic. The intended outcome in many instances justifies the applicable norms and legal strategies that are employed by the various actors and structures.

This paper will focus on the FTLRP in Zimbabwe and how the above issues played out in reality in terms of how and who accessed land under the programme. The situation of women in the process will be a major area of consideration. It will also address the issue of power relations and how these determined and continue to determine the applicable laws, rules or norms that are used in land allocation, access, use and control in the country under the FTLRP. The paper will be informed by empirical grounded research carried out in areas in the country where land has been allocated to various people with a description of the research methods and methodologies that have been used in gathering the relevant data.

THE COMPLEMENTARY RELATION OF EVERY DAY AND RITUAL KNOWLEDGE IN CONTESTING LOCALLY MANAGED MARINE AREAS: CONSERVATION, ETHNICITY AND RESOURCE CLAIMS ON MADAGASCAR'S SOUTHWEST COAST

Frank Muttenzer

The Vezo of (south)-west Madagascar are fishing people who forage both near permanent, ancestral settlements and in marine frontiers, and whose mobile livelihoods clash with marine conservation efforts. They neither have a cognized rights discourse nor a system of exclusive marine tenure, but frame resource claims in terms of ritual performances that complement their fishing skills. Expanded mobility reshapes identities in ways that cut across past ethnic and geographical regions. As migratory fishers claim frontier resources by invoking privileged contact with spirits of the sea, rather than with descendants of past settlers, the skills and rituals associated with mobility become more relevant in constructing ethnic boundaries. Cosmological schemes represent the sea as an inexhaustible container of fish accessible to all, peopled by spirits whose extraordinary powers can be tapped by humans. The recourse to magic and spirit mediums, as well as taboos, ‘bracket’ every day understandings that resources are exhaustible, successful foraging requires adaptive skills and innovative technology, and pioneers take priority over later immigrants. Understood as a technology of self, these rituals are less a matter of “intimate government” (Agrawal) of a commons than of channelling marine fertility toward multiple competing claimants of “ownership in stateless places” (Geisler). Using negation as affirmation they provide fishers with a code for contesting conservationists’ attempts to implement permanent no-take zones or periodic closures, and challenge received descriptions of locally managed marine areas as mere official legal restatements of self-enforced resource and habitat taboos. (241)

GOVERNANCE WITHIN CUSTOMARY LAND ADMINISTRATION IN AWUTU-SENYA DISTRICT IN GHANA

Tapiwa Uchizi Nyasulu

This paper examines governance of Chiefs in land administration in Ghana. Using data obtained from classical anthropology, questionnaire survey, in-depth interviews, and focus group discussions conducted in five communities of Kasoa township in Awutu-Senya District of Ghana between April 2009 and March 2010, we focus on cases of conversion of agricultural land to residential lands as an emerging form of reverse land-grabbing in selected communities. Accountability mechanisms are highlighted in relation to the extent to which chiefs legitimize farm land conversions; how these actions impact on their subjects’ livelihoods in relation to loss of customary lands; and how Chiefs meander around existing state reform initiatives on land administration is also explored.

Differential experiences were discovered in difficulties faced by indigenes and in-migrants in issues of land acquisition and use. In these communities, while 70% of in-migrants are more likely to lose land they acquired on arrival, indigenes are equally no longer assured of secured land titles due to dynamic processes of land marketization championed by chiefs and family heads. We find that local controls on land administration consist of checks on chiefs administrative powers through council of elders who have been corrupted and abused their authority. Further, there are government and donor initiatives to enhance accountability mechanisms in customary land management such as the Office of Administrator of Stool lands and the Customary Land Secretariat as my case study. However chiefs use ingenious means to legitimize their community farmland conversions through claim of outdated laws, adaptation to vagaries of rapid urbanization that is out-stripping the pace of town planning initiatives, skewed attention to selling unused farmland, manipulation of the meaning of communal landownership and use of some youths and land guards to foment conflicts in the area.

UPDATING THE BOAVENTURA SANTOS' THEORY ON LAND PROPERTY AND LAND MANAGEMENT IN BRAZILIAN SLUMSBY

Alex Ferreira Magalhães

Based on a recent empirical socio legal research in two slums at Rio de Janeiro, which was consolidated in our approved PHD thesis, this paper aims to reappraise the research developed by Boaventura Sousa Santos, in Brazilian slums, in the 70'. In his work, Santos identified the slum dweller's association as a central agency to control the access to land by these dwellers and to solve disputes among them. Now, we intend to make an up-to-date discussion on its roles, especially the first one. During the last sixteen years, a wide slums urbanization program has been carried out by Rio's government. As a consequence, some Slums Using and Building Acts were enacted by the city mayor, what hasn't ever happened before, and what is clearly pointing to a new bound definition between the original rules settled by dwellers themselves (and / or their association) – what Santos usually calls "Pasárgada Law" – and the so-called "Official Law". Given that contemporary situation, we would especially like to discuss two questions: 1) could we consider the "Pasárgada Law" is becoming "Official Law", or could we think about the opposite process? That is, has the Government been acknowledging the rules settled by the poor people or, rather, have these ones been working out their own codes through mixing official rules and their customary ones? 2) What are the Boaventura Santos' theory positive and negative points? With the second question we intend to develop some thoughts on a sort of critical analysis of legal pluralism's criticism.

AGAINST THE STATE: LAND CONFLICT STRATEGIES OF NON-GOVERNMENT ACTORS

Laurens Bakker

In the context of both developed and developing states, access to and control over land and natural resources is often contested between government and non-government parties. In many instances, more is at stake than just such land as is needed to meet daily needs. Control over land means control over economic wealth, livelihoods, social standing and -ultimately- the measure of autonomy that one enjoys. Recent decades have seen claims of rights to land come to the fore in various ways, and with varying success: from armed uprisings and indigenous rights protagonism to civil society movements and the involvement of international pressure groups. Ultimately parties must come to a solution that is accepted by all, but the manner in which such an agreement is reached is initially open to such ideas and strategies as parties' come up with. Choosing a role –government, indigenous community, rural poor- does however come with normative assumptions as to that party' intentions, social position, possibilities and limitations.

This paper is concerned with the fluidity that parties can create within their social status, political power and normative positioning. Bailey's (2001) well-known work on treason, strategies and spoils suggests how morality may sit in the way of pure rational calculations of advantage, but also how it adds credibility and legitimation to a party's position if used properly. Lund's (2006) work on 'twilight institutions' has indicated the profitability of keeping one's legal status, organizational structure and social support fairly undefined. Bakker, Nootboom and Rutten (2010) discussed the insecure nature of access, the presence of multiple authorities, and the availability of various sources of legitimization in Southeast Asia, to find that the logic of lodging and substantiating such claims is a process of which the outcomes can neither be predicted by participants nor by observers studying the process' normative base.

In this paper I depart from these premises while focusing the discussion on conflicts over land and natural resources between government and non-governmental groups. I seek to consider groups' notions of legitimacy, state authority and autonomous action in understanding groups' presentations of their own positions and those of their adversaries. In doing so, my aim is to attempt an inventory –however incomplete a first step of such a project might be- of non-state parties' strategies in large-scale land conflict and assess such strategies' effectiveness.

Panel 2 RURAL WOMEN AND LAND ACCESS

BUDLENDER: ABSTRACT FOR PLURALISM PANEL

Debbie Budlender

The overall aim of the survey of 3 000 women, spread across three ex-homeland sites, was to explore changes in how women access land, their use of different types of land, their decision making capacity in relation to the different types, and the extent of their vulnerability to eviction. In exploring the impact of marital status on the nature and content of women's land rights, special attention was given to understanding, capturing and reflecting the different types of marital and related relationships found in the three areas covered by the survey and the terms used to describe them.

In addition to marital status, the survey explored the presence of children and fathers of the children in terms of the relationship of the mother to the father at the time of the child's birth, the father's current relationship to the homestead and his contribution to the upbringing of the child. This latter focus provides for a richer understanding of what constitutes a broader notion of partnership (rather than the narrow term "marriage") and family in rural areas in current-day South Africa. This in turn allows deeper exploration of possible reasons for the changes revealed by the survey in women's access to land.

As with other surveys, this research exercise raised many new questions. The paper will highlight areas that could be further explored through further analysis of the existing data, areas that could be explored through further quantitative research, and findings that merit further qualitative research.

SINGLE WOMEN, CHANGING CUSTOMARY LAW AND THE CONSTITUTION

Aninka Claassens

This paper discusses the implications for customary law of significant changes in the rate of single mothers accessing residential sites in "communal areas" after the transition to democracy in 1994. It focuses on inherent difficulties in ascertaining the content of customary law, and in particular in ascertaining how customary law changes over time and develops in practice. The South African Constitutional Court has repeatedly stressed that customary law is 'not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life'.

The paper examines the tension between the "living law" approach adopted by the Constitutional Court and recent laws adopted by parliament that entrench the authoritarian version of rule-bound customary law inherited from colonialism and apartheid. The paper describes that the changes involving single women have not been led by traditional authorities, but appear to have been driven by rural women. Yet the new laws give traditional leaders sweeping power to define and develop the content of customary law. The paper questions whether, in the light of the processes of actual change that are underway, the role of traditional leaders can accurately be construed as a legislative role, or whether it is, and has always been, more declaratory in nature – reflecting shifts in values and patterns of behaviour that have taken place in practice and at scale.

THE LIMITS OF STATE LED LAND REFORM IN BURUNDI: A GENDERED APPROACH TO ACCESS TO LAND IN A CONTEXT OF LEGAL PLURALISM

Klara Claessens

Since its adaptation in 1986, the Burundian land code has been the subject of multiple debates nourished by issues such as the contradiction in the present code, the conflict potential, the issue of returning refugees and the strong link between access to land and food security. In the Arusha peace agreements, a land reform is proposed. This process is being supported by a number of international donors. This article uses a critical pragmatic approach to assess examples of women involved in land conflict to argue that a land reform in Burundi is necessary but not sufficient to reduce uncertainty and to guarantee an equal access to different groups in society. The proposed land reform underlines juridical and economic aspect of land tenure whereas access to land is foremost a social question, instrumental to power relations. Land rights are constantly negotiated at the local level in a complex power arena characterized by a situation of legal pluralism. In this situation, formal reform can only guarantee an equal access in the formal realm of the state. Therefore, instead of only supporting state reform, a bottom-up approach to women and land rights/access to land might be more efficient in order to reinforce the real negotiation power of women and to challenge the underlying gender inequality in existing institutions. A more holistic approach, based on empirical evidence of daily practices and negotiation strategies of women, is thus necessary.

TRADITIONAL COUNCILS AND WOMEN'S LAND RIGHTS: CONTRASTING RESPONSES TO SOCIAL CHANGE IN MSINGA, KWA-ZULU NATAL" PAPER FOR PANEL ON MARRIAGE, RURAL WOMEN AND LAND ACCESS IN SOUTH AFRICA

Ben Cousins

Securing the rights of people living within land tenure systems informed by customary norms and values (so-called communal tenure) is a critical issue within South African land reform policy. One key aspect that policy and law must address is gender inequality within such systems, given the strong commitment to equality set out in the Bill of Rights. But is customary law compatible with the principles of democratic citizenship enshrined in the constitution, or are they fundamentally at odds? Does the notion of "living customary law", as distinct from codified versions create opportunities for custom and democracy to converge?

This paper reports research findings from Msinga district in KwaZulu-Natal, South Africa. In 2009 the Mchunu Traditional Council took a decision to allow applications for land by single people, including women. In 2010 the Council also decided to issue letters making it easier for couples to register customary marriages. Both decisions were taken in response to practical problems faced by community members that arise from changing social realities. In contrast, the neighbouring Mthembu Traditional Council is resisting suggestions that the tenure system needs to be adjusted to changing social realities. Here, traditional leadership portrays itself as attempting to bolster traditional norms and values around marriage and family life, and expresses unease over notions of gender equality. The contrast between the two areas suggests that adapting the rules of "living customary law" to take account of dynamic social realities is an uneven and contested process, and is sometimes resisted.

ABSTRACT FOR 'LIVING REALITIES OF LEGAL PLURALISM' - PROPERTY RELATIONS THEME LEGAL PLURALISM IN THE ADJUDICATION OF WOMEN'S CLAIMS TO LAND IN TANZANIA

Helen Dancer

This paper examines the role of law and custom in the adjudication of women's claims to land in practice. For the first time in Tanzania's legislative history the Land Acts of 1999 enshrined women's equal rights to land in Tanzanian law and declared as void any rule of customary law which discriminates on the basis of sex in relation to land ownership, occupation and use. The Acts also created a specialist formal dispute settlement mechanism for land cases from Village to Court of Appeal. My study, which is based on a year of ethnographic fieldwork in Arusha, examines what happens when women make claims to land through litigation in Tanzania's land tribunal system. I focus on the Ward and District levels of land tribunal, which, as part of Tanzania's plural legal system, are required to take into consideration both custom and formal law in the adjudication of land disputes. Customary land tenure throughout most of Tanzania is founded on patrilineal principles and as such, incorporates gender discrimination. There is therefore an apparent tension between the legal recognition of patrilineal custom and its rejection in circumstances of gender discrimination. Drawing upon extended case studies including interviews with litigants, lawyers, tribunal members and community leaders I will discuss how different levels of tribunal in contemporary Arusha are negotiating and interpreting applicable laws and customs when judging women's claims to land. My paper will also consider the ways in which parties have recourse to various legal and customary processes in the history of a dispute, and the dynamic interactions that occur between family, clan and community-based dispute resolution and legal proceedings.

THE LIVING LAND LAWS OF RABULA

Mazibuko Jara and Rosalie Kingwill

The paper will analyse evidence of local practices in Rabula village, Keiskammahoek district, regarding women's rights and access to land, and the gendered impact of devolution of land. Rabula has distinctive land tenure arrangements. Freehold tenure dominates spatially and socially. Non-registered tenures such as Trust tenure and Permission to Occupy (the latter to residential sites in the village) exist side-by-side. Historically less prestigious or secure than freehold, holders of these rights have since 1994 greater claims to legal protection and security than previously, subtly changing local power dynamics. All land holders share commonage for grazing purposes, though relationships between the various categories of rights holders are far from tension-free.

There appear to have been significant changes in the rights of women to land, both those associated with freehold property and those with other types of rights. The evidence suggests that the political transition in 1994 and the adoption of the new Constitution in 1996 have had a positive impact on gender equality in both categories.

Rabula villagers engage a hybrid blend of practices from different legal legacies with regard to land access and devolution of property. The paper will compare evidence from different tenure systems and will also seek to draw out the significant implications of this hybrid for land administration in terms of the common law, customary law and the constitution. Results from a 2010 CASE survey showing successful claims by unmarried women to land in their own right will contribute to the findings and analysis.

“LIVING REALITIES OF LEGAL PLURALISM” PROPERTY RELATIONS LAND RIGHTS AND ENTITLEMENTS OF TRIBAL WOMEN IN SOUTHERN RAJASTHAN, INDIA - A GENDER PERSPECTIVE ON LEGAL PLURALISM

Soma Kishore Parthasarathy

Tribal communities in Rajasthan, as elsewhere in India, are bound between two sets of legal processes- the customary laws that have prevailed for centuries and form the basis of justice delivery in their communities on the one hand, and the legal structures of the state that have evolved based on constitutional guarantees in post-independence India. The issue of women’s legal rights in such communities has been further convoluted by the normative structures of state policy. There are also the singular provisions for marginalized and excluded sections through development programs, not legal but administrative decisions that impinge on legal domains of rights and entitlement. While conceptualizations of inclusion and entitlements are articulated in state policies, the reality of tribal women’s lives among these communities is embedded in ambiguities as they appeal to structures of customary law on the one hand and are driven to seek recourse from formal legal structures when these traditional mechanisms seem too pitched against their entitlement.

JUDGING WOMENS EVICTION CASES IN MSINGA: THE UNCERTAINTIES OF SEEKING JUSTICE AT THE INTERSECTIONS BETWEEN CUSTOMARY AND STATE LAWS AND COURTS

Sindiso Mnsi Weeks

In the results of the 2010 survey on Women, Land and Customary Law conducted by the Community Agency for Social Enquiry, a small number of women in Msinga responded that they had either been threatened with eviction or felt forced to leave their homes because of relatives. These women fell into almost all categories pertaining to marital status: never married, married, separated/deserted and widowed. Among them, a fair number had chosen not to seek legal redress at all. Of those who did seek it, most turned to the traditional authorities for assistance. Their satisfaction with the resolutions of the customary authorities varied. Yet, of those women who were unsatisfied, very few appealed the matter to the Magistrate’s Court; even there, not all were content with the remedy given. Only one woman went directly to the Magistrate’s Court (without having first been to the traditional authorities). This paper is based on follow-up interviews with the women who responded in the survey to say that they had been constructively ‘evicted’ and pursued justice in one or more of the legal institutions to which they had access. Discussing women’s experiences of loss of land rights at the hands of their relatives, this paper looks at the ways and extent to which they are able to rely on the available dispute resolution forums to secure justice against their relatives and restore their rights in land. It concludes with an evaluation of the Traditional Courts Bill in light of these women’s stories.

