Africa knows! It is time to decolonise the minds

Report of panel D22: Disciplinary trends in Africa: legal and socio-legal studies

25 January 2021

Convenors:

- Carolien Jacobs (Van Vollenhoven Institute for Law, Governance, and Society, Leiden University)
- Ata Akpojiyovbi (co-convenor)
- Nadia Sonneveld (Van Vollenhoven Institute for Law, Governance, and Society, Leiden University)

Synopsis of the panel:

Africa's societies are shaped by high degrees of legal pluralism. State law, customary law, and religious law all have their own sources of normative ordering, and their own history of being and becoming in Africa. People consciously or unconsciously navigate between these different normative orders on a daily basis. In addition to state and sub-state normative orders, in today's globalizing world people are increasingly confronted with supranational and transnational normative orders, for instance through trade agreements, migration, or the privatization of security. What can our globalizing world learn from ways in which people in Africa navigate situations of legal pluralism? This panel invites papers that provide insights into ways in which in African societies different sources of normative ordering (co)exist or interact and how people navigate this plurality, showing how the law works and is experienced from the bottom-up. The panel also invites papers that deal with the ways African universities integrate these different legal perspectives in teaching and research.

Speakers:

1—Ayako Hatano, University of Tokyo

The internalization of international human rights and development agenda on traditional cultural practices in Kenya

The objective of this study is to explore how international human rights and development agenda and norms, are internalized into the domestic context, by examination of the laws and policies on female genital mutilation (FGM) in Kenya. Kenya criminalizes FGM by enacting the Prohibition of Female Genital Mutilation Act (2011), after the consecutive government's commitments to eradicate the practice, responding to international calls (FIDA 2009). However, FGM continues to be practiced widely and often justified as a cultural practice. In early 2018, a Kenyan doctor filed a lawsuit asking the Kenyan government to declare the 2011 Prohibition of Female Genital Mutilation Act unconstitutional as the dignity of traditional practitioners of female circumcision is disregarded by the law. It then begs the question of why the stringent legislation on the matter has not seen much success, or even caused backlash seen in the lawsuit. Against this intractable problem of combining international human rights and development norms with local cultural traditions, many scholars emphasise the importance of cultural change that shapes the process of legal development and implementation, based on interdisciplinary analysis [Risse and Sikkink 1999; Levitt and Merry 2009, Goodman and Jinks 2013; Cao 2016]. Building on those previous literatures on acculturalization, or vernacularization of international norms in local context, this study explores the stages and mechanisms through which international norms and standards can lead to changes in domestic practice by critically examining the social and political backgrounds of the development of domestic regulatory frameworks and momentum against FGM in Kenya. Based on the intensive field research including interviews with legal professionals, government officials and advocates in Kenya, this empirical study will provide a solid case study to explain how international human

rights and development norms work in practice and can inspire the discussion on the effective implementation of global norms in a local context.

2—Christa Rautenbach, North-West University & advocate of the high court of South-Africa

Navigating customary law in the formal courts: perspectives from South Africa

The constitutional obligation to apply customary law in the formal courts of South Africa is challenging and has consequences for the oral status of customary law. The aim of this paper is to explain the different ways the formal courts are dealing with some of the issues.

In 1994, the transitional Constitution of South Africa recognised customary law, and ensured a prominent place for it in future by promising that "[i]ndigenous law, like common law, shall be recognised and applied by the courts". The intention could not have been clearer: the common law and indigenous law were from now on to be treated alike. Although the final Constitution (1996) does not refer to common law and customary law in the same breath, as did the transitional Constitution, it also recognises the institution of traditional leadership that observes a "system of customary law", and it compels the courts to apply customary law when applicable, though subject to the Constitution and any other legislation. It is generally accepted that the mandatory wording of the final Constitution elevated customary law to the same position as the common law and, although it is not always easy to treat them alike, that is exactly what the courts have been trying to do. So far three approaches can be identified. The first one entails an infusion of common and customary law norms to provide protection for vulnerable members of society (Bhe v Magistrate, Khayelitsha 2005 1 SA 580 (CC)). The second approach confirms the prerogative of a community to develop its own customary law rules (Shilubana v Nwamitwa 2009 2 SA 66 (CC), and the third one is an example where the court used its lawmaking powers to develop a customary law rule to provide protection to a customary law

wife (MM v MN 2013 4 SA 415 (CC). The three approaches are totally different, and they illustrate how the courts are trying to navigating situations of legal pluralism that involves customary and common law norms in a legal order where the law of general application is based on different norms and values. The aim of this paper is to explore the different ways the formal courts in South Africa have been dealing with customary law issues.

3—Dennis Ndambo, University of Pretoria

The resilience of traditional legal systems in addressing social injustice in Kenya

