



CUSTOMARY GOVERNANCE AND DEMOCRACY BUILDING: EXPLORING THE LINKAGES

Conference Report

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INTRODUCTION

Today more than ever, the field of democracy support is characterized by a diverse and fluid approach. In recent years the focus of international support has increasingly shifted from assisting short-term individual democratic ‘events’ such as first-time elections to facilitating the establishment and consolidation of sustainable, long-term democratic processes. In practical terms this focus typically translates into a preoccupation with building the capacity of ‘established’ (i.e., formal) state institutions such as electoral management bodies, the judiciary, national legislatures and other related organs of governance.

At the same time, the national contexts within which such democracy-building efforts operate are often characterized by limited (or non-existent) state institutional capacity, combined with prevalent customary governance structures that are based on pervasive local identities (ethnic, religious, clan-based or tribal) and allegiances.

How best to address customary governance structures within the framework of democracy support programmes is thus an important and challenging question, and one that has received relatively little systematic attention to date. To address this issue, in 2009 International IDEA initiated a comparative assessment project, generously funded by the Belgian Ministry of Foreign Affairs. The specific aims of the project are:

1. To analyze the role of customary governance structures in a variety of current and potential future democracy-building contexts, giving particular attention to their actual and potential contribution to democratic consolidation and reform, gender dimensions of their functioning and specific challenges and insights derived from conflict and post-conflict contexts.
2. To review the overall function and role of customary governance structures and processes in a range of democracy-building contexts.

3. Based on an analysis of concrete experience in a variety of geographical settings, to assess the nature of customary structures’ relationships (or lack thereof) to ‘formal’ democratic institutions, as well as their actual and potential contribution to democratic consolidation and reform.
4. Drawing on the outcomes of the above, to develop and disseminate policy-relevant conclusions and recommendations directed to the broader democracy-building community.

The IDEA project also builds on a number of previous experiences and initiatives, in particular:

- Insights and perspectives gained from a major comparative study of the role of traditional justice and reconciliation mechanisms in African post-conflict societies: *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (International IDEA, 2008—English and French print versions available; also at: <http://www.idea.int/publications/traditional_justice/index.cfm>).
- Lessons gained from IDEA’s practical democracy-building experience in a range of national contexts, particularly in countries where customary structures play a significant role in local and/or national governance.

While the outcomes of this endeavour will hopefully prove interesting and useful to a wide range of constituencies, notably within the international democracy and development assistance communities, specific target groups are at the forefront of the project’s intended audience, namely:

- National and international policy makers, in particular policy makers in the fields of conflict, reconciliation, judicial reform and human rights; and

- Specialist analysts, academic institutions and think tanks in the same areas.

Within the project framework an initial expert consultation involving a small group of thematic and national/regional experts from regions of particular interest to International IDEA—Latin America, Africa, South Asia, the Middle East and the Pacific—was held at the Indian Institute for Advanced Study (IIAS)¹, located in Shimla, India, in May 2009². Following consultation with a number of key project partners and stakeholders, an international conference was co-organized with the United Nations Economic Commission for Africa (UNECA)³, which has long had a keen interest in the issues addressed by this project. The conference, held at the UN Conference Centre in Addis Ababa on 15-16 September 2010, was attended by 70 participants drawn from a wide range of constituencies and regions, many of them noted experts in their respective geographic regions and/or fields of intellectual enquiry.

A key objective of the conference was to further develop and deepen the analysis of the role and functioning of customary governance structures within a variety of democratic contexts that was initiated at the Shimla Consultation. The Shimla meeting affirmed the fundamental view that, practically speaking, in many contexts ‘formal’ and ‘informal’ governance structures cannot easily be separated. Participants at the Addis conference recognized the need to develop an approach to democracy building that seeks to harmonize and synthesize these seemingly parallel systems of governance.

This requirement is more than simply intellectual or conceptual; the core of the conference discussion focused on the need to anchor democracy in the many and highly diverse local contexts in which it operates. In this sense the project of ‘customizing the democratic’—and at the same time ‘democratizing the customary’—is essential if the overall democratic enterprise espoused by a majority of the world’s nations is to be considered truly legitimate by their own populations.

In operational terms, the development of such a project and approach necessitates an examination

of the transformations required by both customary governance institutions and the formal state in order to achieve a functioning, dynamic *modus vivendi* between the two systems. Understanding how these mutual transformations can and will unfold, and the implications of such a process for the legitimacy of the modern state, has a number of highly significant outcomes. In particular it can make a major contribution to democracy building on the ground and help to move policy discussion about democracy building beyond the conceptual impasse of ‘state failure’ and ‘failed states’ that has been such a salient feature of international discourse in recent years.

What is the nature of the transformations required within both governance systems by such a process? One line of argument is that we are currently witnessing a transitory process in which a single governance logic will ultimately prevail. Another is that there is an enduring cohabitation between the two logics, and that both are required to address the particular governance challenges confronted by each country. A third theory is that we are currently witnessing a series of *innovative institutional responses* to a democratization process that has roots in a European culture and institutional approach that are fundamentally alien to most countries and regions, notably in the global South. Viewed from this perspective, such innovative institutional responses offer a tool for better understanding the workings of local, as opposed to imported, democracy. In this sense, these responses are a critical contribution, in the first instance from the global South, to what might be termed the democratization of the democratic debate itself.

Overall, participants agreed that the Addis conference deliberations were both rich and varied—so much so that the main body of this report presents them in rather more detail, and with greater attention to contextual nuance, than is usually the case in such documents. Indeed, a key conclusion of the discussions was the need to recognize and pay attention to contextual specificity—regional, national or local. Conference participants will hopefully forgive us for shortening their contributions in the interest of space, while the broader readership of this report is strongly encouraged to delve deeper into the papers on which much of the report draws.⁴

¹ <<http://www.iias.org>>

² A full report from the Shimla Expert Consultation is available on request from IDEA.

³ <<http://www.uneca.org>>

⁴ All the background papers commissioned for the conference are also available on request from International IDEA.

ACKNOWLEDGEMENTS

The conference of 15-16 September 2011 was jointly organized by UNECA and International IDEA. The conference owe much to the efforts of Mark Salter, Katarina Jörgensen, Julian Smith and Lisa Hagman. Many thanks are due to Alemtsehay Abate and Tsion Yohannes for their work on providing the draft transcription of the conference discussions on which the main body of the report is based. Special acknowledgement goes to Mark Salter who was the key editor of this report.

Special thanks are due to the following: Abdalla Hamdok, Kojo Busia and colleagues in the Governance and Public Administration Division at UNECA for

hosting the Addis meeting and their enthusiastic support for the overall initiative; Peter deSouza, Tanja Chopra, Kripa Ananthpur and Kojo Busia for their committed advice and support in planning the conference; Alemtsehay Abate and Katarina Jörgensen for their untiring assistance in organizing the event; and last, but by no means least, Ambassador Luc Teirlinck, Director Peter Saverys, Marc van Wijmeersch and colleagues in the Belgian Ministry of Foreign Affairs for the financial and moral support that has made possible both this and the preceding 'African Traditional Justice Mechanisms' project that inspired it.

ACRONYMS AND ABBREVIATIONS

APPP	Africa, Power and Politics Programme
CDF	Civil Defence Forces
CIESAS	Centro de Investigaciones y Estudios Superiores en Antropología Social, México
CVC	customary village council
DFID	Department for International Development (United Kingdom)
GDP	gross domestic product
GNH	gross national happiness
GPs	Grama Panchayati
IIAS	Indian Institute for Advanced Study
ILO	International Labour Organization
International IDEA	International Institute for Democracy and Electoral Assistance
MP	Member of Parliament
TRC	Truth and Reconciliation Commission
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNIFEM	United Nations Development Fund for Women
USA	United States of America
USAID	United States Agency for International Development

CONFERENCE INTRODUCTION AND OPENING REMARKS

**DR. KOJO BUSIA ON BEHALF OF
DR. ABDALLA HAMDOK, UNITED NATIONS
ECONOMIC COMMISSION FOR AFRICA
(UNECA)**

UNECA regards it as a great honour to co-host this important conference with International IDEA, the aim of which is to explore the linkages between customary governance and democracy building—a theme that is both topical and timely, notably in the context of democracy- and state-building efforts throughout the global South.

In May 2009, International IDEA organized an expert consultation in Shimla, which was hosted by the Indian Institute for Advanced Studies (IIAS). The Shimla Consultation provided a unique opportunity not only to exchange ideas, insights and experiences on the relationship between customary and formal democratic governance institutions, but also to reflect on the dilemmas posed by their linkages with respect to state-society relations in general and the political legitimacy of the state in particular in many parts of the developing world.

Discussions also focused on specific experiences drawn from local contexts on several continents, and highlighted the importance of integrating customary and formal structures in order to address issues such as gender, youth, HIV/AIDS and health, the environment, climate change, corruption, electoral violence, conflict, peace building, human rights and a host of other governance challenges.

Overall, the Shimla Consultation reaffirmed the fundamental view that formal and informal government structures cannot easily be separated. Accordingly, an approach should be developed to reconcile, harmonize and synthesize these seemingly parallel systems of governance if democracy is to be considered legitimate by the majority of the world's population. Creating

An approach should be developed to synthesize these seemingly parallel systems of governance if democracy is to be considered legitimate by the majority of the world's population.

such an approach requires an examination of the mutual transformations required by both customary governance institutions and the formal state, and the blending of the norms, values, rules and processes associated with each system. Understanding how these mutual transformations unfold and the implications this has for the legitimacy of the modern state will make a major contribution to state building and move us beyond the conceptual impasse of 'state failure' and 'failed states' that has dominated recent discourse in this area.

This meeting seeks to further the discussions and analysis initiated in Shimla. This diverse group of experts can delve deeper into the comparative perspectives drawn from different regions and continents, share experiences and insights, and identify successful approaches to—and outstanding challenges related to—'democratizing the customary' and 'customizing the democratic'.

**DR. PETER DESOUZA, INDIAN INSTITUTE
FOR ADVANCED STUDY (IIAS)**

It is important to place these discussions within the larger framework of global discourse. In the last few years, many countries in the global South seem to have become disillusioned with democracy. This disillusionment can perhaps be explained by the gulf between the promise of democracy and its actual workings. There is a substantial body of evidence documenting the poor governance that characterizes the practice of democracy today; in some cases its capture by elite groups promotes the pathologies of political culture as a result.

Implicit in this criticism is a suggestion of two different normative orders: 1) a modern state with a kind of rationalized attendant democratization process and 2) a traditional political structure. In this context, it has been suggested that the normative frameworks and systems inherent in traditional political structures may be more conducive to effective governance processes.

Over the years, rich case-specific material has given us complex empirical insights into the working of democracy in particular countries. This evidence invites us to do comparative work, because we need to understand why the deficits exist, what internal processes are involved and what factors produce these deficits. A key question that guides the work of International IDEA and all others who are concerned with democracy is thus: what can we learn from these case studies, and what can comparative assessments tell us about the democratization process?

One line of argument is that we are currently witnessing a transitory process in which a single governance logic will ultimately prevail. Another theory is that there is an enduring cohabitation between the two logics, and both are required to address each country's unique governance challenges. A third theory is that we are currently witnessing an innovative response to a democratization process that has its roots in an alien culture—Europe—which brings with it specific and complex cultural packages and institutional forms. Innovative institutional responses, so the argument goes, can help us better understand the workings of democracy. In this sense they are a critical contribution to democracy discourse from the global South.

What are some of the emerging questions that require further consideration? For example, do we see the relationship between formal and informal governance

structures as an expression of an evolutionary process of democratization, or rather as a process of hybridization and indigenization? What forms should the related institutional architecture take? How does one deal with questions of adjudication and conflict between the two forms of governance? Can the political cultures they represent co-exist comfortably with each other? Or is there a primacy when conflicts are involved and one normative order begins to trump the other?

Several elements of the democratization process—such as participation, transparency, accountability and responsibility—can perhaps be harmonized more easily between the two forms of governance. But potential conflicts surface in relation to formal structures, particularly with respect to the rule of law. These conference discussions will help us make sense of the case studies: We will examine the formal and informal processes of each case within a comparative framework and place this information within the context of the larger debate on the democratization process. It will help us understand how the functioning of democracy in other regions of the world can contribute significantly to the global debate, and in this sense contribute to the democratization of the democratic debate itself.

**MARK SALTER, THE INTERNATIONAL
INSTITUTE FOR DEMOCRACY AND ELECTORAL
ASSISTANCE (INTERNATIONAL IDEA)**

Why is International IDEA working on the specific theme of this conference? One of the things implied by the core focus of International IDEA's work—the promotion of sustainable democracy—is the fundamental understanding that for democracy to take root and flourish, it needs to be nourished by and live within the biosphere of its local context. This may appear to be simplistic or even a truism, but it is remarkable how this idea continues to fly in the face of overtly normative existing approaches to democracy support that rest on the assumption that there is, if not explicitly a 'one size fits all' approach, at least a superior model to which everybody should be aspiring.

It is pretty clear, however, that the kinds of concerns and issues we are exploring here contradict that approach head on. We want to explore the local contexts within which democracy has taken root and is flourishing, and in this context to specifically explore the role and contribution of 'what is already there' with respect to governance structures and processes.

It is in the area of innovative institutional responses that some of the most interesting and useful learnings are starting to emerge.

In this we are partly guided by previous experience with the publication *Reconciliation and Traditional Justice after Violent Conflict: Learning from African Experiences*,⁵ which is based on a set of country case studies on the role of traditional justice mechanisms in post-conflict societies in Africa. Two important conclusions emerged from this study. First, a clear sense of the resonance people felt, and continue to feel, about focusing on *local* resources and *local* approaches to managing everything from small-scale disputes to much more serious conflicts. Second, that understanding of these local dimensions is still lacking in the international community's approach to everything from post-conflict reconstruction to democracy support and state-building efforts around the world.

As those who attended the Shimla Consultation will recall, terminology is problematic: we chose 'customary' because it was seen as the least problematic of the available terms. Some people maintain, however, that we are really talking about informal structures, while recognizing the fact that traditions themselves are in a constant state of change; others prefer the term traditional or, more accurately, tradition-based structures.

We also aim to maintain a balance between exploring thematic issues and country- and region-specific studies. It has become very apparent that there are a number of critical issues—for example accountability, legitimacy, gender and inclusivity—within traditional structures that require a more thematic approach. At the same time, we want to keep examining the specifics of local and regional contexts.

In conclusion, in terms of the tripartite framework of confrontation, co-habitation or innovative institutional response suggested by Peter deSouza, my sense is that some of the most interesting and useful learnings are starting to emerge from work in the area of innovative institutional responses. Finally, it is critical to keep asking ourselves how this discussion of the relationship between customary and formal structures can inform actual policy making in governance, judicial reform and other key areas relating to economic, political, social and cultural development.

⁵ <http://www.idea.int/publications/traditional_justice/index.cfm>

SESSION 1: AFRICAN PERSPECTIVES

**PROF. KIDANE MENGISTEAB,
PENNSYLVANIA STATE UNIVERSITY, USA.
*WHY DEMOCRACY-BUILDING IN AFRICA
MIGHT REQUIRE RECONCILING MODERN
AND TRADITIONAL INSTITUTIONS OF
GOVERNANCE***

My title suggests a number of contentions. First, modern and traditional African institutional systems are both fragmented and, at times, incoherent. Second, existing institutional incoherence undermines the democratization process on the continent. Third, the two institutional systems can be reconciled in practice. Fourth, democratization is likely to require the reconciliation of these two sets of institutions.