**Panel 3
NATURAL RESOURCE MANAGEMENT AND CUSTOMARY LAW**

PROTECTION OF TRADITIONAL KNOWLEDGE IN SOUTH AFRICA: DOES THE “COMMONS” PROVIDE A SOLUTION?

Elmien du Plessis

The Kruger to Canyons Biosphere Region in the Limpopo and Mpumalanga provinces in South Africa is part of UNESCO’s World Network of Biosphere Reserves. Bushbuckridge (or Bosbokrand), an area in this region, has many traditional healers that provide primary healthcare services for people in this region. Traditional knowledge about the different types of local medicinal plants and uses are developed by these healers, and many of these plants own their sustainable use and survival to the traditional healers. Access to these plants, however, became increasingly threatened by people outside the community (muti hunters and pharmaceutical companies) who over-harvested the plants, thereby threatening the continued existence of traditional healers and traditional knowledge.

The government recently tabled The Intellectual Property Laws Amendment Bill [8 of 2010] in an effort to protect traditional knowledge through existing forms of intellectual property legislation such as trademarks, copyrights, geographical indications, designs and patents. The Bill was not passed due to heavy criticism from civil society, mainly centred on the fact that traditional intellectual property law is not the most suitable avenue for protecting traditional knowledge. Finding a solution to the protection of traditional knowledge in the traditional Intellectual Property framework seems unfavourable, since traditional intellectual property law does not pay adequate regard to the communities’ ability to regulate the use of traditional knowledge through customary law and practices.

This paper suggests that the discourse of the commons might provide a solution for this problem. The preliminary hypothesis is that the commons can be employed as an institution where communities can freely manage access (also from outsiders) and use of the traditional knowledge without having to rely on a model of exclusion.

CONSTITUTIONAL RECOGNITION OF INDIGENOUS RIGHTS TO LAND AND RESOURCES: WHAT IMPACT ON LEGAL PLURALISM IN CANADA?

Ghislain Otis

Section 35 of the Constitution Act, 1982 recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. Aboriginal peoples have hoped that this reform would create a secure constitutional space for indigenous legal traditions and systems regarding land tenure and resources management on ancestral indigenous territory. This paper will discuss the extent to which the implementation of section 35 by courts, governments and aboriginal peoples has so far actually fostered a constitutional regime of legal plurality regarding property relations in Canada. The analytical focus will be on the characterisation of the relationship that is currently emerging between indigenous legal traditions and western law in the processes of determining aboriginal land rights and defining land rights derived from both historic and modern treaties. The key question addressed will be whether Canadian law is decisively moving away from the colonial pattern of marginalising and undermining indigenous laws regarding land and resources. The following issues will be canvassed: do constitutionally protected aboriginal and treaty rights make indigenous law an autonomous source of land rights and the basis for regulating land tenure and use on traditional indigenous territory? Has the negotiation of modern land claims agreements clarified and protected the application of indigenous customary law in land and environmental governance? What is the role of indigenous self-government in the dialogue between legal traditions and the development of a plural legal order in property relations? Are there situations where state law and indigenous law interact so as to engender some novel hybrid property law? These questions will be answered using brief case studies and practical illustrations.

CUSTOMARY LAW AND MINING

Henk Smit

In South Africa, the land rights of communities to their communal land are recognised, so is their customary law. But their consent is not required for mining on their land.

In the Richtersveld case in 2003, the Constitutional Court noted that 'the real character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership under indigenous law. The community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface'.¹ In the same matter the Supreme Court of Appeal found that the mainstay of the community's culture was its customary land tenure laws and rules, and emphasised community consent as the organising principle for engagement between the community customary system and third parties:

"The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples: A non-member using communal grazing without permission would be fined 'a couple of heads of cattle'..."

The paper explores the consent requirement in customary law, statute law such as IPILRA², and the lack of community participation in decisions under mining law.

ACCESS TO AND DISPOSAL OF NATURAL RESOURCES: THE CASE LAW OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS AND THE INTER-AMERICAN COURT ON HUMAN RIGHTS

Hennie Strydom

In *SERAC v Nigeria* and *Center for Minority Rights Development v Kenya*, the African Commission has handed down two of its most significant rulings on state duties with regard to securing the rights of indigenous communities in exercising their rights in communal land and to dispose of the natural resources over which they were entitled to exercise collective property rights. What featured prominently, especially in the *Minority Rights* case, were Article 21 (the right of all peoples to freely dispose of their wealth and natural resources) and 22 (the right to economic, social and cultural development) of the African Charter. Of significant importance in this regard is the Commission's identification of the factors/elements that will determine the 'distinctiveness' of an indigenous community for the purpose of classifying such a community as a "people" within the meaning of the African Charter on Human and Peoples' Rights. This has always been a highly controversial matter in African countries who feared a proliferation of claims by indigenous communities against the state with all kinds of political and economic consequences. What makes the African Commission cases all the more interesting is the high reliance by the Commission on the jurisprudence of the Inter-American Court on Human Rights on the rights of indigenous communities. Collectively, the existing jurisprudence of regional human rights bodies, coupled with the standard-setting of the United Nations in matters of this regard, has done a great deal in developing a legal framework for accommodating rights in communal land and in emphasising the importance of securing, at the national level, legal tenure for the holders of communal property rights.

THE CLASH OF INTERNAL CUSTOMARY GOVERNANCE STRUCTURES WITH A POSITIVIST EXTERNAL ENVIRONMENT AS A CLASH BETWEEN COMMON LAW OWNERSHIP AND CUSTOMARY PROPERTY RIGHTS

Wilmien Wicomb

In many regards, the problematic pertaining to the accommodation of customary law within the South African legal framework is closely tied up with the problem of authority. For the members of traditional communities, governance has many faces: their land may be protected by the Constitution, but managed by the traditional leader; their votes in the local government election may go to the councillor of their choice, but their services are delivered by the 'tribal office'. The current legislative framework for traditional leadership in South Africa has arguably allowed traditional leaders to hold legislative, executive and judicial powers over their communities.

In the context of this crisis of authority, the exercise of ordinary people of their right with respect to communally held land becomes particularly problematic: both in terms of asserting the right within the community, but also asserting the right as a community in the face of external pressure. Drawing on the argument of Christian Lund that property and authority are linked by the dual recognition of the institution (as socially legitimate) and the property (by the institution), this paper asks the question how customary communities assert their rights within a broader legal framework when they are drawing on different and often opposing institutions for recognition? In other words, if the user right in property of a member within the community exists due to the recognition thereof of the traditional leadership, how does that member assert that same right as part of the community in the face of land grabbing – when the recognition of the property right is suddenly the function of a different institution speaking a different legal language? It is a question of the clash of customary and common law ownership, but here investigated through the prism of authority.

Panel 4
INTELLECTUAL PROPERTY: ACCOMMODATING PLURAL REGIMES TO PROTECT TRADITIONAL KNOWLEDGE AND ADVANCE DEVELOPMENT

ACCESS TO KNOWLEDGE AND THE PROMOTION OF INNOVATION: CHALLENGES FOR PACIFIC ISLAND STATES

Sue Farran

In the island countries of the south Pacific traditional knowledge informs access to, use and production of cultural artifacts, flora and fauna, medicine, plant stocks and the management of natural resources. All too often however this indigenous knowledge is ignored by the intellectual property regimes expressed in the formal legal systems of these countries. With pressure to develop trade and use resources to earn income as well as agendas to encourage inward investment from foreign enterprises the acknowledgment of and accommodation of traditional knowledge and indigenous intellectual property rights is at risk of being marginalised or misrepresented. All too often western-centric IP laws are adopted which tend to favour industrialised nations' perceptions of the role and function of intellectual property.

At the same time, however, there is international rhetoric recognising the rights of indigenous people and the rights of autonomy of developing states to determine the pace and form of development. There is also regional acknowledgment of the valuable role of traditional knowledge and global demand for the preservation of biodiversity, land and sea-based ecosystems and traditional cultures.

Pacific islands are torn between the desire and demand to exploit traditional knowledge and advocacy of its protection and preservation. The situation is not helped by plural legal regimes which reflect not only a legacy of colonial rule, but also international obligations and expectations, regional initiatives, and national response and the recognition of customary law as a formal source of law.

This paper considers some of the current dilemmas facing Pacific island states, which, while they have a rich cultural heritage and extensive unwritten traditional knowledge, are also facing the challenges of compliance with externally imposed goals through the development of intellectual property laws fit for the twenty-first century.

THE GOVERNANCE OF TRADITIONAL KNOWLEDGE: IS ACCESS AND BENEFIT SHARING A MISFIT?

Rachel Wynberg, Roger Chennells and Doris Schroeder

International legal agreements such as the Convention on Biological Diversity (CBD 1992) and its recently adopted Nagoya Protocol (2010) set in place a framework to reward holders of traditional knowledge for contributions they may make towards the commercial development of biodiversity products. Countries that are party to these international agreements are required to develop and implement national laws to govern access to genetic resources and traditional knowledge and the sharing of benefits arising from their use. However, around the world there are almost no success stories of benefit sharing with holders of traditional knowledge. One of the critical reasons for this failure is that the CBD forces indigenous and local communities to frame their knowledge in the form of „ownership claims“ in potential competition with other groups, and in contrast to customary systems of governance. The concept of ownership, however, is a distinctly western concept that is incompatible with many customary law systems, which do not frame questions of access and sharing according to ownership principles. The paper will discuss possible approaches for reframing benefit sharing to align better with customary law (international justice in exchange).

HOW CAN THE THEORY OF LEGAL PLURALISM ASSIST THE TRADITIONAL KNOWLEDGE DEBATE?

Miranda Forsyth

The international movement to protect traditional knowledge and expressions of culture has recently started to recognise that there may be a role for customary law in determining access to such knowledge. However, the debate has for the most part tended to revolve around stereotyped assumptions about what customary law is, and to rule out its involvement on the grounds that it is, inter alia, too local, too fluid, and too ingrained with local politics. This paper argues that despite the undeniable difficulties that the utilisation of customary law in an international setting poses, it must be attempted given the inextricable connection between traditional knowledge and the customary law of a particular community. Two of the main reasons for the introduction of a legal framework are to address the sense of injustice of those in the Global South over the misappropriation of their traditional knowledge by the West, and also to preserve the rich diversity of knowledge that exists in communities throughout the world. Both of these aims cannot be accomplished by denying the cultural basis in which the particular knowledge originates and in which access to it is currently regulated, even if this is no longer as strong or complete as it once was. This paper therefore uses developments in the discipline of legal pluralism over the past decade, in particular the notion of hybridity (Boege et al, 2008) together with the theory of responsive regulation (Braithwaite, 2002) to propose practical ways to ensure that customary law principles and institutions are at the heart of national and international frameworks to protect traditional knowledge and expressions of culture.

Panel 5 LAND ADMINISTRATION SYSTEMS AND PLURALISM

“THE IMPACT OF PROCRASTINATION OF BASIC AGRARIAN LAW IN INDONESIA TO AGRARIAN REFORM INITIATIVES IN REFORMATION ERA”

Lilis Mulyani

For more than thirty years, the Indonesian Basic Agrarian Law (UU Pokok Agraria or UUPA), as the main law enacted to manage the agrarian resource has been frozen and temporized (or tarried), due to political and economic reasons in the New Order era. Recently, there has been an effort to return to the very heart of the Law, the Agrarian Reform, as one of the agenda of the current elected President, Susilo Bambang Yudhoyono. The program seeks to redistribute and register land (and/or property for those living at the urban areas), and include them in formal land registration system, in order to enhance their living condition (reducing inequality of land ownership, illegality, and as part of poverty reduction program). Interestingly, the structural and real condition of the impact of procrastination the law has left the agrarian policy in --sectored (sectoral), administrative-minded, prioritizing formalism rather than substantive justice-- situation. At society level, uneven land distribution and land holdings are massive, a condition where a great number of people (peasant, people living in poverty both in rural and urban areas) live without access to land at all; while there are small number of people occupy and own large areas of land. At state level, the sectored laws continues to applied, leaving uncoordinated agrarian resource management by the four main institutions, the National Land Agency (BPN); the Ministry of Forestry, the Ministry of Energy and Mineral Resource; and the Ministry of Agriculture.

In this paper, I would like to analyze how the new agenda of Agrarian Reform would find many obstacles in its implementation due to the abovementioned situation. I would also try unfold the historical as well as socio-legal perspectives to the rights to land given to the people living in poverty having face to face with the situation, where legal and policy setting do not give them any favor.

PROPERTY RIGHTS IN SINGAPORE STRATA SCHEMES: BALANCING THE COMPETING INTERESTS INVOLVED

Keang Sood Teo

In Singapore, the tension between facilitating public interest objectives and the rights of minority unit owners in respect of their properties is most pronounced in the area of en bloc or collective sales. Collective sales are a unique feature of the strata title landscape in Singapore. The basic idea is to enable the majority unit owners to sell the strata development to a purchaser without the consent of the minority unit owners, subject to the approval of a Strata Titles Board or the court, as the case may be. It is proposed to look at how the relevant collective sale provisions balance the competing interests involved and the court's approach in this regard. In this context, the nature of strata ownership will also be examined. Potential areas for reform will also be considered.

TAILORING LAND REGISTRATION, LESSONS FROM HISTORY

Jaap Zevenbergen

Land registration legislation has been identified as the most technical law subject around (Ruoff). It concerns, however, a large number of choices between possible (legal) options, that will not automatically bring tenure security to the land holder. Not only do certain options only work well in combination with others, but the approach to land registration has to fit the context. This includes the legal context with regard to property law, but at least as much the administrative context of the country (institutional, legal and practical). Often both interrelate and can strengthen or weaken each other. An example is the focus on preventive justice that is often attributed to the involvement of a Latin notary in a land transfer, that adds more to a deeds than to a title registration based approach.

Land registration in many countries roots in legal transplants, which were introduced without much concern for these contexts. Lessons will be drawn from the history of a few developed countries on accommodating transplants and fine tuning them in their context after that (e.g. French Civil Code into the Netherlands), and the question will be discussed if these lessons can also teach us something for countries currently struggling to increase their tenure security.

JUBILEE CONGRESS ON LEGAL PLURALISM, LAND ADMINISTRATION SYSTEMS AND PLURALISM EQUITY IN ACCESS TO CAPITAL THROUGH LAND REGISTRATION IN NAMIBIA

SK Amoo

Namibia at the time of independence inherited two broad categories of land rights, freehold titles and customary land rights of usufruct, which for the purposes of legal continuity, have been given both constitutional and statutory recognition. Current land rights in Namibia therefore are governed by two legal regimes. In terms of registration of land rights, the country with the exception of the Rehoboth Gebiet, uses the deeds registry system under the provisions of the Deeds Registries Act 47 of 1937, as opposed to the Torrens or Notarial systems. Land registration in the Rehoboth Gebiet is governed by the Registration of Deeds in Rehoboth Act 93 of 1976. The deeds registry system is meant to ensure certainty and security of land rights and titles, but the cost involved might negatively impact on the financial capacity of holders of various customary rights to comply with the requirements of registration. Land registration facilitates the flow of and access to capital from financial institutions to holders of registered rights. Flow of capital is therefore underpinned by registered rights. However, given the differing interests in land, registration per se does not guarantee equity in access to capital. Rights created by short term leases, or even statutory lease created over communal lands and customary land rights do not attract the level of security that financial institutions require for the release of capital.

Taxation is part of land administration and it is the role of the State to ensure distribution of revenue and provision of services through property taxation. Interests in land must be registered for tax valuation purposes and to ensure liability for payment of tax. Property registration is therefore a sine qua non for efficient property taxation.

Panel 6 THE ROLE AND RULES OF LAND LAW

NAVIGATING BETWEEN TRADITIONAL LAND TENURE AND INTRODUCED LAND LAWS IN PACIFIC ISLAND STATES

Sue Farran

As in Africa and other parts of the world, the South Pacific region experienced British colonial administration accompanied by the introduction of non-customary land laws and policies. In some cases colonial administrators took land which they deemed uncultivated by western standards and claimed it for the state or Crown; in others they reshaped customary institutions and structures. On independence and in the years that followed much of the land which had been alienated was restored to customary owners, but the slate could not be wiped entirely clean. In all cases, the legacy of introduced laws, and forums for the resolution of land disputes, remains relevant today, despite the fact that in most Pacific island states over 80% of land is still held under various forms of customary tenure. Alongside shifts from rural residency to urbanisation, from subsistence economies to monetary ones, there are, however, pressures - both external and internal, to do things with land; to make it more productive or to commercialise it or exploit it in some way. The perception is that non-customary tenure facilitates this while customary tenure hampers or obstructs it. Some Pacific islanders embrace the opportunities, other oppose them, often depending on whether the motive is short-term gain or longer term security. Drawing on legal and anthropological research, this paper looks at contemporary examples of how Pacific islanders are negotiating the space between two systems and the challenges that confront them in doing so. It focuses in particular on the island countries of Melanesia, which is a part of the Pacific region where not only is customary land tenure predominant and traditional forms of social organisation still strong but also where political instability and linked to this, weak governance, is a persistent feature of the broader landscape.

