The institutionalization of law

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The system of law with its institutions of legislature and administration of justice has a central political and cultural importance in state building. Both institutions may have a longer or shorter history of development at national levels.

With H. L. A. Harts distinction between primary and secondary rules as a starting point the lecture will deal with the relations between customs and customary law as perceived and functioning at local levels and the formal general law instituted by the state.

The legislation and court practice are seen as instruments of the state to reconcile and absorb conflicting interests and values in the various segments of the population. The official recognition of customary law which is a general trend in post colonial states may take different forms. In any case the recognition proper is a means of suppressing customary law by freezing it. This may be unintended but in multi-ethnic countries unifying of law is an avowed means to build a nation state.

The aim of the lecture is to demonstrate the use of comparative studies of the development of legal institutions in postcolonial states to be able to understand legal institution building as a generally used political means to cope with tribal or ethnic conflicting interests and eventually with conflicting interests of the sexes.

My background for taking up the issue is the observation of certain common traits in the development of law in the new African states during the colonisation and since independence.

The systems of law in these countries seems to be essentially unlike the model of a legal system we are being teached at our law schools at the universities in Europe. The mark of law is its character of a logically cohesive network of rules and rule-bound relations with general applicability within the boundaries of the nation state. The law in the European colonies in Africa (and Asia) is as a contrast being described as a pluralistic system of law consisting of the imported Western legal systems and the mostly unwritten customary law systems of the indigenous peoples.

In the former colonies now independent states a process can be observed by which on the one hand unification of law is aimed at and on the other hand recognition of customary law seems to be part of an official legal policy.

The resulting sets of rules appear full of contradictions and potentially rich in conflict. Thus open to the criticism of the Western scholar interpreting the ob-

served phenomena as token of the weakness of the new states. But another interpretation may be more appropriate ?

Law and institutions of law, rules, legislature and administration of justice

Definition of law has taken up much time of scholars. A definition is a matter of choice and for my purpose which has to do with the interaction between customary law and general or formal law I have found it relevant to take H. L. A. Hart's handling of the problem of definition as a starting point. Before I deal with his ideas I will return to what the western educated lawyers take for granted: Law consists of a cohesive network of rules, and legal institutions are rulegenerating as legislature or ruleimplementing as courts. Administrative agencies are a mixture of rule generating and implementing. In this usage legal institutions are concrete arrangements and institutionalisation an observable process leading to such concrete arrangements.

Norms and rules. Primary rules and secondary rules

The term norm in the social sciences may refer to routinized behaviour or to prescriptions for behaviour. In jurisprudence "rule" is synonymous with norm in the last meaning. A definition of law to be used in theory building concerned with development and change has to concider that the nation state, the legal profession and jurisprudence as a university disciplin are phenomena with a history and a time of birth varying from society to society. For that reason I have found Hart's distinction between primary rules and secondary rules adequate. "Primary" and "secondary" hint at a chronology.

Rules of primary type impose duties/obligations. Human beings are required to do or abstain from certain actions.
Rules of secondary type confer powers, public or private. Human beings may by doing or saying certain things introduce new rules of primary type, exstinguish or modify old rules, determine their incidence, control their operation.

The idea of obligation is central to a concept of legal rules. Rules imposing obligations may be wholly customary in origin. There may be no centrally organised system of sanction for breach of the rules. The importance or seriousness of the social

pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations and therefore are considered rules of law.
Hart assumes the existence. now or before, of societies with only primary rules. "Only a small community closely knit by ties of kinship, common sentiment and belief and placed in a stable environment could live successfully by such regime of unofficial rules." In any other conditions three defects by a system of law based on primary rules alone would be exposed: 1.Uncertainty on the content of the rules. 2. the static character of the rules. 3. The inefficiency of the diffuse social pressure by which the rules are maintained.
I do not agree with Hart about the static character of primary rules, but that is another story. For Hart the remedies for these defects consist in supplementing the primary rules of obligation with secondary rules. Secondary rules are concerned with primary rules. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined. The respective remedies for the three types of defects are the introduction of rules of recognition of primary rules, rules of change of primary rules and rules of adjudication(implementation). I will return to these three types of secondary rules and their connection with the institutionalisation process. But I will first take up some problems with the study of customary law and general law.