Institutional scholars tell us that when formal and informal institutions are coherent, citizens know what is expected of them, both individually and collectively. Institutional incoherence, by contrast, leads to both confusion and social instability—which is why these institutions need to be reconciled for the purposes of social stability and stable democracy. In the existing literature on African institutions, however, there is a lack of clarity regarding the relationship between traditional, formal and informal institutions.

For example, there is no comprehensive study of the dynamics of chieftaincy systems and how they might be integrated into or reconciled with formal institutions. One school of thought dealing with informal institutions concentrates on the clientelist, corruption-focused and patrimonial characteristics of African state functionaries. It is debatable, however, whether we should view these as illicit activities or institutions. It seems more appropriate to view them as guides for behaviour, and illicit activities cannot properly be described as such. An additional problem with this approach is that it chiefly focuses on the

behaviour of state functionaries, but does not address other aspects of informal institutions in Africa.

A second approach focuses on traditional institutions. The problem with this approach is that it tends to describe chieftaincy systems and how they operate, but does not deal with non-chieftaincy institutional systems, or indicate the mechanisms by which these institutions could be incorporated into prevailing governance structures. Some analysts are clearly opposed to traditional institutions. They see them as incompatible with democracy and argue that the best thing to do would be simply to abolish them. Others argue that traditional institutions are an essential feature of the governance landscape, and African states cannot manage without them. The problem, however, is that these points of view do not help us understand how to build institutional systems into which relevant aspects of traditional structures can be integrated.

The African institutional landscape consists of three groups. First, there are formal institutions that constitute the base on which the state operates. These are either legacies of colonialism or more recent imports from advanced Western countries. Second, there are traditional institutions that enjoyed a formal status in the pre-colonial era. Thus, African political systems have their own institutional basis. With the advent of colonialism and indirect rule, these institutions were relegated to the sphere of informality; they continue to operate, although they have been modified by colonialism and over

The existence of incoherent institutional systems is undermining the democratization process on the African continent.

time. Third, there are formal societal institutions, which are subject to changes and differ from place to place. For instance, religious groups have different formal societal institutions, customs and norms, as do different ethnic groups or people who live within different modes of production.

The fragmentation of the formal and the traditional is an empirical reality in Africa. Especially in rural areas, large groups of the population still adhere to traditional institutional systems of governance, while the state operates in a different form. The key question, however, is: are the systems incoherent? Do they clash with each other? If so, in what areas? Traditional systems, of course, generally operate within different economic systems; you cannot expect nomads in rural areas and business people in cities to operate within the same institutional frameworks.

To illustrate the areas of potential institutional conflict, let us examine two areas: 1) resource allocation and property rights, and 2) conflict resolution mechanisms. The most important resource in the traditional institutional space is land: for peasants and nomads, their livelihood depends on it. Traditional land ownership systems are quite different from those sponsored by the state.

By and large, traditional ownership of land is communal, and membership in the community is essential for access: as long as you are a member of the community, you cannot be denied access to land. In many instances the state does not recognize customary ownership of land, and following the colonial example some states declared that all land belongs to them, so that they can expropriate it as and where they want. At other times states recognize property rights, but since they do not really recognize customary ownership they still take land and fail to provide effective compensation. In areas with mining or commercial farming, for example, compensation

mechanisms are generally either non-existent or extremely limited in scope.

When states confiscate land or declare that it belongs to them, they are in effect violating the customary ownership of land, so the conflict between the two systems of governance is obvious. In some countries the state encourages land registration and privatization. Land thus becomes a commodity subject to the market, which is again quite different from the principles of land allocation within traditional systems.

There are two basic conflict resolution paradigms in operation. In traditional systems, resolution of conflict involves the narrowing of differences through negotiations and bringing about reconciliation among the disputants. In the state system, however, the focus is on establishing who is guilty and punishing the perpetrator.

Thus the modern legal system operates on the basis of an adversarial approach, while the traditional system functions on the basis of reconciliation and what are sometimes referred to in the West as alternative dispute resolution mechanisms. Even when states settle a dispute, however, the groups involved are not reconciled until the traditional system resolves the conflict. In many African countries, as many as three different legal systems are sometimes in operation: official, traditional and sharia courts. People really shop around in these court systems—they have choices—and it is very interesting to analyze what kinds of cases go to which court systems.

In many cases the official courts are effectively forced to accept the unofficial courts. This is why, for instance, Kenya's recent constitution recognizes sharia courts. All three systems operate in Somaliland, where official courts have no choice but to recognize the unofficial courts; local informants—including judges—report that close to 80 per cent of dispute resolution is handled by the traditional system.

How should these differences be addressed? And when there are incompatibilities or conflicts, how do we promote democracy on the basis of systems characterized by institutional incompatibilities? In many cases, a key issue is that when the state or the market system allocates resources, people operating within traditional socio-economic spaces tend to be marginalized. An analysis of any socio-economic indicators—such as the distribution of public services, poverty or illiteracy rates—demonstrates

Is the Guurti less democratic just because it is not an elected body?

that there is unequal access to resources; the rural population is always marginalized compared to population groups that operate within official institutional systems.

Geography also plays a role: ethnic groups that are located further away from urban areas seem to be even more marginalized. This can lead to ethnic conflict, which in turn undermines both state building and the democratization process. In this sense the existence of incoherent institutional systems is undermining the democratization process on the African continent. It is very difficult to imagine how to build or otherwise make official institutional systems operate in rural areas where the mode of production is different. For example, how would you implement land registration and privatization among pastoral communities? It is very difficult to even imagine how to go about it. In this sense the key problem underlying institutional incoherence is vast differences in the prevailing modes of production.

The process of reconciling the two institutional systems of course requires a reformation of or transformation in the modes of production, which is a long process. We are not going to transform nomads in a short period of time, nor are we going to turn subsistence peasants into capitalist farmers overnight. If fragmentation of the modes of production as well as overall fragmentation and incoherence are characteristics of transitional societies, what kind of institutional system do we aim to build during the period of transition? My argument is that the transitional period also requires a corresponding transitional reconciliation of these institutional systems.

We do not have many examples of success stories that have managed this transition. However, the cases of Botswana, South Africa and Somaliland offer one way of reconciling these institutional mechanisms. In Botswana, modern transitional systems have effectively co-opted or integrated traditional institutional mechanisms. Through decentralization, South Africa has the opportunity to allow the traditional system to be part of provincial and local governance. In addition to incorporating traditional authorities, moreover, the country has somehow reconciled the notion of property

rights. The South African state does not confiscate land from peasants operating under the traditional system. Their problem is the legacy of the apartheid system and the fact that land restitution is so slow.

In Botswana the conflict resolution system is highly reconciled. There are courts of chiefs handling certain types of crimes and land issues. Traditional chiefs are also involved in local governance. Interestingly, in Somaliland they have created a house of chiefs—the Guurti—that is quite different from those operating in other African counties. Parliament cannot pass any laws that are not first approved by the Guurti. Its members are not elected. They are selected representatives of every clan, and are viewed as guardians of culture and religion. They are responsible for resolving conflicts in the country and have the power to regulate the executive.

Why does such a body have so much power and yet is not elected? First, we should ask whether the Guurti would be able to provide the same services if it were an elected body. Often, parliaments do not provide a platform for all the different clans or sections of society to negotiate and reach consensus.

As long as it includes representatives of marginalized segments of society, the Guurti can bring them into the political process. The traditional systems of conflict resolution and resource allocation are both applied because it [the Guurti] comprises the custodians of culture, religion and traditions of property rights.

The worry, however, is this: will the Guurti ultimately facilitate a transition to a new democratic political system, or will it preserve the current system? And if they do preserve it, is there a problem? Is the Guurti less democratic just because it is not an elected body? The universal value of democracy is that the general population controls decision making. Institutions such as elections are vehicles or mechanisms for attaining the ultimate goal of democracy, which is the population controlling the decision-making process. To the extent that the Guurti brings the majority of the marginalized rural population into the political process it can be argued that it is advancing, rather than impeding, the cause of democracy.

**PROF. CAROLYN LOGAN, AFROBAROMETER
AND UNIVERSITY OF MICHIGAN, USA.
*THE ROOTS OF RESILIENCE: EXPLORING
POPULAR SUPPORT FOR AFRICAN
TRADITIONAL AUTHORITIES***

As noted previously, over the years there has been a lot of debate about the role of African traditional authorities and leaders. It tends to be very polarized between the traditionalists, who think that these are very good institutions that need to be built on, and the modernists, who think they should be abolished. ‘Romanticizers’ and ‘trivializers’ is another way that people characterize the two positions. But one thing is very clear: these institutions have proved to be very resilient, and are not withering away, as some predicted.

In fact, we are seeing an increasing number of countries in which a growing role—formal or semi-formal—is being accorded to traditional leaders, particularly in local governance but sometimes at the national level, as in Somaliland. I will focus mainly on the local level. A key question here is the extent to which people still support traditional leaders and believe that they should play a role—and if so, why? What are people getting out of these systems? They are not electing the leaders, but are they getting more access to people who better understand their needs and community problems? And how do these traditional leaders interact with local government structures and leadership? Is it a relationship of competition or synergy?

The prevailing assumption is that it is a competitive, zero-sum relationship in which people either give their allegiance to traditional leaders or to formal government structures. The reality, however, is more complex. And are institutions of traditional authority fundamentally pro-democratic or anti-democratic? This debate is still not resolved.

One of the pieces largely missing in the debate hitherto is good information on the grassroots African perspective—how people perceive their traditional leaders, their role within the state and in the future. Afrobarometer is a survey research project that is currently conducting national public attitude surveys in 20 African countries.⁶ Comparable Barometer studies are operating in almost every region of the world. The main goal is to obtain scientifically reliable data on public attitudes, particularly towards

When the state has high legitimacy, more people think that the role of traditional leaders should increase.

democracy and governance, so that what the public wants can actually play a role in debates about how these systems are evolving in Africa.

The findings presented here are based on about 25,000 surveys conducted in 2008 and 2009—we do face-to-face interviews in the languages of the respondents’ choice. The samples are nationally representative, so rural areas figure in proportion to their national representation. A standard survey instrument is used across all countries so that comparisons can be made to a fair standard. Surveys tend to be conducted in countries that have undergone greater economic and political liberalization. That is not true in all cases: Zimbabwe is part of the sample, and some other survey countries have perhaps been going in the opposite direction. In the latest [survey round four] instrument, a special module on both local government and traditional leadership was included, so we have new information on how people are thinking about some of these issues.

How do people see the distribution of responsibilities for key governance tasks within their community? We look at a host of different responsibilities, from solving local disputes and allocating land to managing schools and health clinics. The data shows very clearly that the key area where people still see a strong role for traditional leaders is—as we would have expected—in solving local disputes and allocating land. In local dispute resolution traditional leaders are widely seen as the lead institution, although central and local government are still regarded as playing an important role. With respect to land allocation the data suggests that people are roughly equally divided on the relative importance accorded to traditional leaders and government institutions. In other areas traditional leaders are seen as playing a less significant role.

⁶ <<http://www.afrobarometer.org>>

There are enormous differences among countries. For example, in Lesotho and Botswana, three-quarters of the population responded that the primary responsibility for solving local disputes rests with traditional leaders, while in Madagascar and Tanzania only a handful of people—less than 10 per cent—view them as playing such a role. (The Tanzanian situation may reflect former President Nyerere’s efforts to unify the country and marginalize traditional communities and local languages, and to get everybody speaking Swahili and develop a national identity.) In Ghana, Malawi and Zimbabwe traditional leaders play by far the largest role in conflict resolution, while in other countries the picture is much more mixed.

The next question we asked is: how much do traditional leaders have a role in governing your local community? Here about 50 per cent of respondents said that they have either some or a great deal of influence. One interesting finding was that the responses were not as different between urban and rural areas as we might expect. Overall, in urban areas 42 per cent attributed a fair amount of influence to their traditional leaders, while in rural areas about one-third said that they do not have that much influence.

How much influence do people feel traditional leaders *should* have? Across the entire sample 58 per cent wanted their influence to increase, which seems a pretty startling finding. In 16 countries the figure is 50 per cent or above—only in Tanzania, South Africa and Madagascar does it fall below 50 per cent. In Botswana, Lesotho and Mali, moreover, three-quarters of the population said they want to see the influence of traditional leaders in the governing of their communities increase.

A few different explanations have emerged as to why people want traditional leaders—or not. The socio-demographic modernization view maintains that as people become more educated and urbanized, they leave their traditional communities and allegiances behind and become more focused on the state system. There are also important questions here as to how women and youth perceive traditional institutions, because in Africa these structures have tended to be very male dominated and gerontocratic. Another common explanation suggests that people do not perceive state government to be legitimate, but rather as consisting of an unfamiliar, imported set of institutions over which they feel no sense of ownership. Consequently, so the argument goes, they reject the state and prefer traditional leadership.

Traditional leaders are not elected: does that mean people who favour them are anti-democratic or at best indifferent to democracy? There is a growing assumption that part of the reason people want traditional leaders is because local governments are performing so poorly, and traditional leaders are viewed as a group that might be able to do better in this respect. Or is the key issue leadership related? Do people, in other words, see traditional leaders as more trustworthy and accessible, as better leaders when compared to local government officials, or elected leaders, and thus prefer them?

To measure perceptions of the level of state legitimacy, the survey includes a set of questions about whether the decisions of the courts should always be binding, whether the police always have the right to enforce the law and whether people should always pay taxes. And here the result is the opposite of what we predicted. When the state has high legitimacy, more people think that the role of traditional leaders should increase.

In fact there appears to be more synergy than competition between traditional leaders and state institutions. Many people tend to see them as separate entities, but our findings suggest that many African citizens do not look at it that way. Rather they see them as a single system and evaluate them jointly: if they are doing well all are doing well, and if they are doing poorly all are doing poorly; they are not in competition. Support for democracy, in other words, equals support for traditional leadership. We have a set of performance indicators for local governance (how well they are maintaining roads, managing local marketplaces and keeping the community clean) and in all cases less than half—sometimes as low as one-third—gave positive evaluations of their performance.

Local councils’ procedural performance is perceived to be even worse. When asked how transparent the councils are about budgets and how well they are involving people in decision making, only about one-quarter to one-third of respondents gave positive evaluations. Overall, the evaluations of local governance are thus fairly negative. Is this fact driving people into the arms of traditional leaders, in the hope that they will function better? Again, we don’t see much evidence of this in the survey. Among those who say that local councils are doing fairly well or very well on substantive issues, 60 per cent want traditional leaders’ influence to increase, and we find almost the same among those who say they are performing fairly badly or very badly. So we are not seeing the relationship that we expected.

African governments need to consider integrating traditional leaders into local government structures.

Finally, with respect to leadership attributes we asked people how much they trusted these different groups. How often do they participate in corruption, and how well do they listen to people's views? The survey showed that traditional leaders were at the top of the trust rankings: they scored above MPs and quite a bit above local government councillors. Traditional leaders ranked above local councillors even more consistently in terms of their perceived ability to listen to people.