NATIONALISATION OF LAND RIGHTS AND ITS IMPLICATIONS ON INDIVIDUAL, COMMUNAL LAND

Olubemi Fatula

Before the Nigerian Land Use Act in 1978 was promulgated, insecurity of title to land characterized landholding system in Nigeria. There was no encompassing and comprehensive law dealing with security of title to land in Nigeria. Particularly the system of customary land tenure operating in the south encouraged fraudulent practices. The expectation was that by the promulgation of the Act, the customary and individual land holding/tenurial arrangements, which had been identified as impediment to agricultural modernization and economic development in Nigeria would be eliminated. Again the Act was also expected to enable the citizenry, irrespective of social status to realise the aspiration of owning the land to live a secure and peaceful life and that government would no more encounter problems in acquiring land for public purposes.

The general view however is that the Act has not made any appreciable impacts on access to land by individuals, communities and government for national integration and developmental purposes. The expropriatory and confiscatory nature of the Land Use Act can also not be denied. As a result of these, several calls for its amendments or total repeal have been made and official steps are being taken in that regard by the National Assembly. Drawing examples from other jurisdictions this paper examines the impacts of the Act on national integration, economic development, individual, community and public land ownership in Nigeria.

PAYMENT SCHEMES FOR ENVIRONMENTAL SERVICES IN TRANSITION COUNTRIES: A RECONSIDERATION UNDER AN EQUITY AND JUSTICE CRITERIA

Ingo Gentes, Sergio A Ruiz and Oemar Idoe

Payment for environmental services (PES), as a new economic instrument for environmental conservation and rural development, has a turbulent history in tropical countries. Although PES has been tested for almost a decade now in developing countries, questions still remain about validity of the concept, the language in which it is couched, and the array of mechanisms for its implementation (Van Noordwijk & Leimona, 2010). Despite the fact that special tools for measuring such services have been developed for the forest and hydrology sector and PES models are being applied through several deals and agreements in tropical regions, a broader assessment of the structural impact on forest management, poverty alleviation and social equity and its overall benefit-sharing for local actors is still requested⁴.

The last two decades, and mainly through technical speeches and political discourses, PES agreements for hydrological services or forests have been promoted as a successful strategy for the conservation of forest or water resources. Different international agencies (World Bank, FAO, and UNECE) have promoted the use of economic instruments for the valuation of water quantity and quality and forest species coverage in different river basins mainly in transition and less developed countries.

It is worth to note that the proposed models are not new and have been developed in industrialized countries⁵. Several presumptions were forecasted by environmental economists and a wide range of international development agencies; first, that market places relying on transferability of rights on territorial and natural resources would be more effective and equitable than top-down approaches promoted by the government. In their most expected and wishful outcomes, PES should generate a potential of local development, guarantee financial flow and build a sustainable economic-ecological incentive, in order to promote appropriate practices for the use of natural resources (Tognetti et al. 2004; 2005).

FORMALIZING LOCAL LAND RIGHTS IN BURUNDI: WAY OUT OF CRISIS OR YET ANOTHER PROBLEM?

Dominik Kohlhagen

In a context of high tenure insecurity and increasing conflicts over land, Burundi's government recently adopted its first ever land policy guidelines. Borrowing a policy model from Madagascar, the 2009 'land policy letter' foresees the creation of decentralized land services that issue certificates recognizing local land tenure arrangements. By taking explicitly into account customary rules and practices, the new land services are meant to provide for a socially more acceptable and an economically more affordable alternative to the centralized titling system.

Based on fieldwork carried out between 2008 and 2011, this paper questions the implementation of the new policy on the ground. It shows that, despite first appearances, the system is not truly adapted to local realities. By applying only to conflict-free land, it merely deals with the least problematic cases. Also, the new certification system does not provide sufficient protection for people with low bargaining power: by formalizing locally accepted power imbalances, it weakens their position even more. In many regards, the reform relies on oversimplified assumptions about supposedly 'customary' land tenure and fails to address the real needs and expectations of rural farmers.

Panel 7

INDIVIDUALIZATION OF LAND RIGHTS IN A COMPETITIVE SOCIETY

BEYOND CATTLE AND COMMUNAL LAND: HOW THE MAASAI ACCOMMODATE CHANGES IN LAND TENURE

Winnie Wairimu and Paul Hebinck

This paper explores changes in Maasai lifestyles and livelihoods that are triggered by the shift from communal rangelands to private land tenure. Land registration creates new arenas for articulating new land use opportunities and fluid political coalitions which on the one hand discredit facile notions of community or interest groups based on property rights and new gender relations on the other. Adaptation and accommodation has been a major avenue by which the Maasai incorporate tenure changes and new property rights in their livelihoods and lifestyles. The paper explores the various strategies that fall outside the 'traditional' Maasai cattle economy and which are increasingly becoming important. While women grab opportunities to grow vegetables in their fenced shamba and raise a marketable surplus, men reconfigure their alliances that enables livestock movement in the face of relative land scarcity. Leasing land for sand harvesting and charcoal burning is taking place alongside all this. The newly forged alliances around land between Maasai themselves and with other ethnic groups signals that new meanings of land as a resource emerge, contesting and gradually replacing cattle as the pivotal for Maasai lifestyle.

"THERE IS NO LAND WITHOUT AN OWNER": COMMUNAL LAND RIGHTS AND THE AFRICAN COMMONS IN THE AGE OF GLOBALIZATION

Paul D Ocheje

Common pool resources, which have for centuries formed a significant part of rural livelihoods in Africa, have come under increasing push toward individualization owing to rapid socio-economic change. Economic globalization is a strong factor driving the current scramble for the commons against a background of weak legal recognition of communal rights in most of Africa. Tenure reforms and administrative schemes aimed at enhancing sustainable use of common pool resources and advancing the interests of the rural poor have largely foundered on a legion of difficulties. This paper would explore a mixture of legislative and judicial clarification of communal rights to achieve two purposes: (1) clarify the nature of communal rights over the commons, thus to move them beyond the debate in which they are currently enmeshed, and (2) make the interest of the rural poor a central element in any scheme of expropriation by constructing a rights-based legal regime on the use of the commons. The paper will draw on constitutional and judicial developments in other parts of the Commonwealth, such as Canada and Australia, which have successfully addressed a similar situation as the one in Africa.

"CUSTOMARY LAND RIGHTS IN THE CONTEXT OF URBANISATION AND DEVELOPMENT" LAND ADMINISTRATION SYSTEMS

JF Whittal and M Mabesa

Many land administration systems e world over are subject to radical reform in order to improve their performance. This contribution explores the goals of such reform processes from a holistic and systems perspective and taking into account multiple perspectives. The modelling of existing land administration systems using Viable Systems Modelling (VSM) and soft systems methodology (SSM) is proposed. Reference is made to modelling case studies of the fiscal cadastral system in Cape Town prior to the General Valuation 2000 reform process, the Land Surveys and Physical Planning (LSPP) system of land administration in Lesotho prior to reform.

INDIVIDUALISATION OF LAND RIGHTS IN A COMPETITIVE SOCIETY

EO Akrofi and JF Whittal

Peri-urban land is situated at the interface between the planned settlements and demarcated parcels of the urban fabric, and the expanse of rural land. Peri-urban areas experience rapid change in property values and land management practices, increasing land development and need for resources and services. This is exacerbated by rapid urbanisation to many Africa cities. This contribution provides some lessons from Ghana in managing this transition with a focus on customary land administration systems which contribute to effective management of land in such areas. The authors endorse an evolutionary approach to land tenure in which customary rural land can evolve to individual parcel-based urban land in a managed process which aims to preserve customary land rights and hence also, the rights of the poor.

Plenary Speakers

EMERGING FROM THE SHADOWS OF THE LAW: CONSTITUTIONAL AND POLICY PROTECTION OF COMMUNITY RIGHTS TO LAND IN KENYA

Patricia Kameri-Mbote

Before the promulgation of the 2010 Constitution of Kenya in August 2010, land in Kenya was classified as individual or private, government, and group or community (trust land and group ranches), and governed under different laws. Customary land rights had not received adequate attention in law. However, the more policy and law sidelined customary tenure systems, the more resilient these systems became, raising the need to reform land relations in Kenya. Group/community ownership in Kenya has been dealt with under trust land and group ranches. The notion of trust land was a way of giving recognition to group and native rights. Trust land consists of areas occupied by the natives during the colonial period and which have not been consolidated, adjudicated, and registered in individuals' or groups' names; and native land that has not been taken over by the government. With respect to such land, every tribe, group, family, and individual has all the rights that they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications of that law. These rights relate to occupation, use, control, inheritance, succession, and other disposal of land. There is an elaborate procedure to follow in the event that the government or the County Council wants to set aside trust land for public purposes, thus protecting the rights of residents from expropriation without compensation. Tenure to trust land has however increasingly changed from the trust status. The implications of this change are significant. In most instances of such change, access for communities previously occupying the land is curtailed significantly. With regard to group ranches, the Report of the East Africa Royal Commission of 1953–1955, concluding the policy on land tenure in the East African Protectorate as Kenya then was, noted that individualization of land ownership should be the main aim. It noted, however, that such ownership should not be confined to individuals but could also be extended to groups such as companies, co-operatives, and customary associations of Africans. It is within this broad context that this paper analyses the implications of the provisions of the 2010 Constitution of Kenya and the first ever land policy in Kenya (Sessional Paper No. 3 of 2009) which provide for the recognition of community rights to land alongside public and private land. The paper will explore the tensions that arise as different notions of property struggle to subjugate others. Indeed as community rights emerge from the shadows, social conceptions of property will need to be addressed in a context where economic, legal and political conceptions have dominated.

LAND CLAIMS AND NATIONAL PARKS: CONSIDERATIONS AND IMPLICATIONS

Juanita M Pienaar

The Restitution of Land Rights Act 22 of 1994 makes provision for individuals and communities to submit claims for the restoration of land or rights in land (or equitable redress) if certain requirements are met. Since 1998 numerous claims have been submitted in relation to national parks in South Africa. My paper will deal with the specific considerations to take into account when land that is of national importance, both for economic and conservation purposes, is claimed. The basis of dispossession will firstly be dealt with in light of the requirement that a dispossession must have been under a racially discriminatory law or practice. Essentially the aim of the paper is to investigate the manner in which these claims have been dealt with in South Africa to date. It is also important to analyse the implications of the specific approach followed. For example, although never a specific aim of the restitution process, the management of national parks has been transformed as communities are increasingly becoming more involved. Assessing the viability of these implications and some guidelines for the future will conclude the investigation.

INDIVIDUALIZATION OF LAND RIGHTS IN A COMPETITIVE SOCIETY

Zoey Chenitz and Amanda Richardson

“This paper will critically examine the policy framing of rural land rights as conceptually distinct from urban land policy and other development policies. In the context of predicted population growth and decreasing availability of land, policymakers will need to be cognizant of the potential for the individualization of land rights to exacerbate land conflicts, place stresses upon the environment, and make it increasingly difficult to maintain equitable access to land, particularly for vulnerable groups. Using examples from recent land reforms in countries such as Venezuela, Afghanistan, and Kenya, this paper will consider how current land policies and regulatory models might be modified to account for anticipated social changes, and whether a holistic approach to land reform might better prepare countries for the risks of individualized land rights.”



Theme 4
**Human Rights and
Development**



Theme 4

Human Rights and Development



Panel 1 WOMEN'S RIGHTS

LEGAL PLURALISM, WOMEN'S HUMAN RIGHTS AND LEGAL DEVELOPMENT AID: PERSPECTIVES FROM THE 'DEMAND SIDE' IN PEMBA CITY, MOZAMBIQUE

Giselle Corradi

With its focus on poverty reduction, the current development paradigm increasingly results in 'access to justice' programs within justice sector aid. Amongst the goals that are pursued with these kind of interventions we find an enhanced protection of women's human rights. Based on a case study in Pemba city, northern Mozambique, I propose to explore how these initiatives relate to legal pluralism and the perspectives of justice users at the grassroots. First, I will provide an overview of the main justice actors in Pemba city and their characteristics. Then, I will describe the main initiatives undertaken in this region for the promotion of women's access to justice and their human rights. Finally, I will analyse the relationship between legal pluralism and legal development aid in the light of local perspectives from 'the demand side', where I will discuss the experiences of women in Pemba city navigating the locally available justice structures and claiming their human rights. This proposal draws on qualitative research conducted in Mozambique in August and September 2009 and in September and October 2010. The methodology included 102 semistructured interviews with local and international legal development actors, experts, local leaders, justice practitioners and justice users, as well as observation of dispute resolution of 24 cases at a local organization offering justice services for women in Pemba city, 4 focus group discussions, the collection and analysis of program documents and a desk review of relevant literature.

DEVELOPING TIMOR-LESTE'S JUSTICE SECTOR IN THE CONTEXT OF LEGAL PLURALISM HUMAN RIGHTS AND DEVELOPMENT"

Andrew Harrington and Annika Kovar

Timor-Leste, the first independent state of the 21st century, has reached a crucial point in the development of its legal sector, attempting to determine the role of customary law in its judicial system.¹ Some steps have already been taken to regulate the matter with the 2009 Penal Code barring public crimes, including domestic violence, from being pursued by informal systems. This process is taking place against the background of a relatively thin knowledge base regarding the content and mechanisms of informal legal systems, which are highly diverse and localized across Timor-Leste. The existing literature is unable to comprehensively map the functioning of these multiple systems as well as the position of women within them. This lack of knowledge is particularly evident and problematic regarding cases of domestic violence, a major societal problem in Timor-Leste.² While domestic violence is now a public crime, the legal framework is little understood and often ignored by both formal and informal actors. Most domestic violence cases are still resolved informally, often disadvantaging female victims who may be blamed for violence perpetrated against them. Yet, crucial issues remain blurred, such as the identity of local authorities administering or influencing dispute resolution, or the question how much of a voice women have in informal justice processes. While the 2010 Law Against Domestic Violence is a step forward in the fight to end violence against women, there are serious gaps between the intent of the law and its effects and implementation at the national and community level. For instance, the public nature of the crime clashes with the fact that many women may not want their husbands to be sent to prison, leaving them and their family without economic support. It will point the way forward on how to better engage and represent socio-cultural values of grassroots communities in formal law in Timor-Leste and globally – without sacrificing human rights and national legal standards.

LEGAL PLURALISM AND THE POLITICAL DYNAMICS OF ORDERING

Alejandro Bendana, Helene Maria Kyed

Legal pluralism is becoming more and more complex as a result of the increased diversification and hybridisation of different norms, practices and institutions of social ordering. This is the case in Southern Africa, as in many other places of the world, where global flows and local claims to more self-determination challenge the state-centric model from within and from the outside. New and old actors on the scene co-exist, interact and compete in various ways, producing new forms of legal meaning and practices. Present dynamics of legal pluralism compels scholars to go beyond looking at isolated institutions or at separate, distinct 'systems' such as the state, the customary, the modern and the traditional. Rather scholars should employ methodological approaches that can capture the networks, the mobility and the hybrid constellations of actors, norms and practices. Central to such an analysis, this paper argues, is to focus on the political dynamics that infuse the different, coexisting forms of ordering. Such political dynamics range from political struggles over the authority to define what is the legitimate order, and its significant other, to political strategies whereby actors attempt to gain political positions or enrol others to pursue political goals by being involved in justice and policing operations. Such political practices are not new, but, I suggest, have become intensified as more and more actors are involved in justice provision and policing, and as states and international agencies increasingly attempt to capture that which lies outside of the state. This paper explores the political dynamics of ordering in Mozambique and Swaziland.

PROJECTING WOMEN'S RIGHTS IN THE CONTEXT OF STATE FAILURE: THE CONGOLESE CASE

Evelyne Jean-Bouchard

The Democratic Republic of Congo (DRC) is considered as a failed state by the international community. Historically, the international recognition of a State was based on the principle of effectiveness to guarantee the insertion of a positive power within its normative conception. During the period of decolonization however, there has been a shift from the principle of effectiveness to the principle of legality in international law, caused by the political pressure to create a new universal order of equal and sovereign States. This has led to the creation of some failed States that are fundamentally unfit to control the external and internal influences upon their territory. It is now the whole issue of the State monopolization of the legitimate means of violence that is put into question. In order to monopolize the legitimate use of violence, a State must first and foremost monopolize the law. But if a State has never obtained a real positive power, this implies that there are parallel legal orders, beside, above and within this State. These orders individuals are able to mobilize. From this theoretical basis, a multi-sited ethnographical field research will be conducted among women's groups in Goma (DRC) in June 2011 in order to track the path of the normative reconstructions and borrowings made by Congolese women on a daily basis. These borrowings may enable them to define for themselves a normative space better adapted to satisfy their fundamental rights. This also may allow us to reconcile, in a feminist perspective, the static and radical approaches to legal pluralism.