The study of law in non-western societies

Vilhelm Aubert (1972) asserts that the study of the system of law in preindustrial and non-western countries shows us in simple form parts of the problems, conflicts and deviations all societies have and try to solve. In these simple forms we may identify fundamental features of our own legal institutions but at the same time also be astounded at the disparities compared with our own law.

I see in this wording an acknowledgement of our inevitable eurocentrism. Anthropologist and lawyers studying illiterate societies have disagreed about how to ascertain the existence and content of a legal system without projecting our own ideas of law (Gluckman and Bohanan 1969). By observing routinized behaviour we can not know whether it is prescribed. By asking for prescriptions we presuppose the existence of a concept of a rule. As a solution many legal anthropologists have chosen to study processes of dispute settlement by a third party. That means that primary rules in Hart`s sense are found through studies of institutions build on se-

condary rules. These institutions could take many forms, from feud and moots to courts more like ours headed by chiefs.

Law in the colonies. The dualistic system of law and the transformation of customary law

A common trait in the colonies was a pluralistic system of law: -roughly speaking European law for Europeans and "customary law" for the indigenous population.

It is now commonly held, that what was said to be the content of customary law was at least partly a construction of the colonial administrators, as most of the colonies were composed of several ethnic and language groups with different customs and norms. Thus customary law was a variety of law systems but in the administration of justice it was often transformed to common laws. Gordon Woodman (1983), an English legal anthropologist, has proposed a distinction between lawyers customary law and sociologists customary law.
How do lawyers find customary law?
We have to look for rules of recognition. I take as an example a brand new act from Zimbabwe. It is the Customary Law and Local Courts Act, 1990, not yet in force. Article 9, Ascertainment of customary law, says: If a court entertains any doubt as to the exsistence or content of a rule of customary law relevant to any proceedings, after having concidered such submissions thereon as may be made and such evidence thereof as may be tendered by or on behalf of the parties, it may without derogation from any other lawful source to which it may have recourse, consult reported cases, textbooks and other sources, and may receive opinions, either orally or in writing, to enable it to arrive to a decision in the matter.

This is customary law in books, textbooks and courts records, fixed and more and more removed from customary law in action as time goes by owing to Common Law's weight on precedents. That is the use of former court decisions as obligatory guide for the settlement of new cases.

The postcolonial state and unification of law in the Nation State building process

After independence most of the states saw uniformity of law as one of the means to build a nation state and to suppress tribalism. To this purpose customary law was considered ill suited for more reasons. The alternative has therefore been the imported European law system. It has been Common Law in the former British colonies and the great European codifications in former Portuguese, German and Dutch colonies. Most of the countries bordering South Africa have adopted a gen-

eral law system with roots in the history of South Africa, called Roman Dutch Common Law. Its a mixture of statutes and precedents.

This foundation of the new law systems has slowly been supplemented and amended by new legislation. However, some admissions to the existence of cultural varieties have been made from the beginning or in the course of time as difficulties for the administrators of justice have turned up.

The concessions have taken different forms.

1. In some cases the constitution makes local traditions a source of law to be taken into consideration.

2. In other cases the presumed content of customary law has been incorporated in legislation.

3. A third solution is to give the courts the power of discretion to apply customary law in certain types of conflicts.

4. One government initiative to solve these difficulties has been an attempt to return to traditional ways of solving conflicts by reinstating chiefs. Some Southern African states have implemented this system.

The resulting law systems have caused many problems with internal conflicts of law within different areas. That means disputes about the applicability of either of two or more systems of law. Mixed jurisdictions are established with different guidelines for resolving conflicts between general and customary law.

Rough figures of the systems of administration of justice in Botswana, Mozambique and Zimbabwe may illustrate the similarities and variations in solutions (not included here).