One of the key points that emerged from the overall analysis of the survey findings is that we did not find relationships in some places where we expected one. For example, with respect to socio-demographics and modernization, education has a negative effect on interest in expanding the role of traditional leaders, but it is by no means a dominant one. In addition, gender, age and urbanization do not appear to have a significant effect: we do not see women or youth being any less interested than other people in traditional institutions.

Concerning state legitimacy, the findings are the opposite of what we expected. The more legitimate people think the state is, the more they want traditional leaders to also play a role. So it is not a contest in the same way that we expected. Similarly, there is no apparent relationship between respondents' support for democracy and the role they would like to see traditional leaders play.

So again, support for traditional and formal governance structures seems to be moving more together than separately. With regard to leadership attributes, how well people feel they're being listened to appears to be a key reason why they want traditional leaders to retain their influence. In Somaliland, for example, my own research indicates that even though members of the Guurti are senior elders of the community, their doors are seen to be more open than those of MPs: people feel that they have much more access to Guurti members, so they go and see them. Nonetheless, we do find that overall attitudes towards traditional leaders and local governance councillors are positively

correlated. So there is a kind of competing incentive here: if people rate their traditional leaders highly, they are also more likely to do the same with their local government councillors.

Finally, another important finding is that people essentially appear to want 'more of the same'. The strongest factor that explains the desire for traditional leaders is their current level of influence. In countries where traditional leaders have a strong influence people want them to have more, while in countries where they have less influence the desire to see their influence increase is the weakest. Keep in mind, however, that even in the latter set of survey countries around 50 per cent of respondents still want more influence for traditional leadership, which represents a fairly high level of demand.

In terms of policy conclusions, the survey findings indicate that African governments need to consider integrating traditional leaders into local government structures. Past studies have often focused on the negative aspects of this approach. For example, some states want traditional leaders to rule in areas they cannot reach. This was common in the colonial era, where indirect rule provided a way for small state administrations to manage territory they could not otherwise govern. It is also commonly hypothesized that states want traditional leaders in order to 'capture' their legitimacy and, for example, influence the way that people vote.

Increasingly, however, our findings suggest that they may also get better local government performance by having leaders that the public supports and to whom they feel they have access. The surveys suggest that ordinary Africans tend to perceive the state and traditional leaders as part of a single integrated whole rather than as two competing entities. Therefore supporting traditional leaders may well translate into gains for the state, in ways that have not been widely recognized so far.

Finally, as Kidane Mengisteab also made clear, there are no blueprints for how to do this. Finding the best ways to integrate the two structures remains the biggest challenge to be faced, because there are so many different systems and possible ways of doing it. In this respect one of the key questions that emerged from the survey concerns whether traditional leaders should have seats in local councils, and if so, whether these seats should be elected or selected. Should they be salaried or remain independent? Can they still be local

representatives of communities if they are on a state salary, or does that ultimately make them advocates of the state as opposed to their own community?

In some countries, an increase in the governance role of traditional leaders has been accompanied by laws requiring them to be politically neutral—which tends to be seen as meaning that they will be more pro-government. For example, Malawi's laws on traditional leadership have required them to be neutral and not to take partisan stands. In the survey we asked if people thought that traditional leaders should sit on their local government council or not, and if so, whether they should be elected by the people, appointed or selected in some other way. The results indicate that most people feel that traditional leaders should be elected to local government councils.

This question requires further exploration. Does it imply, for example, that different traditional leaders ought to compete for certain seats? While the results are not completely clear on this issue, they do indicate that overall support for elections in Africa is rising. People are increasingly committed to them as a way of choosing leaders, but there is also still an acceptance of institutional dualism. In terms of partisan affiliation, people are fairly evenly divided, yet slightly in favour of being non-partisan. Again, however, there is a wide difference across countries.

In Malawi, for example, the non-partisan requirement for traditional leaders seems to have a high level of public support. In contrast, in South Africa, Tanzania and Namibia there is stronger popular support for the right of traditional leaders to take a partisan stand. In general we also found very strong support for the idea that traditional leaders should have government salaries. This could be due to a number of factors, not least that this would ease financial pressure on communities to provide support and bring in new resources.

RESPONDENTS

DR. DANIEL ABIYE, ORGANIZATION FOR SOCIAL SCIENCE RESEARCH IN SOUTHERN AND EASTERN AFRICA

Both papers are excellent: they complement each other and give us a better picture of what is going on in the area of governance and democracy building in Africa. Whereas Kidane appears to be suggesting that the two

institutional systems we are attempting to reconcile are incompatible, Caroline maintains that what we have is not necessarily competition but synergy—which produces better governance results.

Both papers seem to be saying that not enough research has been done in this area. Future research should address some questions. We are talking here about tradition, the informal versus the modern. But Africa is so diverse. Are we assuming that there is a single model of 'the traditional'? With respect to central government, the understanding seems to be that there is a single model—democratic government. So are we proposing a single model of traditional governance, or are we choosing best practices and then trying to create a model based on them?

Similarly, we keep on saying 'traditional leaders', but are we really just talking about male leaders? Kidane's paper focuses on chiefs, which is a male-dominant category. But Caroline's paper looks at traditional leaders, who could be either male or female. It seems to be a very comprehensive term. Gender differences can be brought out more in future studies. Also, we have not addressed the question of religious leaders and institutions. Do we assume that they are synonymous with traditional leaders? Finally, are we talking about one democratic order or various possible orders? Are we discussing the Western model of democracy, or are we simply comparing an African model of governance with those other countries? This is a grey area that needs to be further addressed.

VICTOR SHALE, ELECTORAL INSTITUTE FOR THE SUSTAINABILITY OF DEMOCRACY IN AFRICA, SOUTH AFRICA

Both papers contribute significantly to the debate about the roles and functions of traditional leaders in Africa. I appreciated the categorizing of the existing literature into three strands: those who view traditional institutions as outdated structures that need to be done away with; those that emphasize the extent to which traditional institutions have been transformed by the colonial experience; and those who maintain that you cannot wish away these institutions.

One of the things lacking in the literature is an attempt to explain the resilience of traditional institutions. Lesotho, for instance, has experienced three distinct post-independence political epochs: one party, military and multi-party rule. But throughout this chronically

unstable political history, people have always emphasized the importance of traditional institutions. How can this be explained? From a formal perspective it could be argued that it is because traditional institutions are enshrined in the constitution. We need to go deeper than that, however, to explore this area further.

From a procedural perspective, one of the interesting things about the role of traditional institutions relates to questions of participation. How did people participate under the rule of a traditional authority, how do they do so now and in what ways has participation changed over time? In order to understand traditional institutions we have to appreciate their social dimension. 'Tradition' needs to be viewed as a gamut of values that are practised over time; this is what gives life to traditional institutions.

In this sense traditional institutions are the epitome of the society within which they operate. In most countries, of course, they have been subordinated, but this does not dissolve their bond with the people. In cases such as Uganda legal instruments were used to get rid of traditional institutions. The reality, however, is that formally denying the existence of traditional institutions has not rendered them insignificant in the eyes of the public.

PLENARY DISCUSSION

Frederick Golooba-Mutebi, Makerere University, Uganda. A lot of specificity is lost by using the term 'traditional leaders'. In fact, there are different types of traditional leaders: those from very old dynasties, their subordinate chiefs, chiefs who were created during the colonial era and those created by post-colonial governments. Are we referring to all of them here? Did the Afrobarometer researchers and respondents clearly understand what was meant by 'traditional leaders'? If so, they would not have claimed that traditional leaders play such a significant role in conflict resolution in Uganda. In fact, conflict in Uganda is usually between locally elected leaders and the police rather than elected and traditional leaders, because at the community level traditional leaders are virtually non-existent.

Similarly, with regard to the questions the survey asked about whether traditional leaders should be given seats in local councils or be salaried, it depends on which leaders you are talking to. I am from one of Africa's oldest dynasties and it is inconceivable that we would want our king to be given a salary by the

government. Indeed, the Ugandan government gives salaries to traditional leaders, but in my community we rejected this because it was seen as an attempt to co-opt our king. Moreover, it is inconceivable that he would want, or that we would want him, to sit on a local council.

Dr. Patrick Molutsi, Tertiary Education Council, Botswana. There is a problem in approaching things ahistorically. Tanzania and Botswana, for example, were under two different colonial regimes: indirect rule of the British type made a lot of difference to the approach to traditional leadership as compared to German or Portuguese rule, both of which downplayed their role. Second, a distinction needs to be made between monarchical and traditional decentralized chieftaincy types of leadership. The Lesotho, Swaziland, Uganda or even the Ghanaian Kumasi monarchies cannot be readily compared in the same way as the chieftaincies in other places. This is a fundamental distinction, because in each case the relationship with the modern state is different.

Overall one needs to be very careful when using statistical assessment in this area, as the Afrobarometer is doing. You are bringing out the local voices, which is important, but we should be careful how we draw conclusions about and from those voices. Concerning conflict, the role of chiefs and traditional leaders, even the monarchies, is much broader than simply reaching settlements. In Botswana, for example, they deal with customary affairs, marriage and contractual relationships and a host of other ceremonial functions. This might actually explain why even the elite still support their chiefs.

Dr. Don Jon Omale, Salem University, Nigeria. Traditional leadership in Africa, particularly in Nigeria, has indeed been diluted by politicians, with the result that traditional chiefs and leaders in rural areas are no longer holding onto traditional beliefs, but rather are becoming political institutions themselves. At the same time, the failure of conventional political institutions in Nigeria has resulted in modern uneducated youth beginning to look towards traditional institutions as the only ones capable of servicing the political system. A survey of both educated and uneducated Nigerians would show that support for traditional governors is quite high. Until this dualism in governance is addressed in countries such as Nigeria, they will not advance democratically: traditional institutions are very strong and the public perceives them positively.

Dr. Martin Rupiya, African Public Policy and Research Institute, South Africa. Kidane's paper identified two clearly demarcated governance systems, and the allocation of socio-economic resources as the point at which conflict occurs between them. Is it correct to identify this as a binary system, or do we need to examine the issue further? Additionally, can we simply accept the view that the traditional system is all about reconciliation and the formal system is always confrontational? The really important point is where the two systems clash, because the question is: what then? We need to explore this issue further.

In liberation movement-type countries such as Zimbabwe, Ethiopia, Mozambique and Angola, there has been a very deliberate use of traditional systems. Initially the approach was to dispense with them until 10 to 15 years into independence, when the political elite began to realize that they needed the traditional systems. Once their own mass popularity began to ebb, the political elite went back and started allocating distinct political roles to traditional systems.

Ellen Sithole, Human Rights Commission, Zimbabwe. Regarding Kidane's analysis of the role of traditional leadership in rural areas, we also see traditional leaders getting involved in capitalist development, for example with respect to mining companies that move into rural areas. And in some aspects of their lives people in rural areas are effectively urbanized, while in other respects traditional authorities still play a role. I am also curious about the reasons why women are apparently supportive of traditional leaderships, and the role they perceive for them.

Dr. Raquel Yrigoyen Fajardo, International Institute on Law and Society, Peru. There are a lot of differences between Latin America and Africa, but also some issues in common that are missing from the analysis. First of all is the colonial past. Traditional authorities were in some way permitted, so people felt close to them in the sense of crucial affinity, language and norms. Today, people still feel close to traditional or local authorities due to shared language and culture, but also in part due to a resistance to the recycled legacies of colonialism.

I also missed a sense of what happened in African countries during the post-independence years. In Latin America the whole political system was imported, so people again saw it as an alien, imposed system. Private property was imported as part of the post-independence 'liberal values' package, but this was used by Creoles

to expand their property at the expense of indigenous peoples. For this reason I find it difficult to associate some specific institutions of modern capitalism with democracy.

Gihan Abouzeid, Ministry of Family and Population & Cairo University, Egypt. How valid is it to use modern criteria when discussing traditional structures? For example, can we use the same criteria of participation; does the idea of voting make any sense in the context of traditional structures? The logic of these structures is totally different from 'modern' criteria, so I think we need a different analytical approach. With regard to Somaliland, do you think the Guurti's strength reflects the real situation in the country, or is it more due to the weakness of modern governance structures vis-à-vis the traditional system?

Ambassador Olesegun Akinsanya, Institute for Security Studies, Addis Ababa. The observation that more attention should be given to the historical, pre-colonial aspects of traditional governance systems is pertinent. The element of growth and development also comes into focus, and the approach should be based not on a dichotomy of the modern and the traditional, but how to achieve a blend. In Nigeria, for example, traditional chiefs are doing a lot to complement the activities of the modern state.

Ranjana Kumari, Centre for Social Research, India. An analysis of the role of intermediary institutions between traditional structures and the modern state—for example political parties and community and civil society organizations—needs to be included to help build the process of reconciliation between the two systems. This is important in the Indian experience—not that there is no tension between the two systems—because this is one of the ways in which the relationship between the two is being resolved.

Secondly, India has experienced decentralization, and local traditional governance systems have genuinely been integrated into the modern state. The local dimension deserves greater attention in the discussion and analysis here.

Dr. Lansana Gberie, Institute for Security Studies, Addis Ababa. What approach should be taken to the difference in the relationship and interaction between traditional institutions and the modern state in countries—Ethiopia and Liberia in particular—where there was no serious experience of colonialism and those where there were long periods of colonial rule?

Second, how do we explain the persistence of traditional institutions in countries where the state has completely collapsed and traditional institutions have also been thoroughly undermined, as has been the case in Liberia and Sierra Leone following protracted periods of conflict? Many chiefs were displaced or killed, traditional institutions were completely subverted, yet at the end of war there is still a basic sense of the persistence of traditional institutions. How should this be explained?

PRESENTERS' RESPONSES

Kidane Mengisteab. The research that informed my paper was conducted in a range of communities in South Africa, Ethiopia, Kenya and Somaliland, 11 in total, including both chieftaincy and non-chieftaincy systems. Our interest was in finding out the extent to which traditional systems still operate and are utilized by people; we focused on institutions rather than chiefs. Before conducting surveys, however, we also did both key informant and focus group interviews, so we had a pretty good idea of what the systems looked like.

Kenya has recognized the sharia court system, but even more interesting is how Kenya recognizes community ownership of land. This is a very challenging issue, because it implies the need to define what a community is: is it the dominant ethnic group, and what happens to people who have settled in a different community? This implies the beginnings of recognizing customary ownership of land.

Some of the questions posed arise from my failure to clarify what informed the paper. We were not interested in making judgements about which system is good or bad. Ultimately what we find is that the level of utilization of traditional institutional systems is very high. To address the question about the strength of the Guurti, they played a major role in bringing the Somali clans together after the civil war and managed to carve out an important role for themselves in the process. More importantly, however, in a context in which conflicts tend to be along clan lines, the Guurti creates a platform for all clans to negotiate and build consensus. Through their representatives in the Guurti, the clans thus have a veto power over any law.

Power asymmetries are critical: if someone gets beaten up in an urban area they can go to the nearest police station. In rural areas, however, your only option is the traditional system. We are not saying that the

traditional system does not operate in urban areas, just that it is stronger in rural areas. As for the transitional process, there are incoherent institutions; if 'point A' represents this incoherence, 'point B' would simply symbolize a coherent system of institutions. At the level of modes of production, perhaps subsistence farmers and pastoralists can be transformed into participants in an exchange economy; this is the (not very clearly articulated) notion of transition we have in mind.