Panel 2

LEGAL PLURALISM IN THE CONTEXT OF CONSTITUTIONAL SUPREMACY

LIVING REALITIES OF LEGAL PLURALISM: THE CHALLENGE OF LEGAL PLURALISM TO THE HUMANRIGHTS DISCOURSE)

Manfred O Hinz

The message as we find it, e.g., in the Constitution of Namibia and according to which African customary law is valid to the extent that such customary law does not conflict with the constitution (Article 66 Sub-article 1) sounds simple and straightforward: Whatever of sub-constitutional law and, in particular, of non-state law is not in line with the constitution is not valid and, therefore, has to disappear from the book of law. However, a closer look reveals that the application of the noted constitutional message is much more difficult than its wording suggests:

What determines that a rule of customary law is not in line with the constitution? Will answers to questions of the constitutional validity of law be convincingly derived from the inherited constitutional and human rights jurisprudence? Would such an approach be acceptable in view of the fact that the source of customary law is not the state and its legitimacy different from the legitimacy of state-created law?

Questions of this nature characterise the jurisprudential challenge posed by legal pluralism as a legal anthropological concept to the current human rights discourse. The proposed paper will elaborate on how legal pluralism and research inspired by it can contribute to the current human rights discourse and its application to customary law

CHILDREN'S RIGHTS AND LEGAL PLURALISM IN NAMIBIA BETWEEN HUMAN RIGHTS AND CUSTOMARY LAW

Oliver Ruppel

Children's rights are not isolated from other human rights. They are – without hesitation – universal. Namibia has strongly committed herself to the protection of children's rights by incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal instruments dealing with the protection of children's rights on a global, regional and sub-regional level. These instruments contain a broad variety of material rights for children. Thus, the statutory side offers a comprehensive system of children's rights applicable in Namibia. But what about customary law and practice? There is still room for improvement, and although the Namibian government has committed itself to address the situation of children in the country in a comprehensive manner in order to foster their development, protect them, and prepare them more effectively to serve society, some more work still needs to be done, especially with regard to child poverty, policy support and services, HIV and AIDS, education, discrimination and, in some cases, harmful cultural practices. With regard to cultural practices such as certain initiation rites, circumcision and other discriminatory practices the following questions are raised in this paper: How can serving the best interests of the child be rendered compatible with legal pluralism and traditional African values in Namibian traditional societies? The answers are reflected in the research: the sensitive aspects under customary practices that do not conform to the constitutional principles of equality, fairness, and justice need to be identified, and those concerned need to be informed that such practices are not in line with Namibia's constitutional values.

RIGHT TO DEVELOPMENT: A SUBJECTIVE RIGHT

Ravishankar K Mor

Right to development is considered today as a human right, everyone has a right to development, each individual and group, society and Country have this right. Development has reached many poor and remote states today. Liberalization, Globalization and privatization have reduced this world a single homogeneous body where every individual will get opportunity for his fullest development. Can a horse and a lame race each other, can a weak and mighty wrestle each other, if allowed will it be an equitable competition. If equal opportunity of development is given to a weak and a mighty, who you think will get benefit there of, obviously a mighty one will grab all the opportunities of development leaving nothing for a relatively weak competitor. Thus internationally, developed countries will further develop while developing and under developed nation will always remains so. This right to development needs to be looked at micro level. In the name of right to development, right to exploitation should not be conferred on a few strong individuals. Treating equals unequally is inequality and treating unequal equally also amounts to inequality. Therefore right to development shall be subjective to conferment of other primary and secondary Human rights. While right to development is well defined by international bodies like World Trade Organization (WTO), Basic Human rights are still not defined in clear, certain and unambiguous words. This area is left for Local, regional and National players to be defined and redefined, conveniently, as a subject of Legal Pluralism. No doubt subject of Human rights fairly and squarely falls into sphere of Legal pluralism, so also right to development shall be a part of legal pluralism and not of a strict national and international legal regime. IN this research paper an attempt is made to study inter-relationship of Human rights and Development, as against contemporary distinction made between two by defining one as not justifiable while other biding and justifiable through international legal bodies. Human rights issues are generally left for law like arrangements rather than statutory laws, so also issue of development shall be left for such 'folk law' than by a statutory law. Both human rights and right to development shall form part of living reality of legal pluralism and not legal universalization

Panel 3 ACCESS TO JUSTICE AND RULE OF LAW

PLURALISM, DECENTRALIZATION AND SUSTAINABLE LIVELIHOODS: EVIDENCES FROM PAKISTAN

Khurram Iqbal

The decentralization of power from central to local level is part of a global trend to reduce the role of central government in order to increase the efficiency of services, as well as to promote pluralism, public participation, democracy and empowerment of the poor. In Pakistan the system of local governments replaced the century old colonial system of bureaucratic governance. In the previous system of governance at the local level, the province governs the districts directly through the bureaucracy at the division and district levels. And the local government for towns and cities exist separately from those of the rural areas. The provincial bureaucratic set-ups were the designated 'controlling authorities' of the local governments, and tend to undermine and over-ride them, which breeds a colonial relationship of 'ruler' and 'subject'. The separate local government structures engender rural-urban antagonism, while the administration's role as 'controlling authorities' accentuates the rural-urban divide. The Local Government design is based on five fundamentals: devolution of political power, decentralization of administrative authority, deconcentration of management functions, diffusion of the power-authority nexus, and distribution of resources to the district level. It is designed to ensure that the genuine interests of the people are served and their rights safeguarded. Policies, institutions and processes form the context within which individuals and households construct and adapt livelihood strategies. On the other hand these institutionally shaped livelihood strategies may have an impact on the sustainable development. The present paper analyzes the impact of devolution plan upon livelihood strategies of people living marginal rural areas of Pakistan. Sustainable Livelihood Framework developed by UK based Department of International Affairs (DfID) has been used to identify livelihood assets, livelihood strategies and livelihood outcomes of the rural people.

ACCESSING JUSTICE FROM THE THIRD WORLD TO GLOBAL MIGRATION: STUDY ON INDONESIAN WOMEN DOMESTIC MIGRANT WORKER IN THE UNITED ARAB EMIRATES

Sulistiyowati Irianto

This study is aimed at critically describing the access to justice for Indonesian women who work as domestic migrant workers in the United Arab Emirates. This research focuses on some pillars of access to justice: (1) the availability of law which ensures justice, (2) legal knowledge or legal literacy, (3) legal identity, and (4) legal aid or legal consultancy. How the substance of law which ensures protection to working migrants is critically assessed? To what extent is the access of these women domestic migrant workers to legal knowledge, legal identity and legal aid? Restricted or non-existent access to justice for these workers has placed them in a disadvantaged, vulnerable group. There is barely any law specifically made to protect them. This lack of law is strongly related to how domestic work is constructed socially and culturally as low-level, dirty, dangerous jobs which cannot be considered equal to other formal jobs in the job market. After all, law indeed reflects the social and cultural contexts where it exists. This study challenges the social embeddedness link women as subject of migration and their relations with many parties along the migration "business" from their hometown to host country. How women are structured in that social embeddedness touches the issues of ethnicity, race, class, religion, nationality and gender. It is obviously clear how the women are positioned in that intersectional power relations. These women domestic migrant workers have gone through a lot from how they are placed and projected in the social and cultural structures in their family and their country of origin to their experience in the society in the destination country and the global market. Almost all of the women whom were researched said that their decision to become a migrant worker was made by their family or there was a need to place themselves as a survivor from poverty in their family. The recruiting brokers in their hometown were people they knew or the respected members of the community such as a religious figures. That is an additional factor which makes them even more convinced to go.

PRESERVING DISCURSIVE SPACES: POVERTY REDUCTION STRATEGY, HUMAN RIGHTS AND DEVELOPMENT DISCOURSE

Robin Perry

The incorporation of the social in the new 'post-Washington' development paradigm is perhaps best embodied in the adoption of the Millennium Development Goals and, more specifically, by the genesis of the Poverty Reduction Strategy Papers (PRSP). PRSPs have become a critical device for integrating human rights into development, to the point where the realisation of human rights could now be said to be one of the objectives of, and not merely a means to, development.

However, amidst the grandiose claims and lofty rhetoric it is possible to discern a continuation of the inhibiting orthodoxies and rationales which have been at the heart of 'development' since its inception. The PRSP model has the potential to neuter the oppositional, political qualities of human rights and occupy the dynamic space in which those rights might otherwise operate. In short, PRSPs have become the institutional vehicle for directing the application of human rights towards achieving the orthodox consensus of what constitutes development.

Through an analysis of the rights to participate in public affairs and to access justice, I will thus situate human rights as taking an established, positivist and 'universal' form 'within' development, on the one hand, and an unsettled, pluralistic, resistive form within societies on the other. PRSPs may have the potential to satisfy certain human rights objectives and specific poverty reduction outcomes, however, the restricted scope for the interpretation and construction of rights will reduce the contestation of development to the conventional question of "growth plus" rather than "what growth how".

Panel 4 CULTURE, HUMAN RIGHTS, AND DEMOCRACY: THE INFLUENCE OF THE JUDICIARY

MAINSTREAMING DISABILITY INTO THE POVERTY REDUCTION PROCESS IN UGANDA: THE ROLE OF HUMAN RIGHTS-BASED APPROACH TO THE NATIONAL DEVELOPMENT PLAN

Moses Mulumba

Research evidence suggesting the link between disability, human rights and poverty has been increasing at an alarming rate in recent years. Despite this, there has been very little attention to ensuring representation and inclusion of people with disabilities in poverty reduction processes. However, disability movements and their partners have been increasing pressure to ensure that people with disabilities effectively participate in the development of national development plans targeting poverty reduction.

This paper presents the findings under the project of African Policy on Disability and Development. Under this project, the author wrote a Master of Philosophy thesis which aimed at analyzing the extent to which the human rights-based approach can be used as an advocacy tool for mainstreaming disability in the national development processes targeting poverty reduction in Uganda. The study involved key informant interviews, focus group discussions and literature review.

It was established that the international human rights framework such as the Convention on the rights of persons with disability and the guidelines for a human rights approach to poverty reduction strategies provide opportunities for using a human rights approach to development. There are however, a number of challenges such as the poor implementation of national legislation to vindicate these rights. The paper recommends the need to adopt the human rights-based approach in any development initiative, ensuring disability mainstreaming in policies and the national development plan, in order to effectively address poverty reduction in Uganda.

THE JUDICIARY, CONSTITUTIONALISM, AND DEMOCRACY IN AFRICAN UNION MEMBER STATES

André Mbata Mangu

Democratic struggles have been going on the African continent since the late 1980s. They culminated, in South Africa, with the adoption of the 1993 Constitution later superseded by the 1996 Constitution that finally brought the apartheid regime to an end. These democratic struggles therefore triggered constitutional and political changes in many African countries, including those in Southern Africa. Constitutional reforms took place; elections were conducted; and human rights were also given a pride of place in the constitutional and political discourse. In many countries, however, it has been a case of "constitutions without constitutionalism" and "elections without democracy", with "people voting without choosing". "Democracy" and human rights feature in all African Constitutions that also provide for the principle of separation of powers with an independent judiciary.

Considering the role that the judiciary plays in any constitutional and democratic society, this paper aims to investigate the status of the judiciary, particularly the highest court in the land i.e. the Constitutional or Supreme Court, and its contribution to the promotion of constitutionalism, democracy, and human rights in Africa, with specific reference to Southern Africa. It will be a case study of three representative member states of the Southern African Development Community (SADC), two from Anglophone Africa, namely South Africa and Zimbabwe, and one from Francophone Africa, namely the Democratic Republic of Congo.

Panel 5

COMMUNITY AGENCY, POWER AND SOCIAL SOLIDARITY: TIME FOR A RETHINK ABOUT HOW THE RIGHT TO HEALTH IS CONCEPTUALISED

COMMUNITY AGENCY, POWER AND SOCIAL SOLIDARITY: TIME FOR A RETHINK ABOUT HOW THE RIGHT TO HEALTH IS CONCEPTUALISED? THE LEARNING NETWORK FOR HEALTH AND HUMAN RIGHTS

Leslie London

It is increasingly being recognised that the realisation of the right to health is contingent not only on sound legal application of human rights standards, but more particularly on the assertion by civil society of claims that are created by legal entitlements to a range of socio-economic rights. The experience of the Learning Network for Health and Human Rights, which brings together a set of academics from multiple disciplines in collaboration with civil society partners pursuing health goals in the Western Cape and in partnership with NGOs in Southern Africa, highlights how agency on the part of communities and groups most at risk to violations of their rights can be strengthened so as to advance health rights. Key themes in this empirical work, which will potentially contribute to reconceptualising how the right to health should be best framed are: a) the critical role of participation and information as instrumental to realising health rights; b) the nature of empowerment achievable through rights mobilisation in civil society; c) the reciprocal creation of space for civil society action by rights claims, and d) the place of social solidarity and approaches based on traditional African philosophy in reconfiguring health rights as collective, rather than individualist claims. The panel will present case studies from the LN's experience, with particular emphasis on structures established in South African law for effecting community participation in health as vehicles for realising the right to health, with comparative examples drawn from the Ugandan context.

IMPLEMENTING COMMUNITY PARTICIPATION THROUGH LEGISLATIVE REFORM: A STUDY OF THE WESTERN CAPE'S DRAFT POLICY FRAMEWORK FOR COMMUNITY PARTICIPATION

Benjamin Mason Meier, Caitlin Pardue, Damaris Fritz and Leslie London

This study examines the political, historical, and legal context for the development and implementation of the Draft Policy Framework for Community Participation in Health in the Western Cape Province of South Africa (Draft Policy). Through national and provincial legislative analysis and a series of in-depth interviews with key stakeholders, the researchers analyse key facilitating and inhibiting factors for the adoption and implementation of the Draft Policy, drawing out implications for participation policy in public health law reforms and concluding that attempts to promote participation have not adequately addressed the underlying factors crucial to achieving effective participation. Assuring the future success of participation-driven health policy, this article proposes that policymakers develop future legislation to enable more effective institutions for community participation through an emphasis on representation, roles, responsibilities, and capacity building. Given the public health importance of structured and effective policy for community participation, and the critical importance of participation as instrumental to realising a rights-based approach to health, this analysis informs future scholarship on the challenges to institutionalisation of participation in health services policy and provides the practice community with a research base to frame future policy reforms.

POWER: THE MISSING LINK IN MEANINGFUL COMMUNITY PARTICIPATION

HJ Haricharan, L London

Community participation in health has been a central tenet of the Primary Health Care approach since the Alma Ata declaration (1978) and is a key element identified internationally to realising the right to health (Potts, 2009). In South Africa, community participation in planning and provision of health care services has been outlined in The White Paper on Transformation of the Health System (Department of Health, 1997) and formalised in The National Health Act 61 of 2003 (Department of Health, 2004) with provision for the establishment of health committees at all clinics. The National Health Act requires that the provincial governments must develop legislation that stipulates the functioning of health committees in the provinces. According to Padarath and Friedman (2008), provincial legislation is in varying stages of development. In the Western Cape, a Draft Policy Framework for Community Participation is yet to be implemented. Research has shown that health committees have the potential to impact positively on realising the right to health and improving health care services (Loewenson, 2004, Glattstein-Young et al., 2009). However, numerous studies indicate that health committees are not functioning optimally (Padarath and Friedman, 2008). This paper presents findings from a study of health committees in the Cape Town Metropole, which suggest that the present institutional arrangements do not provide for meaningful community participation. Drawing on Potts' work (2009), the paper defines meaningful community participation as a form of participation where health committees play a role in setting the agenda and in decision-making. The paper argues that health committees' participation is inadequate because their decision-making roles are limited where they function to assist clinics as 'auxiliary' community health care workers and social workers. In many cases, health committees align themselves with facility managers and health care workers rather than being community representatives.

COMMUNITY HEALTH COMMITTEES AS A VEHICLE FOR PARTICIPATION IN ADVANCING THE RIGHT TO HEALTH

G Glattstein-Young, M Stuttaford and L London

Achieving the Right to Health requires more than simply reliance on legal claims. Different institutional arrangements might provide diverse pathways to realizing rights for vulnerable communities. While there is some evidence to suggest that participation can assist the realization of the right to health, the corpus of knowledge establishing this link is still in its infancy. We present results from a qualitative study exploring the relationship between participation and the right to health and examining the factors influencing this relationship within three health committee-facility pairs in South Africa's Western Cape Province. This paper provides evidence for an important interrelationship between community participation and the right to health that is highly influenced by elements of power. Findings demonstrate that even in resource-constrained settings, structures for community participation were able to advance the right to health but that this was limited by the degree of power held at various levels of decision-making. Factors identified as having the greatest impact on the ability of community governance structures to advance health rights include: power and dis/trust, political will, gate keeping and legitimacy. These findings contribute to a growing body of research deepening our understanding of the links between participation and the right to health, and inform the development and implementation of policy on forms of participation, nationally and internationally, as related to the right to health.