The handling of conflicts and the division of labor between the legislature and the institutions of administration

I will now take up the thread from John Martinussen's introduction lecture and his presentation of The New Institutionalism.

In their book, Rediscovering Institutions, March and Olsen "wish to explore some ways in which the institutions of politics...provide order and influence change in politics." The division of labour is a starting point."the premisses of organisation is that not everything can be attended to at once, though , in principle, such attention is required for a comprehensive solution. Thus a central anomali of institutions is that they increase capability by reducing comprehensiveness."

The simplification obtained by division of labour and institution building has political consequences. Significant barriers between domains of legitimate action are created. "The boundaries also create buffers against conflict and this is of-

ten their most significant political effect. One important example is the division of responsibility among legislature, courts and administrative agencies, each with a different set of rules for dealing with what is in some sense the same issue. Laws are made in one institutional sphere, where decision makers do not see many of the practical implications of what they are doing. When laws are implemented in courts of law or in administrative agencies most potential participants and issues are excluded. There are rules limiting what matters can be considered by a court or an administrative agency, buffering the court and the agency from certain types of conflict... By inhibiting the discovering of and entry into some potential conflicts a structure of rules organized into relatively discrete responsibilities channels political energies into certain kinds of conflicts and away from others.

The above quoted presentation of the mode of operation of political life claim general validity. I have catched it as appropriate to present an alternative interpretation of the confusing picture of the intertwined legal institutions of the postcolonial African states. In order to do that we have to se the legal institutions in a broader societal context. That includes to take a look at potential and actual conflicts which the institutions are supposed to cope with in some way and the broader trends giving rise to the conflict potentials. Which are the conflicts which such an organisation and division of labour conceivably may catch and regulate, moderate, suppress ?

Most of these states if not all have geografical boundaries which mean that the populations consist of more ethnic groups. In some of the countries an open conflict exists between such groups. In others some groups are obviously suppressed and week. Even if ethnic controversies might be of lesser importance in some of the countries problems and conflicts are inevitably coupled with the processes of economic development proper. Some general features to be seen in countries developing from prevailing subsistence economy towards dominating market economy are industrialisation of production, urbanisation of human settlements and as a consequence the relative diminishing importance of the kin and family as a frame for daily life and instances of support and control. The most dramatic changes have probably occurred in connection with compulsory transfer of populations stemming from local development projects and next by migration to urban slum areas. These changes have profoundly disturbed life cycles that are the very background for the customs. But also people living in the same geographical areas generation after generation are exposed to changes.

In these processes the daily life of men and women changes but not in the same way for all. One point is that women`s lives have became more diversified. In rural areas migration sets in. That leaves in some cases the responsibility of

farming to the wife alone and a heavier workload as well. The farm work it self will be under pressure to take other forms. The impact of these changes will touch the whole life in the rural socities. Traditions will come under pressure and so will traditional power.

Whether women could be said to win or to loose in that process of re-adjustment is first of all a question of their position in the traditional society. In any case conflicting interests and values arise at a personal as well as group level.

The economic development objectives of the state dictate one policy. Its project for a nation state another. An eventual objective of equality between the sexes a third. At the level of legislature a combination of objectives may be impossible but the different objectives may be considered separately in different parts of the legislature. At the ideological level group conflicts may be managed that way.

In the division of labour between the legal institutions the management of conflicts at a personal level and control of the behaviour of individuals are tasks of the courts. Also within the court system proper a division of labour is instituted. The secondary rules of recognition of primary rules (customary law or general law) and adjudication (the forms of procedure and the manning of the courts) are different for the different types of courts. The trust of the people that the decisions of the courts will be just should be secured either by the possibility of choice of fora or by rules for recruitment to the positions in the court system.

I think that the idea that rules and legal institutions could be and are being used as an effective means of social control never has been absent from the mind of legal scholars. Whether the concrete arrangements as those I have presented above are in fact effective is a matter of empirical research. Very little has so far been carried out.

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