Broadly speaking I would define democracy as a system that enables the general population to control decision making. That is the ultimate goal, but the mechanisms by which it does so—be it elections, appointment or Guurti-type structures—need to be analyzed in the context of the realities of a given country. As for liberal democracies in which the state is limited, the sanctity of private property is enshrined, so I am not going in that direction, but rather simply explaining whether communal or private property is the norm in a given context.

Carolyn Logan. On the historical dimension, I would focus far less exclusively on colonialism because as someone mentioned, traditional leaders have gone through many kinds of changes during the post-colonial era: they have been abolished, restored and so on, often by the same government. This is what happened in post-independence Somalia and many other countries, as was noted in the discussion. Initially traditional leaders were abolished, but ten years down the road when things were not going so smoothly the government started to revive them. This is why focusing purely on colonialism provides far too limited a view in terms of what has happened to these institutions historically.

In terms of terminology, it is always a challenge to come up with questions that work across countries, not only due to huge cross-country differences but also significant in-country disparities. We do, however, work with local partners in the countries surveyed. The questionnaires are tested to ensure that they make sense to people, and interviewers report back on which kinds of questions people have trouble with.

Specifically on Uganda, we have to be a little bit cautious in saying that people are giving the 'wrong' answers. We are trying to talk about broader issues continentally and I think that we have research results that can speak to that. Overall we are getting some fairly consistent responses indicating that however they understand the term, people feel that traditional

leaders are still important and want them to play a role in governance.

The question about women is a particularly important one. I do not think that ‘chiefs’ simply means ‘men’—I have lived in communities where the chief was a woman—but clearly they do mostly tend to be male. In terms of understanding why women are just as interested in traditional leaders—and in some

cases the institutions are changing somewhat in the direction of increased women’s participation—my speculation at this point would be that it is because they are accessible in a way that elected leaders don’t tend to be. In addition, one of their key roles is in resolving disputes, which tends to be an important concern for women—especially if this is where they can reliably get disputes resolved within their communities.

SESSION 2: ROOTING GOVERNANCE IN AFRICAN REALITIES

FREDRICK GOLOOBA-MUTEBI, INSTITUTE OF SOCIAL RESEARCH, MAKERERE UNIVERSITY, UGANDA. *ROOTING GOVERNANCE IN AFRICAN REALITIES: ARE CUSTOMARY INSTITUTIONS THE ANSWER?*

The importance of rooting support for democracy and governance in country realities is the main premise of the Africa, Power and Politics Programme (APPP)⁷. The importance of finding something better than established approaches to institutions in Africa calls for serious, evidence-based discussion. Rooting governance in African realities is not reducible to taking customary institutions more seriously. Indeed, customary institutions may be more a part of the problem than the solution.

Another area in which greater realism and context sensitivity is required is the democracy promotion agenda. There are good reasons for thinking that until democracy is better established than it is today, it will be of little help in improving aspects of governance that contribute to economic progress and the reduction and prevention of poverty. Facilitating democracy strengthening therefore involves greater realism about timetables and aspirations regarding democracy itself.

The considerable diversity of social and political patterns across Africa should not blind us to important threads of commonality and continuity based on the association of power with paternity and the duties and responsibilities of fatherhood. The similarities also include compelling notions of accountability and moral obligation within kin groups and ethnic groups. These notions are not inherently anti-developmental, and there is ample evidence from around the world that local institutions work best when they build on local understandings of power, authority and organization

The problem with externally funded projects is that they rarely allow the necessary space for local initiatives to take shape.

rather than impose external behaviours. Development efforts should therefore adopt a fresh approach and start to build on existing notions of moral obligation and accountability—and stop working against them.

With respect to custom, APPP research in Ghana has focused on local justice provision. A comparative study examined three kinds of dispute settlement across the country: the magistrate's court; alternative dispute resolution services offered by the National Commission for Human Rights and Administrative Justice; and the tribunals of the new customary land secretariats established by the Ministry of Lands to manage customary land. The study explored the following questions: do ordinary people trust these institutions because their approach to justice corresponds to Ghanaian customs and practices? How accessible are they to ordinary people? How effective and affordable are they? How quickly are cases settled? How enforceable are their remedies?

The findings challenge conventional stereotypes of African courts, in particular the notion that popular beliefs are based on traditional restorative forms of justice and the imperative of social harmony. They

⁷ <<http://www.institutions-africa.org>>

also suggest that ordinary Ghanaians have a strong preference for justice involving a balanced process to establish the facts, which in turn requires an impartial judge.

The study found that magistrate's courts are the most popular in terms of their congruence with popular expectations; customary-based land dispute committees were the least popular. Institutions with the strongest connections to customary law are not, it seems, particularly attuned to popular concepts of justice and fairness. By contrast, the more popular magistrate's courts are backed by the state and are relatively well resourced and staffed with members of established professions; they also offer the authoritative enforcement of judgements. They successfully combine the remedies and enforceability that people want with a balanced, impartial process. They also use a wide range of codes, not just formal law but also customary law and local cultural rules, to make common-sense judgements.

Constructing institutions that are effective in delivering judicial services may thus require revising customary arrangements. However, it should not be assumed that customary arrangements will necessarily be the most suited to the purpose. In many contexts, customary institutions will be one of a number of hybrid types with the potential to contribute to more rooted forms of governance. Simply being customary will not be a particular advantage.

Our findings indicate that an important factor is whether a country's particular brand of neo-patrimonialism systematically undermines performance in key areas of public goods provision, or whether it promotes such disciplines. It is conventional to associate public sector performance with downward accountability to citizens and service users as a major hope for democratic consolidation. Our findings on the importance of top-down discipline, however, cast doubts on the likely contribution of several types of bottom-up constraints, at least in the foreseeable future.

These doubts are based on a combination of empirical evidence, published studies and analytical work on institutions and collective action. They underscore the significant limits of bottom-up pressures as visualized by participatory designs of service provision when there are large status differences between users and providers. As for citizen pressure articulated through electoral politics, there are strong analytical and empirical reasons for not counting on young democracies. For reasons that are difficult to change quickly, leaders in

There is ample evidence that local institutions work best when they build on local understandings of power, authority and organization.

young democracies do not seek election or re-election on a programmatic basis. Since electorates do not vote on the basis of programmatic commitments made by candidates for election, prospective leaders' interest in raising the quality of general service delivery will be muted at best.

In addition, local electoral processes often discourage local leaders from imposing measures such as environmental sanitation or protection rules, which are important public goods but not immediately popular with the people they represent. In this respect the advantage of elected leaders over the non-elected commissioners or chiefs of previous eras may be called into question. For many aspects of public goods provision there is no alternative to administrative action backed by governmental authority.

What kind of governmental authorities are really appropriate? They may be ones that harness ideas about leadership, obligation and accountability that have historical roots. This may mean reinventing chiefly or monarchical leadership, as seems to have happened semi-spontaneously in some urban areas of Malawi. It may also mean the explicit neo-traditionalism that is the future of Rwanda's public performance system. What about the rootedness of self-help?

The best positive examples of collective action tend to be grounded in people's recollections about the past, based on observations in the present. They tend to involve chiefly leadership, or a delegated authority of colonial chiefs or kings, which supports the idea that customary institutions can be an important resource. On the other hand, examples of self-help initiatives or local reforms observed during APPP's fieldwork were combinations of and synergies between different sorts of local leadership, including chiefs and elected or appointed government officials.

Our hypothesis is that successful institutional arrangements for public goods provision through

self-help will likely be those that are locally anchored. They should be open ended and flexible enough to overcome context-specific problems that constrain collective action. In other words, it should be possible to find local solutions for local problems with local actors, taking into account local constraints and using mainly local resources.

The problem with externally funded projects is that they rarely allow the necessary space for local initiatives to take shape. 'Local' solutions are much more likely to be sustainable than solutions based on models of organization that have been used elsewhere. Institutions that are able to build at least partly on the familiar foundations of past practices are socially less costly and therefore more likely to be feasible.

This helps to explain why institutions that build on existing foundations appear to be more successful. It is a universal explanation, and does not assume that Africans are typically more wedded to tradition or particularly disinclined to embark upon institutional change. This explanation provides an additional set of reasons to argue that customary institutions may be more relevant to development and democratization in Africa today than was previously thought.

On the other hand, it also clarifies the fact that institutional elements inherited from the past are only useful to the extent that they support problem solving. The relevant legacies of the past may or may not be directly associated with customary institutions. Customary governance has a significant role in thinking about democracy building in Africa. Customary institutions are not, however, *the* answer. Moreover, the question here should not be just about democracy.

PLENARY DISCUSSION

Dr. Jorge Vargas Cullel, State of the Nation Programme, Costa Rica. You call on us to unbundle the concept of customary institutions, and point out their problematic relationship with democratization. And you seem to be inclined towards hybrid institutions. But who hybridizes those institutions? What actors and forces can really build the kind of mixed institutions that are able to deliver the public service provision of goods? Who makes the selection, and on what basis?

Dr. Peter deSouza. I would like to respond to the paper's theoretical ambition. In as much as it constitutes

a critique of established development policy, I think the case was made. But the theoretical ambition is greater, and seems a little unprocessed. For example, you say that local institutions work best when local understandings of power are present, and work less well when external behaviours are imposed. But external behaviours *have* to be imposed in the process of building a larger political community. Local understandings cannot help us build the greater political community of the nation state: the larger logic of the modern, democratic nation state has to be introduced on the basis of imposing external behaviours.

In the justice domain, you state that the customary system is procedurally too formal, whereas the magistrate's court is flexible and thus more acceptable to the population. However, it could equally be the case that the magistrate's court is externally imposed and the traditional system is locally rooted. Moreover, once the argument is opened up to the notion of 'appropriate solutions', you are again talking about external imposition. Appropriate solutions are not necessarily local solutions. They are not replications of tradition: they come from an evaluation of possibilities.

Mohammed Musa Mahmodi, Independent Human Rights Commission, Afghanistan. When we talk about customary governance, it only ever seems to be in the context of fragile or failed states. Customary structures are always filling the gap created by the failure of the state to provide basic services—maintaining the rule of law or control over the means of violence, for example. But if the focus is on democratic governance, there may not be much room left for customary practices or traditional mechanisms to come into play. And in any case, this would only be effective if modern democratic principles are applied to customary structures.

Mónica Novillo Gonzáles, Coordinación de la Mujer, Bolivia. Discussions of democracy often seem to be kept separate from examinations of economic, social, cultural and other systems, but they are all linked together. If the aim is radical democracy then issues of economics and the redistribution of power need to be kept in focus. Popular disenchantment with democracy due to the failure of democratic institutions to respond properly to the people was mentioned earlier. In Latin America many people no longer believe in political parties, as they are regarded as simply monopolizing popular representation. In Bolivia there is a widespread feeling that people are

Continued support for traditional institutions in Africa reflects not the failure of the modern state, but rather the fact that it has not responded adequately to the people's needs.

not properly represented, and talk of political parties is almost seen as using offensive language: in terms of representation, the emphasis is on social movements.

You concluded by saying that the question should not be just about democracy. We should indeed ask about the way our societies are organized and establish if there is a genuine political commitment to redistribute power and wealth.

Prof. Sheila Bunwaree, University of Mauritius, Mauritius. It is extremely important to avoid being parochial in Africa with respect to customary governance. The concept of governance as a whole needs to be enlarged to include a complementary, cross-regional perspective that draws on different disciplines and interventions. Talk of 'rooting in African realities' is far more present in rhetoric than action. In particular, the economic policies that are very often superimposed in Africa today are really old wine in new bottles. When we look at current asymmetries in the distribution of entitlements in Africa, both between and within countries, it raises a basic question: is promoting democracy really focused on delivering a better quality of life to the people? Is customary governance really helping to deliver basic services, and how do customary and formal structures speak to each other?

While it is not a case of one or the other, our challenge is to figure out how to make them work together. While there are certain very positive aspects of customary governance, there is also a need to be careful. In particular, the gender dimension needs to be factored in because it often gets marginalized in this context.

PRESENTER'S RESPONSE

Frederick Golooba-Mutebi. Jorge has asked who makes the selection: is it the people themselves that hybridize the institutions? In my own country, Uganda, we have spent two years debating whether we should have a federal system built around traditional institutions or a unitary governance system. The debate continues to this day. What seems clear, however, is the fact that a unitary system does not appear to have served our purposes or interests very well.

There is thus broad agreement that we need to re-examine a system that was built by someone else. The Ugandan monarchy has proposed that since the current political system was designed by the British, not Ugandans, it is time that Ugandans simply sat down and discussed how they want to be governed. In many ways I think that answers your question. Outside experts simply cannot be brought in to tell Ugandans how to rearrange their politics: this can best be handled by Ugandans themselves.

In a related debate, the Ugandan monarchy is supposed to be allocated a budget by the central government for service delivery management, but the central government has made this contingent on changing the post of prime minister from an appointed to an elected position. This stipulation has been entirely rejected by the vast majority of Buganda, who argue that it is not up to the central government to tell them which kind of prime minister to have. It is an issue for the Bugandans alone, and it is they who will discuss and decide what they want to do. Peter objects to the notion that local institutions work best and behaviour should not be imposed externally. I disagree strongly, since I believe that one of the key problems we have in Africa is trying to work within frameworks that are of somebody else's making.

If you look at some of the parliamentary democracies we have been trying to build in Africa over the last 40 to 60 years, it seems clear that there is something fundamentally wrong with the way some countries were constituted or the way their political systems were built. Arguing that some behaviour needs to be imposed externally in the era of globalization is a nice theoretical proposition. We have been trying to do this for decades in many African countries, however, and it simply hasn't worked. It's high time we tried to adopt a different approach.

The research findings in Ghana also strike me as odd. But these are empirical findings based on extensive interviews with people about which system works best for them. While one might argue that traditional institutions are more likely to be flexible, and modern systems rigid, the findings from Ghana suggest this is not the case. The people we interviewed just seemed to prefer the magistrate's codes to traditional ones.

To reach the population, it became apparent that modern political institutions required the legitimation of customary structures.

Mohammed suggests that customary governance works only in a failed state context, and again I think this is incorrect. Support for traditional leadership or institutions in Africa continues not because the modern state has failed, but because it has not responded adequately to the needs of people in different countries. There is nothing fundamentally wrong with the modern state, it might be argued, it just doesn't measure up completely. Therefore, there is a need for these customary and modern structures to come together and complement each other. Some states have failed precisely because they got rid of traditional or customary leadership and instead tried to impose systems that were completely alien.

Can customary governance be used to strengthen democracy? Broadly speaking there is now agreement that democracy can have different characteristics in different contexts. The argument that there is a template of democratic governance that needs to be imposed across the continent is totally redundant.

SESSION 3:

THE ROLE OF TRADITIONAL GOVERNANCE INSTITUTIONS IN PROMOTING DEMOCRACY AND MANAGING INTERNAL CONFLICT: A CASE STUDY OF BOTSWANA

**DR. PATRICK MOLUTSI, TERTIARY
EDUCATION COUNCIL, BOTSWANA.
*CUSTOMARY GOVERNANCE AND
DEMOCRACY BUILDING: THE CASE
OF BOTSWANA***

There will always be tension in the relationship between traditional and modern political systems, and ultimately one will always become dominant over the other. In so-called ‘mature democracies’ such as the UK and several continental European countries, for example, the monarchy still has legitimacy and a degree of political influence, while remaining subservient to the modern political institutions of democracy. In countries such as Belgium, Denmark, Sweden and even the Netherlands, over time there has been some kind of accommodation and legitimation of the monarchy, giving it a role without necessarily according it a dominant political position.