TRIPS, COMPLIANCE AND SOCIAL WELFARE: THE IMPLICATIONS OF INTELLECTUAL PROPERTY LAW REFORM FOR UGANDA'S SOCIO-ECONOMIC DEVELOPMENT

Moses Mulumba

Trade is a powerful instrument, but much of its potential to improve health as a right, to reduce poverty and stimulate development is getting lost. International multilateral trade agreements such the Trade-related aspects of intellectual property rights (TRIPS) agreement have been criticized for the over emphasis on ensuring high profit margins of private entities at the expense of human rights of the world's poor population and the effect has been high prices on essential drugs beyond the reach of millions of people in Africa, no access to educational materials and limited agricultural production. Human rights principles and mechanisms require that trade rules should not stifle access to essential goods for the welfare of society, including access to affordable medicines, educational materials and food in developing countries.

This paper gives an overview of Uganda's progress in complying with the multilateral Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It discusses key pieces of legislation or proposed legislation that constitute the intellectual property law and policy reform process and their implications for social welfare and national development. It specifically highlights gaps in the protection of intellectual property rights in three key areas: plant varieties, pharmaceuticals, and educational materials. This is a synthesis of the available literature on the TRIPS Agreement, online resources, consultation reports of the Uganda Law Reform Commission (ULRC) on specific legislations, the text and spirit of the specific legislative or draft legislative documents; and interviews with selected stakeholders.

Panel 6

ON "GLOCAL" GOVERNANCE OF INDIGENOUS PEOPLES' RESOURCES, POWER RELATIONS AND DEVELOPMENT OPPORTUNITIES

NATURAL RESOURCES SUBJECT TO A PLURALITY OF LEGAL ORDERS, THE CASE OF THE GÜEPPÍ RESERVED ZONE (PERU)

Ellen Desmet

This contribution aims to explore the different legal orders that are applicable to the natural resources situated in a protected area in the extreme north of the Peruvian Amazon.

The Airo Pai ('People of the Forest', known in Spanish as Secoya) are the ancestral inhabitants of this biodiversity-rich region. In the course of the years, Kichwa, Huitoto and mestizo communities settled down as well. In 1997, a provisional protected area, the Güeppí Reserved Zone, was superimposed on the indigenous territories. In 2006, the Peruvian state signed an agreement with Petrobras Energía Peru S.A for the exploration and exploitation of oil and gas. This Block 117 is superimposed on the indigenous territories and on the Güeppí Reserved Zone, in violation of both international human rights law (lack of consultation) and the Peruvian protected areas legislation (lack of prior favourable opinion of the protected areas agency).

The Güeppí Reserved Zone is characterized by a "plurality of legal orders" (de Sousa Santos 2002). International human rights law and the Peruvian legislation interact with traditional ways of organization and territorial management. Attention is paid to the influence of these legal orders on one another and on the situation on the ground. The case study is based on doctoral field work.

AFFIRMING BIO-CULTURAL RIGHTS – COMMUNITY PROTOCOLS AS A BRIDGE BETWEEN CUSTOMARY AND NATIONAL/INTERNATIONAL LAW

Gino Cocchiaro

Over the last 10 years we have witnessed the emergence of a number of international legal frameworks that link the customary laws, traditional lifestyles and cultures of indigenous peoples and local communities (IPLCs) with conservation and sustainable use of local ecosystems. These often referred to as bio-cultural rights and are not enshrined in one legal framework but are integrated in a range of different regimes, ranging from human rights instruments (e.g. UNDRIP, ILO 169) to environmental frameworks (CBD, Nagoya Protocol on Access and Benefit Sharing, UNFCCC) and subsequent national legislation. In spite of the emergence of these rights, however, for many IPLCs these rights remain unattainable, often due to a lack of legal awareness or because these rights are (knowingly and unknowingly) undermined through actions of third parties. An additional challenge to exercising these rights by communities is the fact that many of their concerns are directly connected to each other on the community level and cannot be addressed in isolation, yet are fragmented in the law. For instance, rights regarding ownership of traditional knowledge for many communities cannot be separated from rights to land or rights to access to protected areas in the region. However, on a national level many of these rights are embedded in different legal frameworks in turn housed by different institutions and subject to different policy-making processes. To address some of these challenges a number of communities around the world have started using bio-cultural community protocols (BCPs) in an attempt to affirm some of their rights regarding land, resources and associated knowledge. Based on the communities' customary norms, values, and laws, BCPs set out clear terms and conditions to governments and the private, research, and non-profit sectors for engaging with communities and accessing their local resources. As locally developed legal instruments they seek to create a bridge between customary laws on the one hand and national and international laws on the other, while remaining firmly rooted in the principles and objectives of the community that has stewarded these resources over many generations. This presentation will provide greater insight into the concepts behind BCPs as instruments that bridge the different legal frameworks and the levels of law and policy, while also providing some practical examples.

CONSTRUCTIONISM AND NATURALIZATION IN THE SOCIAL STUDY OF HUMAN RIGHTS

Ronald Niezen

Processes by which collective human rights are asserted tend to generate entirely new institutional categories—including categories of people and their traditions—in a short space of time, with little or no connection to previously existing institutions, often in defiance of the historical ideas and collective attachments of those with distinct identities. Conceptual innovation in human rights research and standard setting introduces the problem of public reception of new categories of belonging, particularly the widespread acceptance (or rejection) of ideas about culture and group membership. How do institutional constructions of distinct peoples come to be widely recognized as legitimate? In particular, how does temporality become suspended or contested in processes of identity formation and rights recognition? This paper will explore these issues comparatively, with examples drawn from original research in UN meetings on indigenous peoples, and from the study of rapidly reformulated identities and rights claims in West Africa and native communities in northern Canada.

ENVIRONMENT AND STRUGGLE FOR RECOGNITION IN AMAZONIA

Ana Beatriz Vianna Mendes

The Brazilian Federal legislation recognizes the “ways of creating, making and living of the different groups that composes Brazilian society” as a Cultural Patrimony, which has to be respected and protected by all Brazilians and the State. Frequently those groups live in marginalized areas and are not recognized and supported by the State for maintaining their ways of life. Furthermore and to draw a more complex institutional and political scenario, especially in Amazonia, lands inhabited by peasant groups frequently are also rich in biodiversity, and, for that, are recognized by the State as environmental protected areas. Recently we see in Brazil important public policies that statues the possibility to conciliate cultural and biological diversity and aim promote them together. We intend to analyze and present the Brazilian state legislation that protects cultural and biological diversity in the country, and present a critical point of view of the most recent tendency of conciliating environmental conservation and cultural diversity. As I intend to argue, in many cases environmental protection overlaps the respect and recognition of local rulings and ways of life, and thus the cultural patrimony intrinsic to those ways of ruling. By emphasizing the importance of biodiversity conservation and forcing local people to live in sustainable ways (defined and dictated mostly by conservation biology experts), the Brazilian “socioenvironmental” tendency finally risks to fail in both patrimony protections. Further than presenting the Brazilian federal legislation that rules cultural and biological diversity, specially in the last two decades, I intend to discuss, by analyzing a particular Fisheries Agreement held by different actors in the Unini River (Amazon Basin), in 2003, how the rules and limits of natural resources use where negotiated during the process. As a new instrument that tends to formalize and legitimate informal agreements that occurs mainly by conflictive ways, this participative and formal instrument of decision making, the Fisheries Agreement, which I took part as researcher, will be analyzed, as well as the role of the State in those negotiations. We conclude that, in this case, despite the important initiative of the local people to start the struggle for stabling a Fisheries Agreement, the State was not able to respect their decision and acted in a tutelary and authoritarian way, reinforcing the environmental issues as well as the importance of experts to decide not only what is sustainable or not, and thus, what is allowed or not on the river, but also which agreement should be or not benefic to the communities.

Plenary Speakers

ABANDONING ‘RULE OF LAW’? DEMOCRACY, DOMINATION, AND (IL)LEGAL PLURALISM IN INDIA AND BEYOND

Devanathan Parthasarathy

Radical critics of liberal approaches to ‘rule of law’, have tended to use ‘elite capture’, ‘state capture’, or ‘state as an agent of the ruling class’ arguments to discredit modern ‘democratic’ strategies of law-making and order-maintenance, to debunk liberal criminal justice norms and theories, and / or to demystify notions of individual freedom and empowerment. While recognizing the limitations of both liberal and radical approaches to ‘rule of law’ frameworks, this paper seeks to develop on attempts in classical perspectives to redefine notions of legality and legitimacy by using a socio-legal co-evolution perspective. Such an approach would account for struggles around domination that does not privilege just class or capital, but instead also focus on evolving social formations in which social fields related to gender, ethnicity, resource management, governance, and business regulation are observed to implicate law making processes, implicate in fact the very definitions of legality and legitimacy. Using illustrations from India and a few other national contexts, the paper seeks to expose the multiple ways in which ‘rule of law’ is valorized by powerful interests and dominant social groups in either resisting democratizing and pluralizing tendencies in society, or to sustain their authority and supremacy in diverse social fields. Such strategies involve processes of legalizing the illegitimate, and illegitimizing the legal, so that substantive legal-illegal distinctions become blurred, and discussions centre more on juridical and ‘rights’ frameworks with significant implications for equity and democracy, for individual and group life chances. The multiple and plural strategies of illegality – including legal methods of achieving illegitimate ends – have not been as well theorized as issues of legal pluralism.

ON “GLOCAL” GOVERNANCE OF INDIGENOUS PEOPLES’ RESOURCES, POWER RELATIONS AND DEVELOPMENT OPPORTUNITIES

Reetta Toivanen

Indigenous peoples in many parts of the world are in the process of renegotiation their relations with states on the one side and with new private actors (multinational and national companies) on the other side. One of the main goals for the indigenous groups in these processes is to get access to the natural resources in their living areas, either in order to protect them or to use them in a manner, which would benefit what is called the “indigenous way of life”. They are emphasizing their right to free, prior and informed consent as expressed through the organisations and institutions representing the indigenous groups in dealing with the many external interests. The global efforts to lay down legal and political frameworks to guarantee the rights of indigenous people in the global scale requires not only own (indigenous) experts with specific skills to deal with the international law’s and state politics’ and private companies’ demands but also an effective basis to exchange of information on experiences and advices. The UN Permanent Forum for Indigenous Issues has been established in order to offer this kind of forum for the exchange among different indigenous movements and support the cooperation with international human rights bodies. It aims also at finding new ways for the groups to become recognized by international and national laws and systems of decision-making. At the same time, the internationally expressed goal is that the indigenous people would be supported in protecting their own values, cultures, languages and ways of gaining livelihood and defining their own mode of development. Within this workshop we wish to shift the focus on those resources (political, economic, institutional and legal), which are either fostering or hindering culture and language maintenance or revitalization. This workshop addresses questions concerning governance (global, national and indigenous) of resources, power relations and languagemaintenance. The presented papers will tackle, i.e., the question of who is controlling those resources which are vital and essential for a maintenance and revitalization of indigenous peoples’ cultures.

LEGAL PLURALISM: WHAT CAN INTERACTIVE GOVERNANCE THEORY OFFER?

Svein Jentoft

Fisheries and coastal ecosystems are often characterized by legal pluralism. This same is true for the institutions that seek to govern them. Not only would governors therefore need to find ways to account for the legal pluralism that exist within the systems-to-be governed, they must also address the legal pluralism that exist within the governing system which they themselves represent. Neither task is easy from a governability perspective. Governance theory would generally stress that focus should be on the interaction between the two systems and the importance of crafting institutions that are suited to represent and resolve inter-legal system differences within and between the two systems. But these interactions also involve in major governability challenges as they would require designs that are hybrid, flexible and dynamic. Drawing from real life examples in fisheries and coastal zones, this presentation discusses how interactive governance theory and the legal pluralism perspectives should learn from each other. The former offers a conceptual framework for investigating legal pluralism whereas the latter provides insights into multiple normative orders that governance theory should benefit from.

Theme 5 Law & Religion



Theme 5

Law & Religion



Panel 1 MUSLIM LAW AND CUSTOM IN SOUTH AFRICA

A COMPARATIVE CONSIDERATION OF LEGAL PLURALISM: A CASE STUDY OF MUSLIM FAMILY LAW IN CANADA, INDIA AND SOUTH AFRICA

Waheeda Amien

Multireligious societies are becoming the norm; rather than the exception. Which legal framework would best regulate those societies? Does adherence to the traditional notion of separation between state and religion provide a suitable solution? Should religious societies be free to regulate themselves through recognised religious personal law systems existing alongside secular laws such as in India? What about the route chosen by Canada where multiculturalism appears to be respected but all societies are expected to adhere to a single legal framework that is free of religious connotations? Are there valuable lessons to be learnt from the South African experience, which promotes legal pluralism within a framework of human rights? In the context of Muslim family law, the paper attempts to address these questions through the experiences of Canada, India and South Africa. I argue that where traditional and androcentric understandings of Muslim family law are practised within minority Muslim communities (as they are in Canada, India and South Africa), which results in the gendered oppression of Muslim women, none of the approaches in those countries provide adequate protection for women. As an alternative, I offer a Gender-Nuanced Integration ('GNI') approach. I suggest that a legally pluralistic society that allows state regulation of Muslim family law in accordance with the GNI approach in countries that are governed by a supreme constitution, which protects freedom of religion and women's right to equality can potentially better enable sufficient protection for women's right to equality.

LEGALLY RELEVANT PLURALISMS IN SOUTH AFRICA WITH PARTICULAR REFERENCE TO THE NKUNA TRADITIONAL COMMUNITY OF LIMPOPO PROVINCE

Francois de Villiers

Following upon my teaching of African Customary law at a number of universities and my recent participation in fieldwork among some Tsonga-speaking traditional communities of Limpopo Province, this paper envisages a comprehensive inventory of legal and other pluralisms in South Africa generally, at the same time providing also detailed examples of such pluralisms from traditional communities such as the Nkuna of Limpopo Province.

A ZULU FESTIVAL IN CELEBRATION OF THE UNIVERSE'S RITES OF PASSAGE: TOWARDS DEALING WITH A LIVING REALITY OF LEGAL PLURALISM

Christa Rautenbach

South Africa is a relatively young democracy with a notorious past interspersed with illustrations of racial discrimination on all levels of public and social life. The highly diverse nature of South African society and the renewed interest in traditional customs and values poses new problems which threaten harmonious cooperation in society on a daily basis. When the Zulu king, Goodwill Zwelethini Kabhekuzulu, decided to revive the age-old Umkhosi Ukweshwama Festival (the First Fruits Festival), and with it the ritual of bull slaughtering, he probably did not anticipate the public outcry that eventually ensued, especially from animal activists. The controversy finally ended up in court when the Animal Rights Africa Trust (the Trust) applied for an interim interdict in *Smit v His Majesty King Goodwill Zwelethini Kabhekuzulu 2009 JDR 1361 (KZP)* to prevent the slaughtering of a bull. The application was dismissed mainly because the applicant's factual basis was flawed and did not prove that the bull was indeed to be tortured, as had been reported in the media. The Court also expressed the view that conflicts such as these should be resolved by the relevant authorities and the intervention of parliament. What makes this Festival different from other kinds of festivals is the fact that it is now celebrated within the framework of a revived Zulu tradition, which includes elements of both religion and culture, both of which are rights protected in terms of the South African Constitution. Rituals have a tendency to upset individuals and communities who do not share the same values as the community performing the rituals. It is also possible that a ritual may be against the laws of a country. This contribution surveys some of the living realities of legal pluralism when religion and law collide, and discusses a few possible ways of dealing with them. The first part explores the possible meanings of religion in the context of African traditional religion with the purpose of answering the question of whether the so-called Zulu tradition can indeed be regarded as religious or not. The second issue which will be dealt with concerns the question whether the Festival in question qualifies as a religious event and whether the rituals, such as the offerings of the first harvest and the bull slaughtering during the Festival, can also be regarded as religious, and the last part deals with the legal position and the way forward.

REVIEW OF THE PROGRESS OF A GENDER EQUITABLE, LEGAL RECOGNITION OF MUSLIM PERSONAL LAW (MPL) IN SOUTH AFRICA

Najma Moosa

Colonialism brought Muslims to South Africa where Muslim marriages have remained unrecognised and unreformed in terms of South African law since that time. Various factors, including the unique political history of South Africa, have contributed to this. The status quo is about to change with the co-operation of the state and the blessings of the majority of religious authorities and the Muslim community at large. My paper will explore whether the recognition of MPL in semi-secular South Africa has the potential to treat women differently or better than their counterparts elsewhere in the world. In the South African example, recognition precedes reform which will necessarily follow in time to come. Given that such a proposed "Shari'a compliant" code, although based to a certain extent on existing progressive interpretations, has yet to be reformed, the paper also explores whether it would be in the interests of all Muslims living in a constitutional democracy that such recognition should occur at all. Notwithstanding that recognition is about to ensue, the paper draws attention to the fact that both the state, albeit to some extent only, and religious authorities who have initiated recognition, to a large extent, have also been responsible for the delay in recognition thus far. Further, that while initially disagreement between essentially conservative Ulama (religious authorities) and progressives may have been a primary cause of delay in the process of recognition in the recent past, this no longer appears to be the case. This paper broadly tracks the process and progress of recognition throughout this time to understand why recognition, has in the past and still is, taking so long, what factors are causing the delay, and what Muslims are doing and how they seek recourse in the meantime. A summary of MPL in South Africa is provided. To place the position of MPL in historical context, a brief background of Muslims and Islam in South Africa is provided. This is followed by a brief religious demography and role of local Muslim theological (Ulama) bodies. An overview of the constitutional (including international and regional human rights law), legislative and judicial developments with regard to a recognised MPL follows with the conclusion.