In Africa, law and society are intertwined in a complex relationship. Pre-colonial communities had developed elaborate dispute resolution mechanisms that were geared towards enhancing justice. Achieving justice was a means to ensuring that there was harmony, stability and prosperity in society. Colonialism imposed foreign laws and legal structures that severely disrupted the organization of pre-colonial societies. After independence, while African states maintained the imposed legal system and structures, the traditional legal system was also retained but relegated to a low status. In promoting social justice, African governments enacted new constitutions and infused liberal values in old constitutions. They constitutionally entrenched a number of independent offices and they significantly expanded the bills of rights. However, recent events have shown that the executive, judiciary and legislature are engaged in conflicts that are adversely affecting the stability of African societies. Of concern is that these conflicts could jeopardise these formal institutions' capabilities to address social injustice. Consequently, traditional justice mechanisms appear to offer alternative approaches to achieving social justice. In Kenya, the values in traditional African legal systems have now been recognized in the 2010 Constitution and statutory law. These principles are drawn from values shared by most Kenyan communities. In addition, Kenya's Constitution mandates the courts to encourage alternative dispute resolution mechanisms, especially those based on

traditional legal systems. Therefore, traditional African justice mechanisms have proved resilient under the onslaught of foreign legal systems. Because communities in urban areas are not completely divorced from their rural ties, the same traditional justice mechanisms are still used. As such, many disputes are solved at the family, clan or community level without being escalated to the formal justice mechanisms. At the same time, when disputes that have been addressed through traditional mechanisms end up in the formal justice system, there is a possibility of the two systems reaching divergent results. With globalization, national courts are engaged in a dialogue with international courts, resulting in new norms that influence domestic norms. Therefore, the norms that the formal justice system applies may differ from those of the traditional justice system. This paper argues that there are important principles that could be extrapolated from such traditional legal systems in order to secure justice in "formal" (legal) institutions.

4—Willy Tadjudje (University of Yaoundé II) and Clément Labi (University of Luxembourg)

What law for what development in Africa in the 21st Century?

Seeing legal plurality as a unique resource instead of an obstacle for the development of Africa.

In Africa, legal pluralism is a reality. State, customary and religion-based laws coexist and cohabit. In most cases, the rules stemming from those different sources clash: for instance, in state-enacted civil law (marriage, civil status, inheritances, matrimonial regimes, land rights etc.) western-style rules are omnipresent, which do not always fit the habits of African citizens; hence a conflict of sort with customary or religious law, which subjects law seem to prefer, notably in rural areas. Likewise, when it comes to business law, the global architecture of OHADA is a calque of French law and does not always match the needs of Africans. Thus, in the absence of an appropriate law, which subjects of law can recognize as their own, economic activity runs the risk of

stagnating, for lack of a social consensus as to the applicable legal framework. This results, for instance, in the ubiquity of informal work with its cortege of negative consequences.

In actuality, legal pluralism exists to various degrees in every society in the world although it is more obvious in Africa, notably due to external interventions carried out, among others, by colonizing powers. For such purpose, said pluralism should have been assessed as a means of enrichment of the law, in the service of development, and with the purpose of yielding functional rules.

The goal of our reflection is to lay foundations for a reconstruction of law in Africa, in order to successfully integrate the various sources of law. To attain such goal, one should strive to take into consideration the needs and habits of the Africans (thus use an adaptive method) instead of merely mimicking the law produced in other societies. Successful experiences in integrating several legal sources in the service of development in Africa will be cited.

5—Scott London (Randolph-Macon College) and Hamady Alassane BA (Lower Court of Saint-Louis)

Dispute resolution, domestic violence, and divorce: navigating legal pluralism in Senegal

Legal pluralism in Senegal shapes family law and dispute resolution in two senses. One is internal to the formal legal process, and the other pertains to the array of informal options available to families in conflict. In the first sense, Senegal's Family Law Code itself reflects a blend of Muslim, African, and French colonial legal traditions. In the second sense, a range of mediation-style interventions are provided by family members, trusted neighbors and friends, local religious leaders, social service providers, and state judges. This paper examines the possibilities and constraints found among these elements of Senegalese legal pluralism, viewed through the prism of divorce and domestic violence cases, and discusses the

following four findings. First, decisions about type of intervention are most commonly controlled by the husband and his parents. Second, women who contemplate taking husbands to court are often discouraged by heavy social and economic costs. Third, despite some significant differences in normative orders, dispute resolution forums share a common discourse of "female submission" that undermine women's assertions of injustice. Fourth, while mediations by different types of third-party intermediaries share an ethos of compromise, women are typically expected to make more concessions and accept blame for problems. Taken together, these findings suggest that navigating legal pluralism also means navigating a gendered discourse that is generally unfavorable to women seeking redress from domestic violence or divorce. At the same time, the expanding availability of legal assistance for women, activism in support of reforms to Senegal's FamilyLaw Code, and the influence of global feminist discourses, are shifting the cultural and legal terrain on which divorce and domestic violence disputes unfold. This research is based on family court cases in Saint-Louis, Senegal during 2015-19, as well as surveys and interviews conducted in the fall of 2019. The analysis is based on perspectives from the two authors, a cultural anthropologist and a legal scholar who is also a chief clerk of the court where the research was carried out.

6—Annelien Bouland, Van Vollenhoven Institute for Law, Governance and Society, Leiden University

What is "law" in Africa? Africa and Europe and the relational dynamics of knowledge

Inspired by Birgit Meyer's lecture at the "Africa: 60 years of independence" conference and on the basis of a literature review, this paper will ask: what is "law" in Africa?

I approach the question from a perspective that is both historical and relational, foregrounding the entanglements between Europe and Africa. Doing so I aim to answer three separate sub-questions:

(1) What are the implications in Africa of the introduction of the category of "law" by colonial administrations and scholars in Africa?
(2) What are the implications for European scholarship of the introduction of "law" by colonial administrations and scholars in Africa?
(3) What are some current initiatives to revise understandings of "law" in Africa?
As may be expected, answering these separate questions will expose the power dynamics involved the knowledge production of law in Africa. Taken together, I argue that the tensions around the concept of law are a productive point of departure for thinking about what decolonized legal studies and socio-legal studies could entail.