The key issues here are democracy and development and the search for political solutions that will help achieve these goals. The first section of my paper focuses on Botswana’s record in these two areas. The country has enjoyed political stability for more than four decades and the development record speaks for itself if you look at education, literacy levels, access to food and water and quality of life. All the main development indicators suggest that Botswana has been a fairly—and I say ‘fairly’ deliberately—successful state. How did this come about? The unique history of each society is crucial; therefore it is important not to adopt template solutions to what can be very complex and different situations. The specificity of Botswana’s context is partly indigenous, and partly due to the fact that its particular colonial experience led to a negotiated post-colonial political settlement that resulted in compromise, accommodation and recognition—which is a very important element of Botswana’s experience, and one that is too often taken for granted.

The kgotla is a traditional system, historically highly authoritarian and strongly dominated by the male elders, that has been adapted to modern democratic systems and practices.

In fact, when a new political settlement was being debated in 1963, a key question was who would inherit the colonial state—the modern elite in the form of a political party system, or the traditional governance system? Both had existed, to some extent in tandem, under the colonial regime, but the growing modern elite was directly opposed to the feudal chiefly system. Thus when constitutional talks opened, the key issue was who would inherit the modern state. It was no easy debate, because in a decentralized chieftaincy system (rather than a dominant monarchy) chiefs maintained tight control over their populations.

Such distinctions with respect to the relationship between customary and modern governance institutions are very important, because decentralized systems are inherently weaker and thus more likely to adapt to and adopt new structures. The chiefs went into the 1963 negotiations with the belief that they would become

like the British House of Lords: they would determine and approve laws, and the House of Representatives would initiate legislation, but final decisions on how the country was governed would remain with them. In the event, they 'lost' in the negotiations and became advisors, purely on customary methods.

The constitutional and legal outcome of those negotiations was thus a political settlement that made the chiefs subservient to modern democratic institutions. Formulating a constitutional provision and applying it in practice are, however, two different things. How could the traditional chiefs be made subservient to modern state institutions, when they enjoyed total legitimacy and authority on the ground, and were effectively in a position to prevent the functioning of modern political institutions?

In order to reach the population and be seen as legitimate, it became apparent that modern political institutions required the endorsement of customary structures. Both institutions needed each other to legitimize their existence, while they recognized that the nation state has the final authority over society. This has not happened in other countries such as Swaziland and Lesotho. In Swaziland in particular the monarchy has dug in its heels, effectively refusing to change and become 'subservient' to modern institutions—the opposite of what occurred in Botswana. My paper goes on to outline practical ways for modern institutions to legitimize themselves without being seen to fundamentally negate traditional customs.

Thus, for example, you define the territory and the bundle of services that the chieftaincy and related institutions such as the *kgotla*⁸ will provide. In this way you are actually weakening the chieftaincy while at the same time recognizing and redefining it. Issues of articulation, innovation and modernization come into play here; the chieftaincy is progressively redefined via legislation in a manner that removes its control of the land. You take away development responsibilities, in other words, but you leave it with a bundle of services or processes that remain very important to the population.

Dispute settlement is one such service or process; the control of customary ceremonies such as marriage

ceremonies is another. By allowing the population to choose between a customary or a modern marriage (a lot of people in the rural areas still prefer customary rites), you also recognize the chief as a source of community identity. That is partly why the Afrobarometer data show that both urban and rural populations still value the chieftaincy and customary institutions. At least in the context of Botswana, they provide a source of identity and distinction from other groups.

The *kgotla* is a traditional system, historically highly authoritarian and strongly dominated by the male elders. It has, however, been adapted to modern democratic systems and practices. How? First, by making sure that not only men can be chiefs: to accomplish this, female chiefs have been appointed or inaugurated. Second, by extending the system beyond its traditional ethnic base into urban areas. There are still far more men than women—and indeed far more elderly people than younger people—dominating the *kgotla* system, but now at least in principle anybody can become a chief. To retain the *kgotla* and the chieftaincy, in other words, you fundamentally adapt them to modern institutions.

By way of practical illustration, on one occasion the president announced that he was going to hold a *kgotla* meeting in a part of the capital, Gaborone. At the time there was a serious drought, and the president came to explain why there was no water and describe government programmes intended to address the problem. People attended the meeting in very large numbers. After he had spoken, the first question the president received was: 'Mr. President, who is the chief of this *kgotla*?' In other words, you cannot have a *kgotla* without the chief present. Finally the president lost his temper and said: 'I am the chief!' But then, of course, the next question was: 'Who appointed you the chief? You are not the chief of this country, you are the president. You are elected.'

By accommodating the chieftaincy you are giving them the message that they still have a role to play—and by doing so you are also carrying their constituencies with you. When, for example, they are given a role in land allocation without being the final determinant, or in district development councils as members, but not as the final authority, they are in a sense being accommodated.

It is also important to note that even with customary institutions, the people running them are actually the modern elite. The current generation of chiefs in

⁸ Public meeting, community council or traditional law court of a Botswanan village. It is usually headed by the village chief, and community decisions are always arrived at by consensus. Anyone is allowed to speak, and no one may interrupt while someone is 'having their say'.

Botswana have degrees, and many are lawyers before they are chiefs. They have modernized their role to ensure that they understand the intricacies of modern society.

How has modern politics further worked with the traditional in Botswana? In recruiting its elected leaders, the modern state, especially the ruling party, has deliberately gone into royal houses across the country and recruited among the uncles, brothers—and of course sisters and wives—of the chiefs. In other words, you leave the chief to play the customary role while you nominate his wife or brother to be your elected politician. The marriage of individuals and tradition has been an important leverage point in neutralizing chiefly political opposition—a fairly unique aspect of Botswana's experience in this respect.

Overall this constitutes a 'grand coalition of the elite': the recognition of a range of players, elected politicians, traditional leaders and other groups. In this way everyone plays their separate roles, thereby promoting mutual recognition, accommodation and articulation. Political systems are dynamic and change over time. One part of the African challenge is our tendency to use frameworks and lock them up. I have difficulty, for example, in accepting that the monarchy and the Ugandan people alone should determine their political system, as Frederick has suggested, because reality is more complex than is implied by this view.

Traditional institutions have changed over time and adapted to new situations. A complex process of integration, articulation and compromise involving continuous political renewal is what seems to work best. For example, the current Botswanan president and another traditional leader have decided to temporarily suspend their rights as chiefs of their communities and pursue elected political positions. Initially this caused a furore in the country because, as was mentioned earlier, chiefs in Botswana and Malawi are not supposed to be partisan, but rather neutral players who can deal with people on the basis of their needs as opposed to their political alignments. Soon afterwards, another chief followed suit and resigned; he gave his chieftaincy role to his sister and entered elective politics. Luckily he joined the ruling party, so he was elected. Although this is a new development, it also means that chiefs still command sufficient authority and respect to make people vote for them.

By contrast, there was a recent case of a young chief who decided to go back to his community traditions

and force circumcision on people, only to find himself in direct confrontation with national law. After he reintroduced the local customary law of discipline—flogging—and prevented churches from operating freely, the chief's people challenged him with a court case. This is a complex, contradictory system that is still evolving, which—most critically of all—seems to have served the country well in the core areas of political stability on the one hand, and democracy and development on the other.

This is where the focus of the debate should be, because what we want above all is political stability and development, and the Botswana case study does make a contribution. It is not a template; Botswana is a small society. The main message is really that political settlements have to be negotiated, and that they are dynamic and peculiar to specific situations: there are no templates.

RESPONDENT

Martin Rupiya. It is important to point out the uniqueness of the political role of Botswana's chiefs. As protectorates, Botswana, Lesotho and Swaziland had a type of colonial relationship with Britain that made them unique even before independence. When they entered into negotiations in 1963-1964, their working relationship with colonial powers—even with the apartheid state next door—gave them a unique edge. In particular, the chieftaincy system had an operational partner to help them enter the political arena.

In addition, in Botswana the modern constitutional state and the traditional chieftaincy system are cleverly and intelligently integrated and intermingled. But is this arrangement starting to run out of steam? Over the last couple of years there have been some serious problems between the political elite and the customary chiefs. Has the system that has run Botswana since 1964 now reached a point where it is exhausted? In particular, have General Kama⁹ and the current political elite misunderstood their role and function in terms of maintaining the delicate balance between the various actors? There is a lot of talk of the need for discipline, which has caused a furore. A number of retired members of the political elite and customary chiefs have tried to offer their good offices to negotiate a reconciliation between customary chiefs and the current political leadership. There appears, however, to be a stalemate between the two systems.

⁹ The current president of Botswana.

With respect to General Kama, there is a whole issue with regard to civil-military relations within a democracy. In the past in Botswana it has been very clear how the leadership is created and groomed: they are sent to military schools and made into army generals and so on. The role and power of military institutions seems to be missing in the debate about the customary traditions and democracy. In Swaziland, how are police chiefs and army generals created, and how does King Mswati control these key institutions? This is the only key piece missing from Patrick's analysis, which otherwise has done a great job of demonstrating how this political system has developed.

PLENARY DISCUSSION

Mark Salter. At last year's Shimla Consultation there was a strong focus on what I would call 'democratizing the customary'. You have looked at the way in which customary institutions have been reformed and modernized in Botswana. Where would you locate the motor of change? Where were the incentives for the customary structures to reform and change themselves? Identifying how to initiate processes that encourage the democratization of customary institutions to make them more inclusive, particularly the gender and youth dimensions, seems absolutely critical.

Second, it would be very interesting to see whether the Afrobarometer research reveals any linkage between the level of trust enjoyed by customary institutions and the extent to which they have shown a willingness or ability to adapt, become more inclusive and to deliver positive outcomes, which as you suggested earlier is the fundamental developmental and democratic context.

Don John Omale. The argument that political settlements must be negotiated is interesting: it indicates one really important area in which traditional leaders could play a critical role in promoting sustainable democracy in Africa, not least in Nigeria. For example, there have recently been cases in Nigeria where politicians rig elections, but the chief judges go ahead and swear them in as governors. The courts allow opposition parties to make a legal challenge to the outcome. The system is highly prone to corruption, however, with the result that electoral tribunals simply continue to delay their final rulings. In some cases it has taken three years for the electoral tribunal to nullify the election result. What relevance do such judgements have to the opposition party that actually won those elections? However, if traditional leaders were involved in electoral dispute resolution, the

We must be careful in drawing blanket conclusions about how to reform or accommodate traditional institutions.

decision would have been reached faster, and resulted in greater harmony and restorative justice than the contemporary court system is able to provide.

Prof. Guillermo Padilla Rubiano, Centro de Investigaciones y Estudios Superiores en Antropología Social (CIESAS), Mexico. The phenomenon you have been describing can perhaps be synthesized in a phrase that is very common nowadays in Latin America: legal pluralism. Legal pluralism is basically the strategic use of different normative systems, as has been common practice for many years in some countries. In Botswana it appears that this inter-legality is top-down, the opposite of the grassroots, bottom-up processes that are more common in Latin America. From ordinary people's perspective, sometimes it is more strategic to use the customary system, and at other times it is better to use state-initiated structures.

What I found particularly interesting in your presentation is the construction of a new kind of harmony between the modern and the customary, as opposed to the dichotomy usually posited between the two. This is precisely the harmony that needs to be built now in the post-colonial period.

Abdoul Karim Saidou, Centre for Democratic Governance, Burkina Faso. How are ruling parties interacting with the chieftaincies and other traditional rulers in Botswana? In most of the francophone African countries, our experience is that traditional rulers are manipulated by political parties, particularly during the electoral process.

Victor Shale. I am a Mosoto so the Botswana and Lesotho cases are of particular interest. First, did we really have a negotiated settlement in Botswana? Wasn't it rather a case of what happened in the rest of the SADC¹⁰ region, where the governance system adopted at independence came as a package when the colonialists handed over power? Was there really a

¹⁰ Southern African Development Community.

negotiation? And if there was a negotiation, who were the negotiators, and for whom were they negotiating? I do not see where the people are in this equation.

Concerning the *kgotla*, is it really correct to argue that it has been transformed from an authoritarian into a democratic forum? The fact that it was traditionally a structure dominated by males or older people doesn't make it undemocratic. And does the chieftaincy in Botswana need to be validated by the state, as you suggest? We must be careful not to go down the same road as Kenya. For years Kenyans had been saying 'hakuna matata',¹¹ but in 2007 they realized that they had serious problems caused by the suppression of critical issues for such a long time. That is why we need to ask where the people of Botswana are in the equation: do we really say 'hakuna matata' there as well?

Dr. Kojo Busia. The Botswana case has some other unique characteristics as well. The first president of Botswana, Seretse Khama, was a customary chief. Prior to independence he had been studying with the king of Buganda¹², and it seems that he realized that the era of monarchy had come to an end—and that he also advised the Bugandan king to accept to accept these new realities. After a brief confrontation with Prime Minister Milton Obote, the Bugandan king was deposed in 1966. In Botswana, however, we have a traditional leader incorporating the chiefs into the new political system. Thus it seems to be a unique case of the state being led by a chief who has both effectively abdicated and integrated the chieftaincy system. Is this correct?

Prof. Sheila Bunwaree. Mauritius is similar to Botswana in terms of being presented to the world as a 'success story'. We may, however, be becoming complacent about the nature of democracy and development in the country. Should the accommodation Patrick speaks about not be seen more as co-option? By co-option I mean the political elite drawing on the chieftaincy to create a broader membership for itself and thereby justifying its own actions rather than attempting to enlarge the democratic space as such. How diverse is Botswana in terms of its ethnic and cultural setup? In Mauritius our diversity contains the seeds for some potential future difficulties, especially in the context of a globalizing world in which resources are becoming scarcer and development is being challenged in many ways.

¹¹ Popular Swahili saying meaning 'no problems, no problems'.

¹² Edward Muteesa II.

Dr. Tanja Chopra, Consultant. The term 'customary governance' may be misleading. There is a lot more out there than just customary governance and the modern state: military power, for example, or the new power structures created by rebel movements. Go into the Kibera slum in Nairobi, for instance, and you will find that in the absence of other forms of governance, new power structures, norms and a type of overall order have been created. Earlier we were talking about the sharia and khadi¹³ courts in Kenya. These are not traditional structures—in some villages the two sides actually compete for influence. A lot is missed if the discussion is reduced simply to customary governance and the state system.

Frederick Golooba-Mutebi. When talking about traditional leaders or institutions it is easy to slip into the assumption that they constitute a homogeneous entity. Clearly, however, traditional leaders come in different forms: monarchs, paramount chiefs, minor chiefs and chiefs of other kinds. In Uganda, for example, the smallest chieftaincy covers 6,000 people while the biggest, the king of Buganda, leads a population of six million.

The notion that the paramount chief of Botswana told the Kabaka of Buganda that the era of monarchy had ended is erroneous. The fact that the Bugandan monarchy was abolished in 1967 but was later revived¹⁴ clearly demonstrates this fact. The Buganda kingdom has been agitating for a federal relationship with the central government. In trying to accommodate this demand the government has proposed slightly less than full federalism, including recognition of all traditional institutions. With the exception of Buganda, all the country's chiefdoms and kingdoms have accepted the offer, but due to Buganda's refusal they are unable to take it up. In talking about traditional structures it would thus be very helpful to recognize that they are in fact a highly heterogeneous set of institutions.