Panel 2

RELIGION AND CUSTOM: SOUTH AFRICAN CONTEXTS AND THE CONSTITUTIONAL UMBRELLA

'A FORESKIN TOO FAR? RELIGIOUS, 'MEDICAL' AND CUSTOMARY CIRCUMCISION AND THE CHILDREN'S ACT 38 OF 2005 IN THE CONTEXT OF HIV AIDS'

Julia Sloth-Nielsen

The Children's Act, in operation fully from 1 April 2010, gives effect to the obligation at international law to prohibit or restrict traditional practices harmful to the health or well-being of the child (see the African Charter on the Rights and Welfare of the Child, ratified by South Africa on 7 November 2000). In this vein, section 12 of the Children's Act outlaws female genital mutilation, proscribes child marriage and forced marriage, as well as imposing restrictions on the local practice of virginity testing in accordance with human rights standards. In the same section of the Act, limitations concerning male circumcision are to be found. Circumcision performed for the purposes of customary rites is also at the same time regulated by pre-existing provincial legislation in four of South Africa's nine provinces.

The exact nature and scope of this provision of the Children's Act has become contested amongst lawyers, medical personnel and HIV Activists and researchers. The question as to the extent of regulation of circumcision performed as a customary rite has arisen, in the context of the reality that the current wisdom amongst HIV researchers is that circumcision lowers the risk of contracting HIV/Aids. The paper will explore the contours of the current debates, in an attempt to illuminate more clearly the extent to which the legislative provision has in fact altered the normative 'space' for non-medically indicated circumcision, both in religious (Jewish, Christian, Muslim) and in customary law contexts.

DO SEXUAL DELICTS UNDER CUSTOMARY LAW HAVE ANY ROOM IN THE FACE OF THE CONSTITUTION IN SOUTH AFRICA?

Lea Mwambene

Sexual delicts under customary law give redress for the violation of any right, representing material value, capable of being acquired by the family head. In other words, it gives redress for an injury to a woman in so far as a family head's rights towards her have been violated. In principle, an unmarried woman represents to her family head the value of the lobolo he expects to receive for her. So, her seduction is an injury to him as it impairs her lobolo value. For a married woman, adultery is also a violation of the family head's rights (her husband) since no other man may share a wife's bed. Since the advent of constitutional democracy, the impact of constitutional principles upon customary law and practices have been discussed by jurists and scholars, probing the various means by which customary law in all its dimensions have been affected by human rights standards. Sexual delicts under customary law constitute an area in which the discussion should be reopened in order to examine the impact that the Constitution has on the customary law of delict in this area. This paper locates the discussion of legal pluralism and sexual delicts under customary law within the context of the protection of children and women's rights, which ought to be welcome.

DIVORCE AND THE LAW OF KHUL': ENHANCED PROTECTION OF WOMEN'S RIGHTS?

Ashraf Booley

Khul' (Arabic) refers to a woman's right to divorce under Islamic shari'ah law. It is considered to be a release for payment by the wife, and thus a woman is liberated from her marriage in return for some (or all) of the dowry she was paid at its inception. The legal basis for khul' is to be found in Chapter 2 verse 229 of the Qur'an which constitutes the basis of a woman's right to divorce in Islam, Chapter 4 verse 128 of the Qur'an also addresses this question. As early as 1967 the Supreme Court of Pakistan granted a khul' divorce in the matter of Khurshid Bibi v Muhammad Amin. A form of khul' was adopted by Egypt in 2000 with the promulgation of article 20 of the Procedural Personal Status Law, allowing a Muslim woman the right to a unilateral divorce from her husband by court order. As a condition of the divorce, the woman renounces any financial claim on the husband and any entitlement to the matrimonial home. In a landmark judgment of 2002, the Supreme Constitutional Court of Egypt declared the Procedural Personal Status Law constitutional. In a South African context, the Muslim Marriages Draft Bill likewise makes provision for khul', stipulating in sections 1(xii) and 9(5) that the dissolution of the marriage is at the insistence of the wife. If the divorce is effected through khul', the dissolution becomes effective immediately and the wife has to pay over to the husband what has been agreed upon. Freedom for the wife is thus dependent on the payment of compensation to the husband. And yet for some women a khul' divorce remains difficult to obtain as there must be a fear of desertion, abuse or sin in order for it to be granted. And since the payment of compensation or the renouncement of any financial claim is central to the notion of khul', one may well argue that only women who have the financial means will in effect have reasonable access to such a divorce. In a South African context, where there still exists vast economic disparity, Muslim women in poorer communities are unlikely to avail themselves of this remedy. It must also be questioned why only Muslim women who seek their freedom through divorce are compelled to make such a choice. The possible constitutional implications of khul', especially as conceptualised in the broader context of the Muslim Marriages Draft Bill, will also therefore have to be considered.

THE CULTURAL DEFENSE: TAKING THE WORLD BY STORM

JL Matthee

Cultural practises are essential to the identity of various cultural groups in South Africa and as such should not be interfered with. Cultural practises are, however, clouded by a contentious debate seeing as though cultural practises can lead to the commission of a common law crime and/or an infringement of basic human rights protected in the Constitution of the Republic of South Africa, 1996. This situation results in unfortunate and inevitable harm being caused to other members and non-members of the cultural group.

Despite the contentious issues above a lot of appeals are made for strong measures to ensure the protection of minority cultures against an encroachment by more dominant cultures. One of the more frequent appeals is made to culture as providing a justification for certain practices. By raising a cultural defence an accused attempts to put evidence of his cultural background and values before the court in an attempt to escape criminal liability or, at least, receive a lighter sentence. The practical effect of a cultural defence is that the accused, because of his cultural background, did not possess the intention to commit a crime or did not realise that he was indeed committing a crime. What the accused therefore actually alleges is that he did not possess the necessary culpability in order to be found guilty. The basic principle behind the cultural defence is one of dedication to multiculturalism and a pluralistic society, while the defence also sanctions a progressive criminal law system. The cultural defence can also be viewed from a moral relativistic perspective, that is the view that there are no objective truths and all norms are relative and subjective. In this way the cultural defence acquires a deeper meaning in the sense that it becomes an application of the criminal law's commitment to individualizing justice. In light of the foregoing discussion, this paper aims to investigate the influence of the cultural defence on criminal liability in the South African law. Although the idea of a cultural defence is quite novel in South Africa, it is, however, not unique to South African law.

Panel 3

COEXISTENCE OF LAW AND CUSTOM IN MODERN SOCIETY

GOD FOR THE MARRIAGE AND THE JUDGE FOR DIVORCE: CONFLICTUAL LOGICS AROUND MARITAL CONFLICT

Fatima Diallo

Mutations in African societies lead to profound changes noticeable within family units. The most visible effects are the restructuring of authority, thereby causing a reconfiguration of hierarchies and social tear. Amongst such reconfigurations is the increasing frequency of fractures of the matrimonial relationships. Marital conflict resolution is one of the major problems of social control which regulation systems are increasingly facing. Societies find themselves within the transition from modern to traditional as mutants justify why forms of resolution possess both a formal and an informal order. The formal resolution of the conflict refers to the state model of resolution of divorce, whilst the informal finds its roots in tradition, which contains within it systems for resolving marital conflicts based on beliefs and religions. The former appeals to the judges and all those who gravitate around the state judicial system, whilst the latter calls on imams in Muslims religions, traditional leaders, family and neighbors. Both systems appear to have their modes of execution that are specific, and do not have the same degree of effectiveness and efficiency due to social and economic realities.

From the perspective of sociology of law, this paper aims to contribute to the understanding of the strategical mobilization of rules and institutions for resolving marital conflicts in Senegalese society. It highlights the conflicting logics that exist between the modern procedures and traditional modes of dissolution of marriage within a context of economical crisis, feminine opportunism, increase of social individualism etc.

INFORMAL JUSTICE SYSTEMS AND FAILED STATES: LESSONS FROM AFGHANISTAN

Fainula Rodriguez

It is estimated that 80% of judicial cases in Afghanistan are settled by the country's informal justice systems, namely the jirgas and shuras. Further, these institutions, though they pose serious challenges in the access to justice for women and other vulnerable groups, are believed by a majority of Afghans to be more reliable and trustworthy than state courts (UNDP NHDR 2007). Almost ten years into the Afghan reconstruction program, it is becoming increasingly evident that jirgas and shuras have played a vital role in providing justice to the Afghan population. In this way, they have filled a significant gap in the capacity of state justice institutions. This paper reviews Afghan informal justice institutions and the areas in which they have intervened positively to support the reconstruction program. It argues that conventional definitions of the rule of law and deficiencies in research and evaluation methodologies may have contributed to the skewed investment in favor of state institutions and away from the informal justice systems when reconstruction began. Importantly, there is a need for further international understanding of the interplay of traditional and modern systems in these failed states, and to question the emphasis of the international community on modern institutions when traditional ones are present and playing a vibrant role at the community level. The paper seeks to draw out salient lessons from the Afghan experience, lessons which are increasingly relevant to societies in the Middle East and North Africa regions, societies that are similarly structured along traditional, modern, and pluralistic lines.

CUSTOMARY LAWS OF HINDUS AND BASOTHO PEOPLE – DYNAMICS OF DIFFERENTIATION

Tushar Kanti Saha

Unwritten texts exist in many cultures imposing obligations and prohibitions with or without sanctions. Customary law or folk law is a socially defined group's orally transmitted traditional body of obligations and prohibitions. Folk means a peasant and hence, it is often denigrated as *vulgus in populo*. But folks are the roots of national culture and ancestral form of patrimonies serving as the reminder of social consciousness of inheritance of the people. A folk group represents its own local name place often enriched by apocryphal local legends of anonymous origin. The dichotomy is clear in a comparative scale because the written law is authored and not anonymous, fixity against variation, rural versus urban, peasant versus elite and primitive versus modern. But the experience of constancy of change has been a two-way flow. The phrase 'customary law' is now being attempted to be replaced by 'folk law'. But this change is based on subtle difference but the basic framework remained steadily based on traditional practices. Customary and cultural practices are variable and can be transplants on other soil as people meet and interact in social and political context. These practices although embedded on the soil may show remarkable similarities with other societies pointing to the universality of human nature as well as differences in approach in resolving social issues. Respect for the elderly is quite a common attitude in Asian and African societies but in the age of modernity, this is often disregarded but its strong and demonstrable undercurrents often result in its translated recognition in written law. So, seats are now reserved for senior citizens in public transport systems in India and elsewhere. The paper seeks to unfold these similarities as well as differences and analyse the intricacies involved as to how these numerous practices are polished by modern ethos and attitudes among people of different societies.

POLYGAMY IN WESTERN SOCIETIES – LEGAL PLURALISM COMING HOME?

Craig Lind

We are all aware of the extent to which colonial societies adopted the legal systems and rules of their colonial masters and subverted (but rarely terminated) their indigenous legal orders. However, in the realms of family governance it was almost impossible to destroy local norms and regulations that pre-existed colonialism's interventions. The creation of plural legal systems was, therefore, the consequence – at least in part – of this historical phenomenon. But the relationship of authority that existed between colonies and their colonial masters meant that the creation of plural legal systems was unidirectional. At home, colonial powers were able to refuse legal recognition to social norms that belonged in the colonies. However, the reverse flow of migration (from ex-colonies towards their historical colonial masters and other western powers) and the contemporary move towards the recognition of the benefits of multiculturalism have begun to put pressure on western democracies to make legal adjustments in favour of alternative (legal and social) norms which prevail in their immigrant populations. In this context I wish, in this paper, to explore the legal attitude on display in western democracies (concentrating particularly on the UK, but noting legal developments in Canada and the USA) towards polygamous marriage. Although the exploration will extend beyond immigrant religious communities, it will concentrate on the norms established by those communities and the responses which they have inspired in the legal rules of western states. My object is to explore the extent to which legal pluralism is already in evidence in these (western) legal systems and to consider the extent to which further legal adjustments are likely and can be justified. But I wish also to consider the extent to which legal pluralism in this context (and perhaps also in the ex-colonies themselves) is itself subject to universal (and therefore, non-plural) parameters. The question to which I wish to offer a reasoned response is: what are the limits of legal pluralism? Given the pressure to bring more (culturally) diverse social norms into the sphere of legal recognition and regulation the search for the overarching parameters of pluralism are, it will be argued, profoundly important both in the west and in developing states.

Panel 4

RELIGION AND CUSTOM IN SOUTH ASIAN LEGAL HISTORY

THE MAKING OF PARSİ PERSONAL LAW: ZOROASTRIANS AND STATE LAW IN COLONIAL INDIA

Mitra Sharafi

Hindu and Muslim family disputes in British India were governed by religious or personal law. The personal law system was standard in early modern Muslim polities like the Ottoman and Mughal empires. However, while these Asian empires allowed personal law to be applied by each community's authorities, it was the colonial courts that applied personal law in British India. Adjudication of Hindu and Muslim family disputes by colonial judges (usually British men) meant a disempowerment of the community authorities (usually South Asian men) that had decided these disputes previously. This talk explores a different path pursued by an ethno-religious minority concentrated in western India. The Parsis were an affluent trading community that followed the ancient Persian religion of Zoroastrianism. English law was initially applied to Parsi family disputes because colonial authorities believed that Zoroastrians, unlike Hindus or Muslims, lacked a body of religious law. In response, Parsi male elites in Bombay mobilized legally, lobbying for matrimonial and inheritance-related statutes that created Parsi personal law. The legislation that they drafted created a matrimonial jury of co-religionists for the Parsis, a privilege enjoyed by no other community in British India. As Parsis joined the colonial legal profession in growing number, Parsi lawyers and judges also came to control much litigation between Parsis. While the personal law governing Hindus and Muslims in colonial India was largely defined and controlled by European judges, Parsis de-Anglicized the law and personnel governing their legal affairs by working from within the colonial legal system itself.

RELIGION PLURALISM IN INDONESIA: THE IMPLEMENTATION OF KSKB2 MENTERI CONCERNING THE ESTABLISHMENT OF PLACES OF WORSHIP

A Rohana and H Putri

Article 29 (2) of Indonesian Constitution regulates that the State guarantees freedom of each citizen to carry out their religious teachings and worship according to his religion or belief. Then, under Joint Decree of The Minister of Religious Affairs and Minister of Home Affairs No.8/2006 and No.9/2006 on The Establishment of Places of Worship ("SKB 2 Menteri"), the construction of a place of worship need public support with a minimum number of 60 people. According to reports of Unity Churches of Indonesia and of Indonesian Bishops Conference, after the issuance of SKB 2 Menteri, a lot of churches suffered vandalism, arson and sealing/closure. During the period from January to July 2010, Setara Institute reported that there were at least 28 incidents of violence against freedom of worship and belief. For example, in July 2010, a group of people assaulted HKBP congregation in worship activities Ciketing, Bekasi. In an incident, on 12 September 2010, one of board of HKBP Ciketing suffered severe injuries and had to have surgery. In addition, the church priest and several members of HKBP Ciketing suffered bruises due to punches and kicks. People making the threats and attacks argued that the building that was used as a place of worship had not fulfilled the SKB 2 Menteri. To what extent the applicability of SKB 2 Menteri: whether a permit to establish a place of worship includes a permit to carry out worship? Does SKB 2 Menteri is in the line with the Constitution of Indonesia?

'THE CUSTOMS OF THE COUNTRY': CONCEPTS OF LAW AND JUSTICE IN THE PANCHAYATS OF COLONIAL INDIA

James A Jaffe

After the third Anglo-Marathi War in 1817-18, the East India Company took control of significant amounts of territory in western India, including the western Deccan. There, Company officers, led by Mountstuart Elphinstone, were determined to 'bring justice to every man's door' according to the 'customs of the country.' The preferred vehicle for this judicial project was the revival of the customary Indian panchayat, a traditional institution that they believed had fallen into disuse under the administration of the Marathi Peshwas. The purpose of this paper is to uncover and analyze these 'customs of the country' as they were elaborated in the Deccan panchayats. In the vast majority of civil disputes in the Deccan, especially those involving debts and rights to landed property, the panchayat adopted highly legalistic and formal practices. In addition, panchayats were understood to be composed of representatives selected by each party to negotiate a settlement rather than having the decision of their dispute left to a group of elders, disinterested parties, or judges. It was also the customary privilege of litigants to voluntarily submit their dispute to a panchayat. Together, these aspects of the panchayat system helped create a certain set of expectations that were essential to normative conceptions of 'justice' and 'fairness' among Indian litigants during this era.

REPRESENTING FAMILY, REPRESENTING NATION, OR WHO 'KNOWS' HINDU LAW?

Eleanor Newbiggin

Exploring the way in which the Hindu legal system was reshaped and redefined by the transfer of power process, this paper looks at late-colonial income tax policy as the site of competing claims by Indian and British officials as to who really 'knew' Hindu law. Devolution after World War I gave political influence to Indian representatives, but, in expanding state apparatus, it also imposed new financial demands on colonial subjects. Looking to plug this financial gap, the colonial administration introduced progressive income taxation on non-agricultural incomes, in which the amount of tax paid increases according to the amount of income earned. Invoking 'ancient Hindu law' British officials argued that Hindu undivided family (HUF) could only be taxed as a single high-earning unit, a state of affairs that secured higher income for the state. Wealthy Hindus argued that this discriminated against their religious community and, over the 1920s and 1930s, Hindu legislators, judges and lawyers put forward alternative legal visions of the Hindu family, based around individual male property rights and the conjugal unit, rather than the multi-generational collective of the HUF. The way in which Indian representatives asserted autonomy over Hindu law, away from the colonial state, closely mirrored debates about Indian independence and political self-governance. Tracking these debates, this paper examines the way in which a particular vision of Hindu law and, in particular, of Hindu family property rights became bound up with a much wider set of discussions about citizenship, post-colonial statehood and conceptions of the Indian 'modern'.

Panel 5 CHILDREN'S RIGHTS AND ADOPTION

THE CULTURAL DIMENSIONS OF ADOPTIONS IN SOUTHERN AFRICA

Chuma Himonga

There are millions of orphans in Africa and many who are homeless and on the streets. For example, an estimated 3.4 million children in South Africa have lost one or both of their parents due mainly to AIDS related diseases. It is anticipated that this number will rise to 4.6 million by 2015. Orphans are only one category of children on the Continent who are in need of alternative parental care. Adoption is one of the most permanent legal methods of providing such care. Given the fact that the UN Convention on inter-country adoptions has made inter-country adoptions easier and safer for children, inter-country adoption has the potential to augment local adoptions to the benefit of children in need of care. However, my research in Malawi, Zambia, and Zimbabwe reveals several factors that militate against adoption of children. This paper discusses the interface between culture and the statutory law of adoption, and the role that culture plays in the adoption of children in the three countries. It shows that although there is enabling legislation in each of the countries concerned, the cultural and supernatural beliefs that potential adopters have towards adoption stops them from adopting children.

CHILD ADOPTION IN TANZANIA AND GHANA: IN-COUNTRY OR INTER-COUNTRY?

Ulrike Wanitzek

Cases of child adoption are usually categorised as either national or international adoptions or, in another terminology, as in-country or inter-country adoptions. However, an increasing number of cases of child adoption in Tanzania and Ghana appear to represent a new category which cannot be placed under one of these standard categories. Referring to the Ghanaian example, these are cases in which a Ghanaian who lives abroad adopts a relative's child in Ghana in order to take the child along to the foreign country where he or she lives. The same constellation is also to be found in a large number of adoption cases in Tanzania.

There are several reasons why these cases do not fall easily into the usual categories of in-country and inter-country adoptions (or national/international adoptions). First, the definitions of these categories vary in national and in international law. The Ghanaian Children's Act of 1998, for instance, defines an inter-country adoption as an adoption by a non-Ghanaian residing abroad and taking the child abroad. The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption of 1993, on the other hand, does not refer to nationality but to habitual residence only: inter-country adoptions are those in which the child is taken from his or her state of origin to the receiving state where the adopters habitually reside. A child adoption by a Ghanaian residing abroad would therefore be qualified as an in-country adoption under Ghanaian law, but as an inter-country adoption under the Hague Convention.

Secondly, the case constellations are not clearly either international or national in character but contain both elements: although the child is taken abroad and the adopters and the adopted child reside abroad for a certain time, they appear to maintain a strong connection to their home country and family in the home country, and to have an intention to later return to their home country. The question arises how the best interests of the child can be assessed in such situations. Other policy issues including immigration control are also involved.

It is suggested that in the context of increasing international mobility, constellations of child adoption have become more complex and it is therefore necessary to re-consider the current adoption categories in the light of the emerging new patterns of child adoption.

TRADITIONAL PRACTICES, A CHALLENGE IN THE PROMOTION AND PROTECTION OF CHILDREN RIGHTS IN AFRICA

Sakinatou Bello

According to the international Conventions for the protection of children rights, some African States have adopted national laws in order to better protect the rights of children in their respective countries. In 2006, the Republic of Benin has adopted a law on the movement of the minors and on the eradication of child trafficking on its territory (2006-04). However, some traditional practices such as the so called "vidomegon" have highlighted the lack of effectiveness of these laws.

Having been perceived as a symbol of solidarity between families in some African traditional societies, the placement of children has been abused and children have been exploited to such an extent that the practice is now being widely criticized and perceived as a scourge which must be eradicated. It is therefore essential for States to adopt and enforce laws which stop these violations of children rights. However, for these laws to be effective, lawmakers should first acquaint themselves to the socio-cultural realities. The ignorance of these realities can do more harm than good.

The present study is an attempt to analyze the socio-cultural aspects of the phenomenon and the legal challenges that any campaign and fight against the negative effects of the placement of the children in the Republic of Benin is facing. The study will also touch upon the weaknesses of the present law (2006-04) in order to increase its impact and effectiveness in preventing the violation of children's rights in Benin.

Panel 6

RELIGION-STATE RELATIONS IN PLURI-LEGAL SOCIETIES

ADDRESSING THE CHALLENGES OF RELIGIOUS HETEROGENEITY IN NATION BUILDING PROCESSES: THE POLITICS OF JUDICIALIZATION AND BUREAUCRATISATION IN INDIA AND INDONESIA

Yüksel Sezgin and Mirjam Künkler

The article, titled "Addressing Challenges of Religious Heterogeneity in Nation-Building Processes: The Politics of Judicialization and Bureaucratization in India and Indonesia," compares the strategies with which two highly heterogeneous societies, Hindu-majority India and Muslim-majority Indonesia, have dealt with religious diversity in the post-independence period. We argue that the dominant approach pursued by the Indian state has been one of judicialization, i.e. the delegation of questions over religious identity and inter-faith relations to the judicial complex, while in Indonesia it has predominantly been one of bureaucratization, i.e. the management of diversity through the Ministry of Religion. Contrary to the expectation that judicialization, a recurrent phenomenon in democracies, devitalizes normative conflicts while bureaucratization, more frequently associated with authoritarian politics, just "locks" these conflicts "in," we show that both strategies differ little in the extent of violence they commit against religion and that the consequences of India's judicialization have been far more problematic for the country's nation-building project and inter-faith relations than Indonesia's politics of bureaucratization whose effects have been extenuated by the pan-religious ethos of *pancasila*.

LEGAL PLURALISM V. HUMAN RIGHTS NORMS: CUSTOMARY AND RELIGIOUS LAWS AND HUMAN RIGHTS CONCERNS UNDER THE FEDERAL CONSTITUTION OF ETHIOPIA

Mohammed Abdo

Ethiopia is a culture mosaic, manifested by the existence of different ethnic, linguistic and religious groups (There are about 84 ethnic groups speaking close to 82 different languages, and, in addition to some traditional beliefs and religion, the main three religions, Christianity, Islam, and Judaism, are embraced and practiced in the country). Ethno-linguistic and religious diversity resulted in the presence of various customary norms and religious laws on which people relied on for settlement of disputes for long time. In a stark contrast to the past constitutions, the incumbent federal constitution of 1995 has taken a bold measure in according, in explicit terms, recognition to customary and religious laws, regardless of the pros and cons that may be raised against such system. On the other side of the spectrum, the constitution gives due emphasis to human rights, with almost 1/3 of the 106 provisions of the constitution devoted to human rights. The constitution provides that human rights instruments ratified by the country are integral part of the law of the country, that it is the supreme law of the land and as such laws, decisions and customary practises, etc that are against it shall be of no effect, and that its provisions on human rights shall be interpreted in conformity with international human rights instruments adopted by the country (Articles 9 and 13). One of the challenges that the recognition of customary and religious laws poses to human rights relates to the uniform application of human rights in the country, which is envisaged under the constitution. It is clear that there is a tension between legal pluralism (which is in favour of particularity in application) on the one hand and the human rights instruments adopted by the country and enshrined under the constitution on the other (which are universal in nature and require uniform application). The paper tries to grapple with the customary and religious laws in Ethiopia in the light of the human rights norms provided under the federal constitution of the country as well as international human rights instruments to which the country has become parties to.

OUR JUSTICE FOR ALL, A CRITICAL APPRAISAL OF RULE OF LAW PROGRAMMING IN LEGAL PLURALISM MUSLIM SOCIETIES

Laila al-Zwaini

In Muslim-majority countries, the predominant discourse with regard to law and normative behaviour appears to be Islamic. The “undisputable” supremacy of shari`a as the ultimate legal and moral reference is being employed not only by the traditional religious scholars (ulama), whose authority depends on this very premise, and by national rulers, who employ an Islamic rhetoric to legitimize their leadership vis-à-vis their Muslim subjects (and Islamist opponents), but also by a plurality of social and political actors who engage in social and legal change in their own communities, be they Islamist movements, tribal authorities, feminist activists, or Muslim extremists. This seemingly monolithic discourse tends to turn our eye away from the actual reality on the ground: normative behaviour of ordinary Muslims is often guided by local customary or traditional norms that are not derived from Islamic sources, nor primarily controlled by Islamic or national judicial authorities. Often these norms even contradict Islamic rules, let alone constitutional standards. Moreover, shari`a itself covers a myriad of ideas and ideals, specific rules or general principles, depending also on the different frameworks under which it is invoked, such as law, religion, politics, morality, and international relations. This complex continuum of normative pluralities and discourses, on the ground as well as within the domain of shari`a, very often thwart Rule of Law-programming designed by international donors. Leaving aside the various motivations to engage in such interventions (development cooperation, human rights promotion, security sector reform, transitional justice), relatively few of such interventions actually have the impact envisaged. In my paper I will address - as a scholar and rule of law practitioner - various pitfalls of RoL-programming in so-called Muslim ‘fragile states’, with examples from Yemen and Afghanistan.

THE LAW OF THE GOD OR STATE: THE BIGGEST DILEMMA OF VEILED WOMEN IN TURKEY

Gul Ceylan Tok

In 2010, the headscarf ban in universities in Turkey was eliminated by the decree of the Higher Education Board (YÖK). As a result of this ban women wearing headscarves have been denied entry to universities for thirty years and they faced the dilemma wherein one would have to either act against religious belief or leave university education. Throughout these years the ban could not have been abandoned due to the strict opposition of secularist establishments in the country; mainly the judiciary and the military. In this paper the role of the judiciary in the headscarf issue will be explored by looking at the national and international legislations. The decisions made by the Constitutional Court, the Council of State of Turkey and the European Court of Human Rights (ECHR) between 1980 and 2008 will be investigated in order to analyze how veiled women were presented in the judicial discourse. It will be argued that the state’s modernist interpretation of secularism which conceives it as a secularization process rather than a constitutional principle is shared both at the national and supranational level. It will further be argued that in stead of protecting the freedom of religious of expression of the citizen, which is violated by the nation-state in this case, the ECHR empowers the state by legitimizing its assimilationist intervention on bodies of the women in the name of ‘protecting secularism and women’s freedom’.

STATE LEGAL ACCOMMODATION & WOMEN’S RIGHTS: THE CASE OF THE COMPILATION OF ISLAMIC LAW IN INDONESIA

Mustaghfiroh Rahayu

The Compilation of Islamic Law, which was enacted in 1991 through the Presidential Instruction, is part of state accommodation of Muslim community in Indonesia and one of evidence of Indonesia’s legal pluralism. However, as it has been warned by Susan Moller Okin in her article “Is Multiculturalism Bad for Women?” (1999), the state’s accommodation to specific group practices oftentimes put women in disadvantaged group. Some stipulations in the Compilation showed that irony, such as polygamy, bride minimum age and the provision of nusyuz, that a husband can divorce his wife if she disobeys him. Realizing this fact, a group of people called Working Group of Gender Mainstreaming lead by Dr. Siti Musdah Mulia, proposed a Counter Legal Draft of the Compilation of Islamic Law that presents a more women’s friendly stipulations. Nevertheless, this proposal gained huge opposition from some Muslim women’s group such as women group of Majelis Mujahidin Indonesia and Majelis Ulama Indonesia. Despite all the ideological backgrounds behind these groups’ statements, I do believe there was some genuine arguments in their opposition can be discussed. This paper will show this debate, present their arguments and critic to both sides and also display the government response to this debate. In this context, the government has to deal with Muslims demand on Islamic law and at the same time they have to take into account women’s right issues. This paper will also elaborate an alternative policy should taken by Indonesian government, and possibly a unique one compares to other Islamic countries, through which women’s rights and religious accommodation in the form of Islamic Law are not positioned in an oppositional way.

Panel 7
ACCESS TO JUSTICE & DISPUTE RESOLUTION IN PLURAL SOCIETIES

DECISION-MAKING ON PLURALIST NORMATIVE GROUND: ON THE GOVERNMENT OF DISPARATE TRADITIONAL, RELIGIOUS AND STATUTORY LAW IN PLURALIST SOCIETIES

Matthias Koetter

How do courts come to decisions in hybrid legal contexts? Which rules and procedures are functional in managing normative plurality? And to which extent does legitimate and effective conflict resolution rely on valid statutory rules? These questions are touch upon core problems which hamper rule of law projects all over the world. On a conference in Berlin coming up on 17 - 19 May 2011 they will be discussed with traditional authorities, judges and other legal experts from Ethiopia, Pakistan, South Africa and Southern Sudan. By assessing the account of legitimate non-state arbitration institutions to legal ordering the conference aims at a better understanding of pluralist legal systems and the specific role and function of the judges and arbitrators in resolving social conflicts. The proposed paper will present results from the Berlin conference. Focusing on the judges and arbitrators and their specific approach to "judging" in legal pluralist situations in four different legal cultures, we hope to be able to identify similarities and differences in the way societies deal with non-statutory normative orders, and especially in the specific role and function of the examined conflict resolution institution and their methods of resolving normative conflicts. In detail, we will have a close look at a Pakistan jirga, an Ethiopian social court and customary courts in South Africa and Southern Sudan. We expect to find not only an understanding of law and jurisdiction that differs relevantly from a European concept of law and its regulatory function where judges above all have to strictly apply statutory law in the individual case and thus affirm the legal order. We also expect to find a specific self-concept of the judges and arbitrators who play an important part in resolving conflicts and integrating heterogeneous communities in areas with relatively weak state impact.

ACCESSING JUSTICE WITHIN PLURAL NORMATIVE SYSTEMS IN AFRICA

Ada Ordor and Adenike Aiyedun

The right of access to justice presupposes the existence of accessible dispute resolution systems and the application of fair standards of justice. Providing this legal infrastructure has posed a challenge to most African countries since their integration into western systems of justice. Life in Africa is conducted under multiple normative frameworks, which sometimes intersect, but just as often diverge. The principal sources of laws which construct the environment in which the majority of Africans live are customary, religious, constitutional, statutory and judicial. With the propagation of a universal canon of human rights, all judicial systems, including traditional (and religious) courts, are mandated to administer justice in adherence to certain formal rules. These rules are often not designed to accommodate the flexibility and dynamism that characterize traditional justice systems. Perhaps this accounts for the fact that while they are formally recognised as part and parcel of the state apparatus, traditional courts are often treated as optional alternative dispute resolution mechanisms. The challenge for the custodians of these traditional systems is to resolve disputes in line with constitutional standards of fair trial, which are themselves reflections of international bills of rights. Prominent among the elements of fair trial, is the right to equality which guarantees equal access to justice for all.

UBUNTU AND THE LAW: DECONSTRUCTING AND CLAIMING BACK UBUNTU

Sibusiso B Radebe

The Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') is a unique document of fundamental rights. This is so because; it is one of the few Constitutions in the world that protects eleven official languages. In addition, the Constitution protects the cultural rights of all people who are in South Africa in a non-discriminatory way. Furthermore, the Constitution incorporates customary law and requires courts and the government to protect and promote the rights of indigenous communities. This protection is however, subject to a proviso, namely; that customary law is guaranteed as long as it is in line with the values espoused in the Constitution. This protection of customary law subject to compliance with the Constitution gives rise to new controversies and challenges, particularly regarding the proper interpretation and place of customary law values in the Constitution. One of these values of customary law that has given rise to much of controversies and confusion is the constitutional value of ubuntu.

Panel 8
FAMILY, RELIGION AND WOMEN UNDER RELIGIOUS AND CUSTOMARY LAW

STATUTORY REGULATION OF CUSTOMARY LAW MARRIAGES IN ZAMBIA: REALITY OR A MYTH

Annie Chewe Chanda

Zambia operates a dual legal system where two justice paradigms are at play at the same time. These are the local customary law and the statutory law. With 73 ethnic groupings, many people are regulated by customary law in their day to day aspects of life. One controversial issue has been the conduct of marriages under customary law let alone the rights enjoyed by women in these customary law marriages. Currently, the nation is in the process of enacting legislation to regulate customary law marriages. One is interested in knowing just how this will materialize and what the consequences will be. Will this afford women enjoyment of rights? Will abuses under the guise of customary law come to an end?