With reference to the argument for democratizing traditional institutions, making them more inclusive, some traditional institutions can be easily changed in this way, while others cannot. Some traditional institutions are not aspiring to be accommodated, but rather to enter into relationships with the state via fairly complex types of constitutional engineering. So

¹³ Kenyan court system that enforces limited rights of inheritance, family and succession for Muslims.

¹⁴ The Kingdom of Buganda and its king (or Kabaka) were officially restored in 1993.

We are not dealing with 'either/or' here, rather with using what is good on both sides—the formal and the customary—without either romanticizing or pretending that the solution lies exclusively in either side.

one must be careful in drawing blanket conclusions about how to reform or accommodate traditional institutions.

PRESENTER'S RESPONSE

Patrick Molutsi. I have constantly emphasized the historical specificity of each situation and thus the importance of not applying templates, so I would agree that we cannot simply apply Botswana's experience directly to Uganda, or Uganda's to Nigeria, or Nigeria's to Ghana. My starting point is the need for political stability—which is not the same thing as democracy, although of course the best possible outcome is democratic political stability.

One cannot pretend that Uganda is stable right now. The monarchy as an entity cannot simply be left as it was; it must be adapted to current conditions. This is where Frederick and I may have a difference of opinion. I fully agree, however, that a central monarchy of the Swaziland and Ugandan type is different from chieftaincy-type structures. Civil-military relations and many other power structures are indeed different, but remember that for a change here there was a choice to focus on customary structures.

Similarly, we cannot ignore the fact that new generations of African politicians are techno-bureaucrats who at one stage were senior civil servants. They are much more educated and sophisticated, and they have had the opportunity to travel and gain more experience than previous generations. So there have been complexities and changes even in the transformation of the political system.

The military has been coming into politics—as have the bureaucrats, teachers, union representatives and others. How do we then say that because this person was in the military and the other was in the labour movement, one can become part of the political system, and the other cannot? There are now many different entry points into the political system, which complicates the overall picture; in these discussions we are focusing specifically on its customary aspect.

We should certainly not be complacent, new chiefs are even challenging the negotiated settlement that has existed for more than 40 years. In my view they may actually represent new growth and new opportunities for negotiation, rather than instability. In terms of ethnic diversity, the picture is fairly contrary to the general perception of Botswana as a monoethnic society. While it is true that close to 80 per cent of the population comes from the same ethnic stock, there are significant minorities that have played a very important role and forced the debate to open up.

For example, the 1964 constitution recognized what were called 'the eight major tribes': other communities were described as 'minorities'. Over time those minorities have forced a change in the relevant constitutional clause—in fact, it has since been removed. Eight major tribes were initially recognized simply because they were represented in the constitutional talks. Other communities were viewed as their subjects, and as such their paramount chiefs were excluded. However, they have since forced a constitutional amendment that accommodates those who were not represented in the original settlement.

Seretse Khama is very interesting because he brings out the extent to which societies are sometimes modelled around personalities. There is no question that the character of Khama, his marriage to a white woman, deportation and 10 to 15 years of living in exile in the UK did make him different—he was a national rather than a local leader. That is how he learned his politics—and that is probably what he was really saying to the Ugandan king. Khama rejected the chieftaincy and renounced his right to the monarchy, and returned to the country more as a politician than a chief. He had first been popularized nationally by apartheid-era opposition to his marriage, and he modelled the construction of the Botswanan polity around his own multi-racial marriage. His model was a multi-racial, multi-party and multi-polar political system, which was seen as much preferable to the apartheid regime across the border.

Was this a settlement? Yes, because when the chiefs and some selected elites and representatives of the white settler communities gathered in 1963 they were there as representatives of their own different national constituencies. Clearly they did not all have equal power, experience or educational backgrounds. It was, however, a settlement in the sense that everything was laid out in the constitution, including rights and responsibilities. The details had to be enacted through legislation, which is where new tensions emerged. For example, one chief was appointed ambassador to the United States of America (USA) because he was causing problems locally. Several chiefs were also suspended from their positions, and their sons or uncles occupied their positions temporarily until they were reinstated.

Clearly, the chiefs were acting from a position of weakness in the new political order because the constitutional settlement gave the nation state increased authority over the customary. But customary leaders also retained their control over access to their community, and the *kgotla* became a highly strategic entry point. If, for example, a politician came to a *kgotla* and the chief had not invited them, the people

did not turn up: the chief must first announce that Minister X is coming to brief them on a particular policy. Anyone who wanted to access the community had to go via the *kgotla*, which was the source of their strength and negotiating power. Even today the chiefs retain some measure of control over who comes to, and what can be said at, the *kgotla*.

While chiefs are officially not supposed to be political, they do influence who represents their communities, not least by announcing that they would prefer candidates drawn directly from their own communities. And sometimes they work behind the scenes to secure nominations for candidates they feel will adequately articulate their own viewpoint.

Overall the key message is that we are not dealing with a question of 'either/or' here, but rather of using what is good on both sides—the formal and the customary—without either romanticizing or pretending that the solution lies exclusively in either side. At the same time, in the Botswanan case it is critical to understand that it was not so much a question of equal partners—they were not equal in power—but rather of mutual recognition and accommodation.

SESSION 4: DEMOCRACY AND CUSTOMARY GOVERNANCE: AN INDIAN CASE STUDY

Moderator: Peter deSouza. So far the focus has been on the role of customary authority with respect to the jurisdiction of political authority, development and politics. Other zones of authority, notably the cultural and the religious, have largely been left out of the discussion so far. During the last 60 years in India the modern constitutional state has acquired overwhelming authority in the public domain. Over time, however, with development and the deepening of democracy as more political communities entered the public sphere, new forms of authority have begun to assert themselves, notably in the cultural and politico-religious domains.

In the Sikh and Muslim religions, for example, we have cultural authorities beginning to impose their authority over the social and political practices of their community members. In the mountainous state of Himachal Pradesh where I am located, local gods are beginning to assert their authority over the development process: they can now veto the modern state's plans to build a ski resort or a dam, for example. So overall it is clear that there are other forms of authority that need to be brought into the discussion.

The entire process of democracy building and governance reform assumes that all institutions that are not rooted in liberal democratic principles are bad for governance.

PROF. KRIPA ANANTHPUR, MADRAS INSTITUTE OF DEVELOPMENT STUDIES, INDIA.
THE ROLE OF CUSTOMARY AND ELECTED AUTHORITIES IN LOCAL SERVICE DELIVERY: THE CASE OF KARNATAKA STATE, INDIA

There has been a lot of talk about the relationship between customary institutions and formal local governments. This case study is from the southern Indian state of Karnataka, where I have examined the interactions between customary institutions and formal local government.

There are two things that we need to keep in mind when looking at a case study from India. First, the level of territorial authority involved is very different from the African cases examined earlier. Unlike the kings, monarchs or other wider categories of traditional authority that you find in Africa, in India customary institutions are very small and operate purely at the village level. Second, and again unlike Africa where various forms of recognition have been accorded to these institutions, in India the customary village councils do not have any formal, legal recognition or sanction from the state.

When I started my research in 2000, I noticed that the specialist literature was not talking about these institutions either in the local democracy or the governance context. A lot of studies had been done on village-level institutions immediately after independence in the early 1950s and 1960s, but these were very specific to that context. Nobody had actually gone back to study what happened to customary institutions after the 1992 constitutional amendment that accorded constitutional status to local governments. As a result, newly established local government structures entered the village-level political arena, but thus far few researchers have gone back to see what happened to pre-existing institutions as a result of this reform.

Generally, people studying democracy and local decentralization believed that the new local government structures filled a prevailing institutional vacuum. Thus even the literature and discourse on democracy and decentralization assumes that pre-existing institutions based on customs and norms have now ceased to exist, or that there was simply an institutional vacuum. In a sense, the entire process of democracy building and governance reform assumes that all institutions that are not rooted in liberal democratic principles are bad for governance. As a result these institutions are either not given consideration, or if they are, the prevailing assumption is that since they are bad for governance they need to be abolished.

This was the context in which we were trying to examine and understand what was happening on the ground. Accordingly, my main objective here is to assess whether institutional innovation with respect to local political structures has the potential to change the nature of the interaction between customary and formal governmental institutions, in the context of decentralization for better development and governance outcomes.

The overall aim is to take the debate to the next level: to start by demonstrating that there is a particular set of interactions occurring on the ground, and based on this observation, to see whether introducing better-designed political institutions can help us change the nature of the interaction between formal and customary institutions. Our research examined three different districts of Karnataka because we wanted to include different agrarian structures, agricultural developments, and social and cultural backgrounds. Using the level of development as the key criterion, the three districts selected were Mysore, a highly developed area, Dharwad, which is somewhere in the middle range and Raichur, the least developed of the three. We chose about 10 villages in each district—with 100 to 1,000 households in each village—for a total of 30 villages. Some had local government head offices located within them.

In terms of policy implications, one of the most important is that getting the institutional design right really does matter.

Villages with a multi-caste composition were included. Another selection criterion was distance from the nearest government offices (block headquarters), as we wanted to see if access to state machinery made a significant difference. Thus villages situated both very close to and quite remote from urban centres were included. The final independent variable considered was literacy levels.

Our research focused on two types of institutions. The first were the *Grama Panchayati* (GPs), the formal local institutions created by the mandate of the 1992 73rd Constitutional Amendment. This is the lowest tier of formally elected village-level bodies all over India. The area covered varies from state to state. In the region we examined, the GPs cover a population of 5,000-7,000 people; each formal GP institution has an average of five to six villages under its jurisdiction. There is a constitutionally mandated reservation of 33 per cent of the seats for women, and marginalized caste groups are also represented. GPs receive grants from both the state and central governments, and have the authority to levy taxes on the local population, so overall they are quite well resourced. The responsibilities of the GPs include providing local infrastructure services and managing development projects.

By contrast, the customary institutions we are studying have no legal or formal governmental sanction. They only cover individual villages, so within a formal local government structure comprising five to six villages there will be one customary village council (CVC) in each village. They enforce caste and gender hierarchies, so generally the customary institutions serve as a kind of congress of the various caste levels. For example, if a village contains five or six different caste groups, each group would have a caste leader and these leaders would come together to form the CVC.

CVCs differ from *Cast Panchayati*, which are restricted to a particular caste or lineage and consist purely of men. They are not provided with any official resources, but do collect donations for religious activities and impose fines on transgressors if called on to resolve disputes, for example. Thus, contrary to what many people tend to believe, the majority of CVCs continue to exist, and have adapted to the changing context of decentralization. First, the leadership is no longer fixed or hereditary, but rather is most often elected. In this sense they are borrowing from formal institutions and changing their own structures. Second, membership has become much more representative of the local population: once the constitution mandated caste-related reservation

of seats in formal local government structures, the CVCs were also effectively forced to adapt and become more broad based themselves. Particularly over the last six to seven years, they have adapted to changes in formal local governmental structures to avoid being perceived as discriminatory. In addition, local government representatives are sometimes invited to attend, particularly when the discussion relates to local development activities. In this sense CVCs are no longer controlled by the village elite or traditional leaders; they also include elected local governmental representatives.

Very interestingly, in two villages in Dharwad district we found that the female GP elected representative is sometimes asked to sit in on disputes related to women. We have not seen this anywhere else, and it represents quite a change—albeit in a marginal sense—in terms of incorporating women. In addition, the customary institutions appear to have a very high degree of built-in accountability, particularly on financial matters. They maintain bank accounts to manage the donations collected for religious purposes and provide annual accounts to the villagers of what they have collected and how it has been spent. They also operate very formally in the sense that they have fixed dates for their meetings and so on.

The existing literature usually refers to these institutions in terms of their performing ‘traditional activities’, namely dispute resolution and organizing the religious life of the village. In all 30 villages researched, however, we found that along with these traditional activities they were also playing other roles. Most notably, they provided social welfare by, for example, helping destitute or widowed women obtain a share of their husband’s property if it is being contested, providing financial assistance to students who cannot afford to go to school, or helping other people in need.

In addition, these institutions undertake a lot of informal resource mobilization for local development activities—which is not widely reported. In our sample, 23 of the 30 villages had undertaken some sort of development activity in which CVC leaders were actively involved in raising resources, for example facilitating donations of land to the school or raising money to build living quarters for the local nurse. In some villages they are also involved in public-private partnership development programmes and help raise matching grants. These are all wholly autonomous activities.

It appears that village inhabitants do not understand the nature of the relationship between formal local governance institutions and CVCs. Generally speaking, people say there is no relationship between the two institutions; one is viewed as a social institution, the other as a political structure. Closer observation, however, reveals that there *is* interaction: one of the main ways that CVCs tend to exercise control over the local governmental process is by controlling who stands as the village candidate for the GP, in order to maximize the villages’ resources. In addition, many CVC leaders—or, alternatively, their deputies or sons—stand for GP election, so you often see leadership shared between both institutions. CVC members also strive to consolidate their own positions within the formal institutions.

One of the ways in which CVCs exert control over the local electoral process is by organizing a series of meetings to decide who should contest an election as soon as it is formally announced. If consensus is reached over who should stand, they suggest that the person in question should be considered to have been approved and elected; these are known as ‘unanimous elections’. The first local government elections following the constitutional mandate were held in 1995. Almost 25 per cent of the seats in Karnataka were elected uncontested, while in 2010 the figure was around 5 per cent.

The CVCs’ influence is declining because as local governments are formalized and institutionalized, villagers increasingly wish to participate in the local government process and are blocking the CVCs’ attempts to influence electoral outcomes. Everybody wants to contest elections, not least because the CVC helps the local GP member choose the locations for development projects and select the beneficiaries for housing schemes and other benefits.

What are the broad research findings? Contrary to conventional wisdom among academics and policy makers, in Karnataka CVCs are not disappearing; they are active in all 56 villages we studied, albeit with important inter- and intra-district variations in levels of activity.

Broadly speaking, the existing literature assumes that these institutions fill the gap in places where the formal state is weak, and are thus thriving in backward regions. We found, however, that this is not true in Karnataka. For example, we found that CVCs were much more engaged in all kinds of activities

In many South Asian countries customary institutions are grappling with modern institutions, sometimes very vigorously.

in Mysore—ranked highest on the comprehensive development index—than in Raichur, which ranked lowest. In other words, higher levels of development do not appear to deter CVC activity.

We found that two institutional variables were critical to understanding the level and intensity of CVC activity: proximity to local government headquarters and the effectiveness and strength of local government institutions. In the absence of studies on local government effectiveness, we used their success in raising resources as a quantitative indicator; a qualitative indicator was obtained in focus group discussions with different groups of people about their perceptions of local government.

We found that wherever the local government is strong and its offices are located close to the CVC this appears to trigger synergetic interaction between the two. In other words, individually they are significant and when they combine their impact becomes even more marked. This led to two questions. First, if CVCs matter, is this specific to Karnataka? Second, if this the case, has there always been synergetic interaction between formal and informal institutions in the region?

To answer these questions we examined the different models of government that have existed in Karnataka over the past 50 years and the nature of the interaction between CVCs and local government. Essentially there have been three models of local governance. In the first, which existed from the 1950s to the 1970s, there was a group of villages known as *Panchayati*. These were weak formal institutions with very limited power and resources. They undertook little, if any, significant development work and the formal institution was either limited to one village—occupying the same territory as the CVC—or covered a group of 10-15 villages, in which case they were very distant from individual villages.

The second, known as the model *panchayat*, was a very strong institution in the sense that a lot of funds

were devolved to it. It organized a lot of development activities, but structurally speaking it was a fairly large local government structure, consisting of ten to twelve villages. For an individual CVC the model *panchayati* were quite distant. The third model—the GP consisting of five to six villages that exists today—is a relatively strong institution: they do not overlap with CVCs, in the sense of being physically close enough to erode or challenge their power, but at the same time they are close enough to be able to energize them.

Helmke and Levitsky have developed a framework for analyzing the interaction between formal and informal institutions and establishing what affects the nature of outcomes.¹⁵ According to them, a formal structure's institutional design, combined with its effectiveness, has the capacity to change the nature of the interaction from one of antagonism to synergy.

On this basis we can see that in the initial post-independence *panchayati* structure the interaction was antagonistic and competitive. With the model *panchayati* structure, formal local government and CVCs operated as more or less parallel—and sometimes substitutive—institutions with indifferent relationships to each other. They did not have formal interactions in the way we see today. With the GP, however, we can see that the relationship is synergistic as well as complementary.

One of the most important policy implications is that getting the institutional design right really does matter. Better designed and more effective formal state institutions seem to trigger positive synergistic interactions with the CVCs. Wherever there is greater synergy between the two institutions, moreover, it appears that CVCs are more engaged in a range of partnership programmes with formal institutions. There is a whole literature that talks about good institutions generating good institutions, and to a certain extent this holds true here.

There is also a lot of qualitative data to substantiate our findings. Focus group discussions with women or marginalized groups within a village, for example, indicated that wherever the CVCs are involved with the entire process of local governance, awareness of and satisfaction with the activities of the formal local government itself is much higher. By contrast, in villages where there is low interaction between

¹⁵ Gretchen Helmke & Steven Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda', *Perspectives on Politics*, Vol. 2, No. 4, pp. 725-740.

the CVC and the formal local government, villagers reported high levels of corruption in local government and less overall satisfaction with the activities of the formal institution.

Finally, in the process of democracy building or state building, in particular in the context of fragile or post-conflict states, it is critical to understand the nature of the interaction between formal and customary institutions, to examine what triggers these interactions, and from this perspective to look carefully at the nature of the formal institutions to be introduced. In a democracy-building context, for example, innovative institutions can be created that take into account both the context of the particular country or region and the need to ensure that the proposed design will not turn the existing interaction between customary and formal institutions into a more adversarial one.

This has been a problem, for example, in South Africa. New municipal demarcations divided traditional territories into different municipalities, leading to a lot of conflict between the traditional authorities and local municipalities. The traditional authorities suddenly found that their territory was being governed by two different elected bodies, which created a lot of problems. In designing institutions it is thus essential to be aware of the kinds of institutional interactions that already exist at the local level. In addition, it is critical that the process of democracy building is used to bring about changes in the structure and functioning of customary institutions, in particular broadening their representation and introducing further accountability measures.

RESPONDENT

Prof. S. D. Muni, Institute of South Asian Studies, National University of Singapore. This paper very cogently challenges the notion that traditional institutions are disappearing. Moreover, it underlines the positive role that CVCs are playing in synergy with state-sponsored institutions and organizations, in particular highlighting the way that institutional design has enabled this synergy to develop. It would, however, be useful to hear about more specific aspects and strengths of the way in which positive synergies and interactions with the GP are being driven forward. In policy terms, for example, it would be very instructive to know what to encourage and what not to encourage. What is driving the process, the customary institutions' need to survive, or a desire

to synergize with state-sponsored institutions? What are the specific aspects of good governance, delivering public goods or democracy building in which they are positively collaborating?

Additionally, there are clear areas of conflict and tension between the two structures that need to be spelled out. By looking at these it may be possible to identify areas for potential collaboration and areas where it is very hard to establish co-operation between customary and state-sponsored institutions. Even more importantly, what are the factors and forces, and who are the stakeholders, mediating between the two? And if conflict has been resolved, how was it done?

It would also be helpful to have a broader comparative perspective. In particular, it would be fascinating if contrasts and comparisons could be drawn not only from within Karnataka but from other states in India as well. Most states are governed on the basis of a specific regional agenda, so it would be important to see whether these synergies are working everywhere, or if not, in what specific conditions are they functioning well, and to what extent are they actually operating.

The assessment's value would also be increased by referring to the broader social and political context in which these institutions are operating. In other words, the state needs to be brought into the picture—the bureaucracy, legislature and judiciary, and whatever other aspects of state functioning are impinging on local governance processes.

Ever since the late 1950s and the establishment of the *Panchayati*, the Indian state has been at least rhetorically committed to local self-government and inclusive democracy building. Thus each federal state has its own agenda, and at the central level there is a special minister looking into local self-government and rural development, as well as the way in which government policies, resource allocation and the administrative apparatus are helping—or hindering—them.

Many of these processes are negotiated through political parties, electoral processes and power struggles. Elections—unanimous or otherwise—are largely a tool for securing access to policy making and resource allocation. Thus the role and impact of these intermediary institutions and forces needs to be taken into account.

As noted in the paper, there is also a need to look beyond the formal, structured customary institutions

to analyze the role of cultural institutions and religious and caste bodies. It is through these that social groups are now confronting the rule of law and responding to the central- and state-level agenda of transforming a formal democracy into a real inclusive democracy, and this requires further examination.

Finally, can the analysis be broadened to South Asia, or even Asia as a whole? In many countries of the region, customary institutions are grappling with modern institutions, sometimes very vigorously. For example, look at the way the Afghan state is grappling with the *jirgas*. Initially President Kharzai had to resort to the *Loya Jirga*¹⁶ to help legitimize his rule. While Asian democracy may be comparatively more developed than in other continents, it is also facing complex challenges within its transitional processes, and these should be further explored.

Peter deSouza. This paper gains significance from the democratization process that has been taking place in India over the last 20 years. It provides an insight into the micro-process that illuminates the macro-process of deepening democracy in India. Essentially it is an empirical discussion of the third tier of government, the local government (the first tier is the national state and the second tier is states within the federal system). This third tier comprises a few hundred thousand such institutions around the country.

The 73rd Constitutional Amendment introduced a third local tier of representative government, whereby approximately 300,000 new representatives entered the formal state structure. When the paper talks about *Panchayat* institutions it is referring to the modern state taking on the language of tradition and making it modern, and developing institutional innovations of affirmative action through constitutional amendment: providing for representation for women, marginal and excluded groups; giving *Panchayat* institutions grants and the power to raise revenues; and creating a regular body of elections such that representative structures exist at the local village level.

The paper helps us explore how a modern institution uses the language of traditional institutions to interact with traditional institutions themselves in a particular region of India. The request for a comparative dimension is pertinent. Is this only a

Karnataka story, or can one generalize it to other regions of India? In northern India, for example, traditional institutions are increasingly asserting themselves in a far more negative way.

PLENARY DISCUSSION

Mohammed Musa Mahmodi. The type of local government discussed here does not exist only in India. After the 2003 *Loya Jirga*, Afghanistan established a large-scale national solidarity programme, whereby significant resources were channelled to the local level by forming village councils. Villagers were required to elect the council members and ensure women's participation. As a result, the heads or treasurers of many councils are now locally elected women.

Limited funds of around USD 20,000 were allocated to each council to spend on local projects of their choosing. Unfortunately, to date there has been no overall project or programme evaluation to determine how villages have been assisted in their overall functioning, representation and participation by this funding. The presentation will help us examine the national solidarity programme from this perspective.

Brendan Bromwich, United Nations Environment Programme, Sudan. The quality of relationships between different types and levels of government structures, and therefore between the people and the state, seems to be an overarching theme of the whole discussion. This is very helpful in the Darfur context: a lot of the work being done there is focused on trying to build strong relationships between the different livelihood groups who are competing over natural resources. The problem with a lot of this work is that it is not being done in the context of improving the relationship between the government and the communities. It is important to think not just about the relationships between government and communities, but also between the different state organizations; for example between the judiciary and the local legislature.

Ranjana Kumari. It is good that the India paper used the term 'customary institutions' rather than 'customary governance', because the latter enlarges the role of customary institutions to include delivering development and being representative, participatory and accountable.

When it comes to the gender deficit, customary institutions are a men's world in which women are not

¹⁶ A mass meeting usually prepared for major events such as choosing a new king, adopting a constitution or discussing important national political or emergency matters as well as disputes in the Pashtun areas of Afghanistan and Pakistan.

allowed to be members, and judgements are delivered regarding their situations—divorce cases, property rights, adoption and so on. In fact, it would be more appropriate to call them caste institutions, because there is nothing that could be called customary institutions within much of Indian social reality. A very diverse picture emerges when you look at different regions. In the northern states of India, for example, customary institutions are used by political parties as intermediaries. In this sense they effectively become part of the larger democratic process by providing vote banks.

With respect to their local role in northern India, they are not just village-based bodies: when similar kinds of caste groupings exist they cut across village, district and sometimes even state boundaries. And of course they create highly oppressive, traditionalist and fundamentalist structures. In Karnataka, for example, there have been reports of religious groups attacking young people sitting in pubs and bars. In northern India young people who marry out of *gotra* (i.e., caste) have been killed by such groups. The state's response is to create a regulatory mechanism, as they are unable to intervene on the basis of the modern justice system.

Thus in the Indian context there is no customary governance, but there are customary institutions operating under constitutional control that are in line with the vision of the country's original constitution makers. In many instances such institutions are pulling democracy apart, regardless of whether they are religious or caste institutions. The gender perspective is extremely important in the context of this discourse. Even modern democracies are not providing the kind of justice that women deserve, and are not protecting their rights equally. In overall terms, gender justice is critical to globalizing democracy and building future democratic states.

Dr. Jorge Vargas Cullel. Who initiated the relationship between customary and formal institutions, and who drives it? In my country—and probably many others as well—such initiatives do not exist, or if they do they were usually started by international donors, and having them as an intermediary makes a big difference.

Dr. Raquel Yrigoyen. It is confusing to use the word 'informal'. Whether institutions are recognized or not is not important domestically; most of the institutions referred to as informal here are in fact highly formal institutions with authorities, norms and a legal culture.

Additionally, the term suggests that they are less valuable than 'formal' institutions. We should find another term and leave 'informal' to refer to spontaneous reactions, often outside prevailing norms—for example, violent police actions, riots or lynchings.

What are the economic objectives behind policies of recognizing customary law? In Latin America during colonial times, the recognition of customary authorities was intended to help organize the colonial economy. Indigenous authorities were recognized simply for their capacity to govern towns and resolve minor conflicts, to help the colonial authorities organize the labour force and so on. Following independence, the republican authorities did not want to recognize them, because during the colonial era the indigenous authorities instigated the riots that led in part to the end of the colonial model. Liberal ideology was used as the basis for banning customary law.

Today there is recognition of customary law, based for example on the acceptance of indigenous rights, the view that says that indigenous people should have their own law and authorities because they have the right to take their destiny into their own hands. On the basis of new liberal policies, others argue that indigenous authorities should have their own law, but only with respect to minor issues. They should have the authority to resolve minor cases among themselves because this supports the idea of a reduced state. Local communities can have local justice for the poor, in other words, but should not touch the corporations operating within their territories. Thus today, as in colonial times, policies of recognition are strongly connected with the economic objectives of the political forces proposing them. How does this look in Africa and India?

PRESENTER RESPONSE

Kripa Ananthpur. Comparison within India is extremely difficult for various reasons. There are plenty of sociological and anthropological studies of village-level institutions and the CVC councils, but very few have been conducted to specifically investigate decentralization. There is an ongoing comparative study in Rajasthan that indicates similar kinds of synergies, but not to the extent that we see in Karnataka. Comparative studies are not out there yet, which is why we should be cautious about generalizing from our Karnataka case study.

Importantly, there are a number of intersecting village-level institutions in India: customary village

‘Institutional innovation’ is a conceptual framework that helps us connect the different empirical stories.

councils, *khap*¹⁷ and caste *panchayati*. Caste *panchayati* operate for a particular caste group, while *khap* are more lineage-based, using horizontal networks that transcend state boundaries (lineage-based institutions such as the *khap panchayati* are not usually found in South India). By contrast, CVCs are locally based, multi-caste representative institutions. This is the main reason our research focuses on them. Caste *panchayati* simply manage relations within a particular caste, and to a certain extent represent their interests vis-à-vis other caste groups, but they are not really engaged in village-level development activities or dispute resolution. They might take care of dispute resolution within a particular caste group, but they are not truly representative of an entire village unless it happens to be a single-caste village.

Ranjana talked about women and young people being led out of bars and so on. This is happening all over India, and in Karnataka (as elsewhere) it is not the CVC doing this but rather self-appointed religious mafias. Interestingly, although this moral policing is conducted in the name of tradition and culture, it is actually carried out by strongly urban-based political forces. In fact, moral policing started because those involved were collecting *halfia* (protection money) from bars: if bar owners did not pay the usual amount it ended up triggering moral policing—an interesting example of using honour, tradition and culture for particular extraction purposes. In addition, ongoing research reveals that a number of so-called honour killings were in fact related to settling personal scores and property-related disputes. They are described as honour killings, however, because these are a sensitive issue that the government has to treat carefully.

Neither the police nor the administration formally recognizes CVCs. Interestingly, however, we have found that when a local dispute reaches a police station, the local police officer always talks to the

council to ask what decision was taken regarding the dispute, to find out the ‘real’ story so to speak. So the police do recognize this institution when it suits them, although generally they try not to take a formal stance in this regard. We have also found that whenever there is a disaster or communal riots, to a certain extent the district administration use the councils to manage communal interest.

In terms of economic objectives, these institutions are simply not recognized formally. It was pointed out earlier that formal recognition of customary institutions was withdrawn after independence, except in the northeastern region, where the tribal population is powerful and more numerous. In this sense they continue to operate as a form of shadow institution.

Dr. Peter deSouza. To summarize, I propose three issues for consideration. First, with respect to the different institutional innovations that have been tried out both in India and Africa, a common factor is that when modern states and elites have been confronted with both the popular aspiration for democracy and the practical experience of democratic deficits, they have had to innovate either to bring more groups into the political realm or to enhance development outcomes. ‘Institutional innovation’ is thus a conceptual framework that helps us connect the different empirical stories.

Second, we have been using critical terms that need to be distinguished: *accommodation*, *compromise* and, I would add, *toleration*. These are not the same: there are exercises of accommodation in the relationship between the two domains that stem from a kind of positive impotence. Because there is positive impotence, there is a sense of needing to work to find institutional ways and means by which the practices and cultural baggage of each side can be made to cohabit.

By contrast, compromise arises when the two sides need to work out some kind of cohabitation arrangement. The notion of toleration also needs to be introduced, because if we are looking at the role of customary institutions outside the realm of the political—in the realm of the cultural and the religious, as is the case in India—we can see that the powerful modern state may be willing to tolerate the exercise of customary authority in areas that do not pose a political challenge to it. However, when these domains begin to challenge the modern state, as is happening now in India with the *khap panchayati* pushing for the state to change the law and pass the

¹⁷ Customary institutions historically found predominantly in northwestern India. Today the term is used to refer to a socio-political grouping with a geographic base.