The proposed paper will cover these issues in depth and will also discuss matters relating to the guarantee of non-discrimination under the constitution.

"THE LEGAL, THE CUSTOMARY AND THE RELIGIOUS IN AN ISLAMIC MARRIAGE IN TANZANIA"

Goodluck Peter Chuwa

In Tanzania, the primary law that governs marriage is the Law of Marriage Act of 1971. This law was enacted in an attempt to have a uniform law of marriage. Therefore, many of its provisions are of general application in that they are intended to govern all forms of marriage contracted in the country. But despite being primarily intended to be a uniform law for all types/forms of marriage, the Act recognizes three types of marriages: civil marriage, customary marriage and religious marriage. Among the forms of religious marriages recognized under the law is the Islamic marriage. My proposed paper intends to look at the legal complexities of an Islamic marriage in Tanzania taking into account the requirements of the Law of Marriage Act and the customary practices in Tanzania.

My proposed paper, therefore, will look at the complexities in law and practice brought about by legal pluralism in the Islamic marriage. The paper will attempt to answer the question whether there is a true Islamic marriage governed by Islamic law principles in Tanzania. The paper will also analyze some cases in which the courts in Tanzania have adjudicated on marriage matters involving customary, Islamic and state law principles and suggest the approach that should be followed in future in those cases. In doing so, the paper will examine the legal requirements of an Islamic marriage as well as the rights and duties of the spouses under Islamic marriage, and the extent to which these have either been modified or affected by customary practices and state law.

MORALITY DISCOURSES IN YEMENI LEGAL DEBATES

Susanne Dahlgren

In this paper, I will discuss morality discourses in Yemen to the background of family law reforms that have taken place in the Southern part of the country in the 1970s and 1990s. I will look at rhetorical tools applied in law debates that deal with women, family and the state from the perspective of Southern women who emerged in Yemeni unity in 1990 from a privileged position to that of Northern women, soon to lose many of the earlier accomplishments. In this analysis, I will look at how Islam is played out as a discourse both to promote and to limit women their rights. I will argue that by the turning of the millennium, Islam has emerged as the decisive factor in defining woman's "proper place" in society thus sidestepping the discourses of "modernity" and "tradition" that earlier characterised such debates. This change has been accommodated in the women's rights movement, too, where the old demands for women's emancipation (tahrir al-mar'a) are now voiced as if originating from Islam. In looking at the debates, I will ask how does the difficult unification of the tribal North Yemen and the modernising South Yemen get voiced in family law debates. These elaborations provide background to debates in Arab countries at large. While particular legal codes are called Family laws, at issue tends to be women's rights and the contested question of how much modernity, understood as personal freedom from kinship bond, a state can afford to allow its women. The paper is based on ethnographic field visits to the Yemeni town of Aden during the years 1988-2010, altogether some three years.

WOMEN AND "LOBOLA" EXPLORING THE INTERFACE OF LAW, RELIGION AND CULTURE IN RAPIDLY CHANGING ENVIRONMENTS

Amy S Tsanga

Across the continent, we continue to witness rapid expansion in many African countries in the passing of new laws, the adoption of international treaties and the formulation and ratification of regional instruments affecting women— all this coupled with a focus on activism centred on raising awareness about these initiatives. At the same time that the above realities have unfolded, we have witnessed an equally rapid, if sometimes not a deeply unsettling upheaval of social and economic roles and responsibilities, emanating from globalised, capitalist market economies. These have put tremendous strains on traditional expectations of roles. Simply put, women have inevitably had to step up their efforts at contributing economically to family survival. This has been further exacerbated by the social impact of HIV/AIDS. Furthermore, within this context of increased stress and strains, we have witnessed a strengthening of the role of religion as a source of hope in many societies.

I will argue that despite globalisation and the significant pull of religion, the traditional practice of payment of lobola has continued to hold sway. However, this is in a manner that reveals both continuities, as well as major tectonic shifts of a gendered nature, that emanate in no small way from increased consciousness of self among women in particular. In fashioning the analysis of these issues reliance will be placed on observation of the interplay between law, religion, and culture from women's lived realities as well as social events such as lobola ceremonies, and wedding showers. The paper will use experiences from Zimbabwe as its frame of reference.

"LIVING REALITIES OF LEGAL PLURALISM"

Lauren Fielder Redman

My paper explores the complicated nature of the overlap of law, custom and religion in Africa. Specifically, I will analyze the relationship between customary law, the right to gender equality embodied in many African constitutions and religious law using the lens of polygamy. I will examine the practice of polygamy and explain how it is a religious practice important to many peoples' cultural and religious beliefs. I will also discuss how polygamy can infringe on women's rights. In exploring this issue, I will focus on how constitutions and constitutional courts are resolving this tension, including the validity of the Courts' use of international and comparative law in informing their decisions. This study is comparative in nature, focusing on numerous jurisdictions and approaches to allowing or disallowing polygamy. It will also be an intervention into the debate on whether human rights standards are truly universal. I will argue that what is needed is a growing African jurisprudence, with increased dialogue, borrowing and cooperation between courts in different African states.

THE INTERACTION OF LAWS AND REGULATION OF INHERITANCE IN TANZANIA

Grace K Kamugisha and Lillian M Mongella

This paper examines the various legal regimes in Tanzania providing for inheritance matters. Apart from examining the positive and negative aspects of having a pluralism of laws, the paper also advocates on the need for the society to move forward and apply constitutional and International laws in inheritance claims, apart from the Customary and Islamic laws that are highly applied. Tanzania has three categories of legal regimes that potentially regulate the subject of inheritance. The first category includes customary law, Islamic and statutory law; the second is Constitutional law and the third is International law, especially International Human Rights Law.

Customary and Islamic laws, though mostly applied, are highly contested for being discriminatory especially against women. Under customary law, widows do not have the right to inherit at all and daughters inherit in a third degree while other children apart from the first son of the first house (in case of polygamous marriage) inherit in the second degree. (See, Customary Declaration Order). Under Islamic law, widows are entitled to one eighth (1/8) of the estate of the deceased husband. The Indian Succession Act, (a statutory law applicable in Tanzania) which is supposed to give equal shares to all rightful heirs is not regularly applied by parties in inheritance matters. Other statutes that also touch inheritance issues include the Land Act and Village Land Act of 1999 as amended in 2004 and the NSSF Act of 1997.

On the other hand, the Constitution of the United Republic of Tanzania contains a Bill of Rights which provide for the basic rights for all citizens of Tanzania. These include the principles of equality before the law and of non-discrimination on basis of gender. By virtue of Article 30 of the same Constitution and the Basic Rights and Duties Enforcement Act 1994, the above mentioned rights can be independently enforced by victims of discriminatory inheritance practices. Finally, Tanzania has signed and ratified an array of International Conventions such as CEDAW, ICCPR, ICESCR, Banjul Charter, The African Women Protocol, e. t. c. These instruments also provide for rights to property, equality and rights against discrimination among others. The judiciary in Tanzania has ruled that, International Conventions once signed and ratified by the State must be obeyed as the same signifies the intention to be bound even if the Convention is not yet domesticated. (See, *Transport Equipment & Reginald John Nolan .v. Devram Valambhia*, Appeal Case No. 19/1993, CAT and *Bernado Ephraim .v. Holaria Pastory & Another*, (1990) LRC 757, High Court of Tanzania).

Plenary Speakers

LEGAL PLURALISM AND THE SEARCH FOR THE 'RIGHT LAW': LAW AS KITE FLYING

Werner Menski

The presentation aims to show that recent significant recent advances in the understanding of how to theorise law from a pluralist perspective give rise to hope that we can now finally pay more attention to the practical application of such plurality-conscious methodology, rather than fussing about the definition of what is legal and what is not., what should be included and what should be excluded. Trying to find the 'right law', or perhaps that elusive phenomenon of 'justice', requires open minds and widely opened eyes to the pluralities all around us. If this confuses lawyers, so be it; it confirms that their training was insufficient to prepare them for the challenges of life, because life itself is plural.

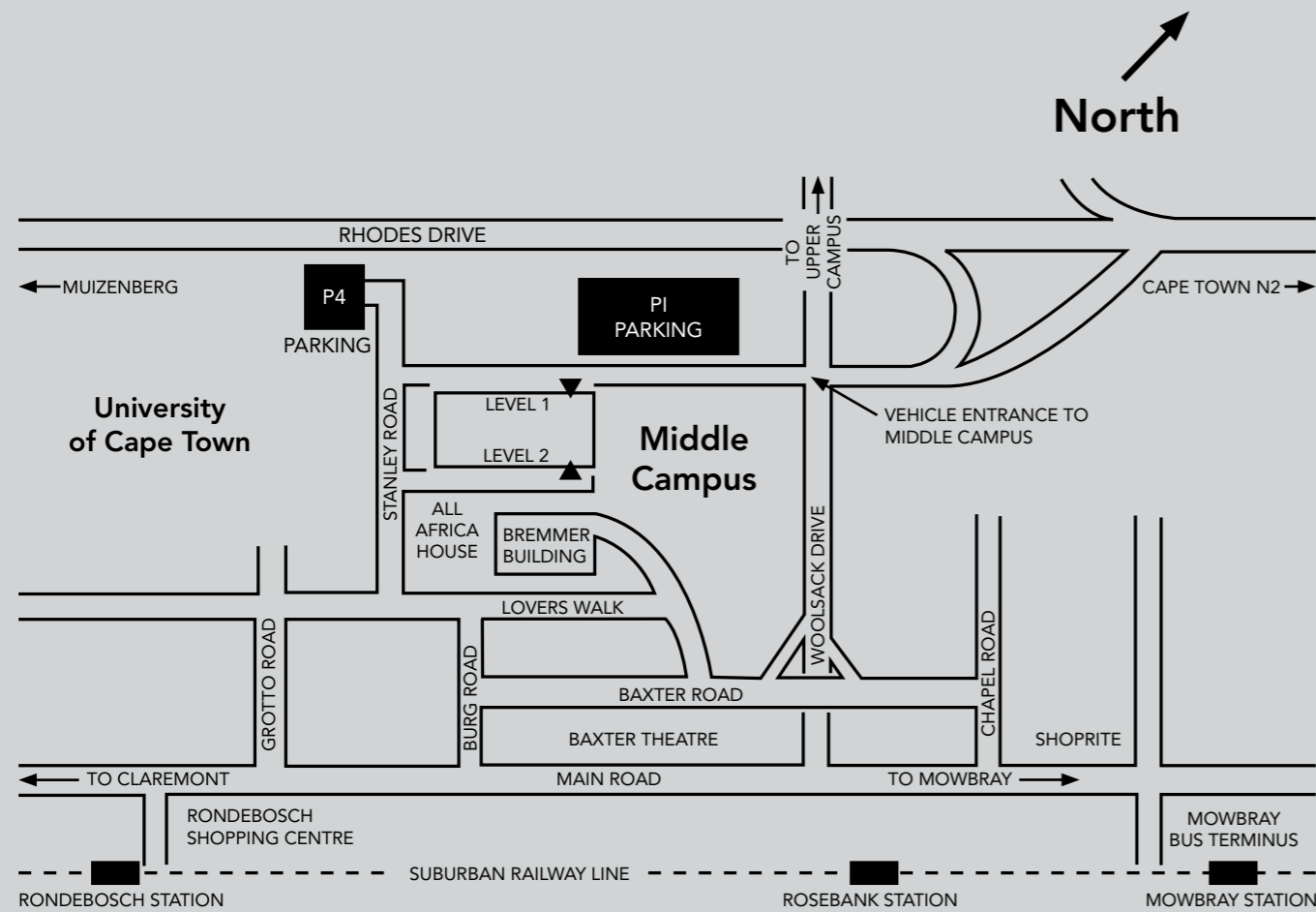
Major jurisdictions in the world are clearly not developing along the lines predicted by Western 'model jurisprudence' and are thus confirming the ancient truth that law is not merely state law. Law is at least four competing things at once. Everywhere, law-related outcomes feed selectively on a toolbox of available concepts and perceptions of different legal approaches, each internally plural. Law, then, becomes a plurality of pluralities. It appears that the international community, states, societies or communities and ultimately every one of us need to manage these pluralities to sail as peacefully as possible through life. Comparing law to the flying of a kite illustrates that the challenges are enormous, but the journey can be enjoyable. It works, if only for blissful moments. For, ultimately, we all have to die one day, but a long happy journey and the multiplication of blissful moments can be promoted by better awareness of plurality and of strong or deep legal pluralism, transcending petty ideological (and often academically instigated) turbulences. The presentation argues that recognising difference and the need for synergetic co-ordination are the keys to success for this journey. After all, one thing we do agree about: law is dynamic!

THE GENDERED IMPLICATIONS OF STRUGGLE FOR SUPREMACY BETWEEN LAW, CUSTOM AND RELIGION

Amy S Tsanga

This paper will draw on examples to illustrate the impact on gender relations and gender issues in general, of the continued competition for normative supremacy between law, custom and religion. It will be argued that while state law has increasingly projected a morally superior ground when it comes to gender equality, especially by drawing on human rights standards, the impact of this in the face of custom and religion has remained limited. Custom and religion also continued to exert their standards perhaps even more effectively than state laws. For women in particular as compared to men, the choice between seemingly progressive state laws and custom has not been an unproblematic choice divorced from concepts of belonging. Given the increasing power of religion (in particular the Christina religion) in the lives of many Africans especially women, the paper will also examine the extent which religion has promoted or forestalled critical dialogue on social justice concerns. The implications from a gender perspective are examined. Finally, the issue of the role of the state amidst all the above realities will be raised.

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Programme September 2011

Jubilee Conference on Legal Pluralism

Time	8 September, Day 1	9 September, Day 2	10 September, Day 3
Day 1 09h00 – 10h00 Day 2 & 3 08h30 – 10h00	OPENING SESSION - Pamela Schwikkard - Maarten Bavinck - Hanri Mostert	Plenary: Law, Custom and Religion - Werner Menski - Fareda Banda - Amy Tsanga	Plenary: Theory - Tom Bennett - Anne Griffiths - Franz Von Benda-Beckmann
10h15 – 11h45	Plenary: Property - Patricia Kameri Mbote - Juanita Pienaar - Zoey Chenitz & Amanda Richardson	Property Relations Panel 2 – LT1 Property Relations Panel 7 – C/R1 Human Rights and Development Panel 4 – C/R2 Governance Panel 4 – LT2 Law, Custom and Religion Panel 4 – LT3	Property Relations Panel 3 – LT1 Models and Practices Panel 7 – C/R1 Governance Panel 2 – C/R2 Governance Panel 5 – LT2 Law, Custom and Religion Panel 7 – LT3
11h45 – 12h15		Tea	
12h15 – 13h45	Property Relations Panel 1 – LT1 Models and Practices Panel 1 – C/R1 Human Rights and Development Panel 1 – C/R2 Governance Panel 1 – LT2 Law, Custom and Religion Panel 1 – LT3	Property Relations Panel 2 cont. – LT1 Models and Practices Panel 5 – C/R1 Human Rights and Development Panel 5 – C/R2 Governance Panel 4 cont. – LT2 Governance Panel 10 – LT3	Property Relations Panel 3 cont. – LT1 Models and Practices Panel 7 cont. – C/R1 Governance Panel 2 cont. – C/R2 Governance Panel 7 – LT2 Law, Custom and Religion Panel 8 – LT3
13h45 – 14h45		Lunch	
14h45 – 16h15	Property Relations Panel 1 Cont. – LT1 Models and Practices Panel 2 & 4 – C/R1 Human Rights and Development Panel 2 – C/R2 Governance Panel 1 cont. – LT2 Law, Custom and Religion Panel 2 – LT3	Property Relations Panel 2 cont. – LT1 Models and Practices Panel 6 – C/R1 Human Rights and Development Panel 5 cont. – C/R2 Governance Panel 6 – LT2 Law, Custom and Religion Panel 6 – LT3	Property Relations Panel 6 – LT1 Models and Practices Panel 7 cont. – C/R1 Governance Panel 9 – C/R2 Governance Panel 8 – LT2 Law, Custom and Religion Panel 8 cont. – LT3
16h15 – 16h45		Tea	
16h45 – 18h15	Property Relations Panel 1 cont. – LT1 Models and Practices Panel 3 – C/R1 Human Rights and Development Panel 3 – C/R2 Governance Panel 3 – LT2 Law, Custom and Religion Panel 3 – LT3	Property Relations Panel 4 – LT1 Property Relations Panel 5 – C/R1 Human Rights and Development Panel 6 – C/R2 Governance Panel 6 cont. – LT2 Law, Custom and Religion Panel 6 cont. – LT3	Plenary: Governance & Human Rights Development - Devanathan Parthasarathy - Reetta Toivanen - Svein Jentoft CLOSING