Hindu court bill, the state is beginning to respond in a highly constitutional and authoritarian manner.

Third, there is the issue of trust. In the Karnataka study we can see that people begin to rely on the CVCs simply because they are *there*. People access or approach them because they represent an expansion of the local-level institutional density available to them. And since they are trusted, these institutions increase people's chances of accessing state resources. The dimension of trust thus needs to be placed on the table.

Mark Salter. Today's discussion highlights the validity of our original hypothesis that the relationship between formal and customary institutions is an area that requires further attention: we need more empirical study at the local, regional and national levels. Future studies need a clear methodology and an ongoing dialogue that cross references experiences from very different regional, cultural, political and geographic contexts. This is not easy, but experience so far suggests it is more than worth the effort. Tomorrow we will be continuing with that effort.

SESSION 5:

CUSTOMARY GOVERNANCE AND DEMOCRACY

BUILDING: PERSPECTIVES FROM THE ANDEAN REGION

Moderator: Marlene Choque Aldana, Comunidad de Estudios Sociales y Acción Pública, Bolivia.

Latin America is a very diverse region that shares with other continents the deep imprint of old and even new colonial relationships. Bolivia demonstrates the huge problems encountered in the meeting of indigenous and modern traditions. At both the local and national levels, democracy is currently being modified by Bolivian society. This process has its roots in the indigenous and Amazonian heritages and experiences in tandem with the inevitable Western influences. The Bolivian experience is worth studying because democratic continuity was at risk only two years ago.

Following the historic electoral triumph of President Evo Morales and the convening of a constituent assembly in 2006, political conflicts—including disagreement over the direction of democratic and societal change—cast the threat of disintegration over the entire political community. Since 2006 a political and economic elite that was previously proud to exclude the indigenous population has been forced to confront a new reality.

Proposals for political reform from each side appear incompatible. The existing elite proposed regional autonomy without changes in social and economic structures that, based on popular support in the regions in which it dominates, would allow it to retain its privileges. The government proposed fundamental national reform. The project of a new constitution was approved without the presence of the opposition, although it was supported by the majority of the population. The reform project envisages four levels of political autonomy. Democracy building remains a direction and a goal; as yet the nature of the communitarian democracy envisaged in the new constitution, the limits of communitarian justice and the criteria that will govern relations between the four proposed levels of political autonomy are unclear.

The difficulties of linking liberal democracy with indigenous approaches to democratic governance should not be underestimated. An example of this is the coca grower's movement, which is an important component of grassroots support for Evo Morales' leadership. Coca is not an illegal plant in Bolivia. Coca growers are a regional Andean immigrant population, and with almost no state support they have successfully implemented land distribution, built schools and sanitary installations, and opened new roads. During the 1990s, coca growers were considered the weakest link in the drug production chain.

Relationships between communitarian and representative institutions are potentially conflictive in some respects. Bolivia's 36 indigenous population groups have very different political traditions, although their communitarian institutions all have a democratic basis. From a liberal point of view, decision making in these communities is not democratic because collectivity prevails: individual secret ballot based on universal franchise is not the primary form of decision making. From an indigenous point of view, however, voting instead expresses the possibility of opening a dialogue and reaching an agreement. At the same time, all community members have a formal right of veto over decisions. Moreover, indigenous peoples show a strong commitment to representative democracy: indigenous electoral turnout is usually around 95 per cent.

Thus Bolivia is confronting many ongoing challenges. Citizenship should be redefined to include new forms of political participation. Some communitarian practices should be recognized as democratic, in order to realize the new constitution's commitment to communitarian democracy. Institution building must incorporate the notion that individuals are part of the collective, and new forms of direct participation and representation should be correspondingly embraced. To date there have been a number of important advances in this respect. Seven national deputies have been chosen by

the country's smallest indigenous groups, for example, and in seven of the nine departmental legislative assemblies there are now indigenous representatives chosen both by young people and on the basis of customary criteria.

**PROF. GUILLERMO PADILLA RUBIANO,
CIESAS, PACÍFICO SUR, MEXICO. *LATIN
AMERICA: NEW POLITICAL ACTORS, NEW
DEMOCRACY AND NEW STATES: THE
ROLE OF INDIGENOUS PEOPLES IN THE
REFOUNDING OF THE STATE***

The title of my presentation refers to a new phenomenon in Latin America that has much in common with the historical process in other continents. In Africa, for example, we are now seeing the building of new hegemonies following the attainment of independence from the colonial powers. Latin America is experiencing a similar phenomenon, particularly with respect to the most deprived sectors of society. Mexico, for example, is currently celebrating 200 years of independence. For the majority of Mexicans, however, there is very little to celebrate. This is due to the failure of the founding fathers, who had many things in common, including their Spanish-speaking, Catholic European ethnic background and their cultural heritage as the descendants of rich landowners.

The origins of Mexican independence are seen as being based on the French Republican tradition of equality before the law, freedom and democracy. However, it is precisely those sectors that were left behind; there was no room in the process for women, indigenous peoples or those of African descent. These groups are now the protagonists of the new challenge to the hegemonic state that I will discuss here.

The noted Marxist philosopher José Carlos María used to say that the original sin of the conquest of Latin America was to have created a state without the Indian population. This is the source of the fundamental challenges confronting states in the region today. Boaventura de Sousa Santos recently published a book in which he speaks of the refounding of the state in Latin America—a refounding that is initiated by the main victims of the state-building project hitherto. The victims of racism, colonialism and capitalism are precisely the ones who are now challenging the hegemonic state in a process that began no more than 20 years ago.

*For the first time in history,
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language.*

Obviously the history of this process extends more than 20 years back. The emergence of powerful indigenous movements all over the continent should not be forgotten, nor should the Zapatista movement in southern Mexico, but the biggest and most profound changes are happening in the ancient countries of the Andean region. I will thus focus on the two countries that inaugurated new constitutions in 2008 and 2009, namely Ecuador and Bolivia.

These constitutions express what Boaventura defined as a 'new epistemology of the South'. In this sense he focuses on the role of those sectors of society that have been suffering without interruption since the beginning of the conquest for independence, and the state's failure to represent them. The indigenous movements have grown around a range of issues, in particular political representation and participation, the refounding of the state, fundamental reform of the justice system based on its decolonization, and the introduction of a customary judicial system.

In addition, there is a recognition of the importance of issues related to land rights and natural resources, autonomy, self-determination, regional decentralization, and spiritual and cultural rights. Different sectors of society that suffered from the same kind of racism have been united in this project—what we call unity and diversity. Indigenous peoples have united with those of African descent, poor peasants and women.

Who are indigenous peoples? Is there an internationally recognized definition? In this context, the importance of people who identify themselves as native, who existed prior to the colonization of Latin America, needs to be recognized. This self-definition is also a very important element in the development of international legislation, notably International Labour Organization (ILO) Convention 169 and the Declaration of the Universal Rights of Indigenous Peoples approved by the UN General Assembly in 2007.

In some countries such as Mexico, which has probably the world's largest indigenous population—10 million people—the fact that at least 40 per cent of those who identify themselves as indigenous have a non-Spanish, non-European native language is also taken into account. Moreover, conscious of the fact that they are a minority in Guatemala, Bolivia and elsewhere, indigenous peoples that have organized themselves around the issues mentioned earlier are also demanding rights that go beyond specific autonomy or cultural rights.

Where indigenous peoples constitute a significant section of the population, such as in Ecuador, the focus is limited to their own specific rights, particularly to participate in control of the state and currently, in its refoundation. In a book published in 2000, Mexican writer Carlos Flatus argues that when Latin American people talk of the 'disaster of the conquest' they are not confronting their own historical legacy, namely the fact that most of them were born out of that process. We became mostly *mestizos*, meaning a mixture of indigenous and European blood, Spanish speakers and—in the case of the Brazilian Portuguese—Catholic in the majority: a kind of Catholicism, however, that cannot be understood without reference to its Indian mask.

A striped face of Indian, black, Greek, Roman and Mediterranean colours is what created Latin America. From the onset of constitutional nations on the continent people have been asking the basic identity question. Who are we? Who were our fathers and mothers? Do we recognize our brothers? What do we remember? What do we decide? What used to be the name of that mountain? To whom do the lands and resources really belong? Why do so few have so much and so many own so little?

Five hundred years after the conquest we made an important gain: the indigenous peoples. They are the ones who provide us with the most important answers to these questions. In finding the indigenous peoples, we discovered to our shame that the answer to those questions largely remains as bad as it was at the beginning of the conquest. Today in Latin America indigenous peoples, along with those of African descent, remain the poorest sectors of society, largely deprived of the benefits of modernity.

Less than 30 years ago, moreover, in countries such as Guatemala more than 100,000 indigenous people were killed simply because they were Indians. In

Colombia there were organized hunts of indigenous peoples, and today in southern Mexico we still find them in slavery. It was precisely because of the state's inability to represent and improve the situation of indigenous peoples that the issue reached the international arena. Long before the formation of the UN, at the beginning of the 1900s the ILO created a commission to study working conditions around the world. The commission found that those with the worst working conditions on the planet were indigenous peoples who largely remained in conditions of semi- or total slavery.

As a result the ILO decided to create a commission to propose a set of legal norms aimed at improving the situation of indigenous peoples. The first significant step towards this goal, ILO Convention 107 (1957), was criticized by anthropologists and sociologists, who joined indigenous peoples in highlighting what was seen as the convention's assimilationist approach. They argued that the convention assumed that the only way to improve the situation of indigenous peoples was for them to be assimilated by the state and forced to learn official languages.

Mindful of this criticism, the UN established a new commission that produced ILO Convention 169 in 1989, seen today as the most important global legal instrument regarding indigenous and tribal people. Most Latin American countries with indigenous populations have ratified Convention 169, which has played a significant role in defining constitutions all over the continent. Only three Central American countries—Panama, Nicaragua and El Salvador—are yet to ratify Convention 169. Even in those countries, however, the Convention still plays an important role because their legal systems are also affected by decisions of the International Court of Human Rights, which along with other codes provides an important legal basis for effective recognition of the convention.

Today indigenous peoples are demonstrating a remarkable capacity to organize themselves on the basis of these new international bodies and legal instruments. From the moment they moved their struggle into the international arena they effectively created a new space and reality that has had a tremendous domestic impact around the continent. Equally if not more important in bringing about change in the treatment of indigenous peoples have been local efforts to claim rights, notably to be included in state institutions at large. This has in turn compelled political forces in a

number of Latin American countries to reform their constitutional processes—an issue that Raquel will address later in more detail.

Another important factor is the role academics have played in this new reality. Anthropologists, sociologists and historians have broadcast a new interpretation of indigenous resistance to the international arena and have helped bring about new UN and ILO approaches and legal instruments. These developments have directly affected the refounding of states in Latin America.

Over the last 20 years, these sectors of society, which political scientists have largely ignored, have created the most important reform initiatives and forced states to adopt a new approach. This process of ‘democratizing democracy’ involves streamlining judicial systems in a deep consensus regarding the need to refound states. This new political situation in the majority of Latin American countries worries the US administration, since it understands that the most important challenge to US hegemony is emerging from among the indigenous movements—not just because they threaten the political status quo but also because almost 80 per cent of Latin American biodiversity, water included, is located within their territories.

It is important to remember that following the US-supported coup that violently ended socialist rule in Chile in 1974, neo-liberals used Latin America as a territory on which to experiment with new approaches. The Pinochet dictatorship that seized power in the wake of the Chilean coup had the full support of the Chicago School of Economics led by Milton Friedman and his disciples. They began to implement policies that resulted in the establishment of new hegemonies all over the region. Their policies stemmed from a belief that the state is no longer necessary because the market can better fulfil its task. Curiously enough, there were a number of points of seeming convergence between the neo-liberal and indigenous agendas. The neo-liberal approach attempted to both respond to and contain growing indigenous movements by introducing new institutions that have initiated reform processes over the last two decades.

Their rhetoric included references to the rights of indigenous peoples, and focused on reforms that were deemed crucial for the expansion of capitalism. During this period there were many examples of what might be called ‘neo-liberal multiculturalism’. The aim of such rhetoric was to minimize or contain indigenous protest and mobilization while suppressing reforms

that went beyond what was structurally essential for advancing capitalism. In Mexico, for example, reform was introduced in the shape of Article 4 of the Constitution, which declares how proud the country is of its indigenous inheritance. It states that the indigenous shall have the right to speak their own language and wear their traditional costume, and to fully experience their own spirituality. However, Article 27 declares that their communal lands will no longer be protected but opened up to the market: the essence of ‘neo-liberal multiculturalism’.

This doctrine has had diverse effects in many countries. In Bolivia, Sanchez De Losada and his indigenous vice president, Víctor Hugo Cárdenas, initiated radical neo-liberal reforms from the mid-1980s onwards. The outcome of neo-liberal policies all over Latin America is well known, not least the disasters to which this led, including the near destruction of powerful economies such as Argentina and Mexico. A consequence of these experiments is the emergence of powerful social movements of the poor in Venezuela, Bolivia and Ecuador as well as the advent of centrist and centre-left governments all over the region.

Over the last 20 years, 12 Latin American governments have been unable to complete their constitutionally mandated periods of rule. Of those, only one, the June 2009 *coup d'état* in Honduras, was ended in the old style method of a coup orchestrated by the local US embassy. In the other 11 cases, elected leaders were not able to finish their mandates as a direct consequence of popular movements revolting against neo-liberal policies.

One important characteristic of the new Latin American indigenous movements is what some anthropologists call ‘strategic essentialism’: indigenous peoples represent themselves in the public domain by emphasizing their commonalities, such as cultural practices, language and a history of suffering. As we can see today, this strategic essentialism plays a critical role in the political arena. Then there is the question of intercultural constitutionality, of which Israel, Ecuador and Bolivia are all excellent examples. For the first time in history Ecuador and Bolivia have been able to overcome a Eurocentric approach to constitutional language. Constitutionally speaking, they have been creative in developing a holistic, global approach. For example, in both Ecuador and Bolivia, *Pachamama*—Mother Nature—is included as a subject of rights and drinking water is defined as a human right in both the Ecuadorian and Bolivian constitutions.

These elements come from the indigenous approach, a fact that distinguishes and separates them from prevailing Eurocentric constitutional discourses and approaches to human rights. In addition, indigenous approaches towards what is called *sumak kawsai*—balanced living—are incorporated along with other elements derived from the pre-Hispanic inheritance that indigenous peoples have managed to conserve.

That said, Peter deSouza pointed to a number of difficulties involved in this process. The first relates to the fact that a refounding of the state does not imply its elimination. This fact suggests important challenges, because the indigenous peoples that are now controlling the constitution-making process in Bolivia and are taking a very important role in the same process in Ecuador—and are assuming an increasingly important role in a number of other Latin American countries—have to deal with states that are run on the basis of a political apparatus that has existed for more than 300 years. In other words, an apparatus that has long been used by the elites to represent and protect their interests is now engaged in refounding the state with a view to make it better serve those who have been historically excluded from it.

State refoundation also implies changing individual and social habits and mentalities. As was the case in many African countries after independence, there is the related struggle to establish a ‘new hegemony’. This kind of struggle cannot be undertaken purely by its proponents. It is important to establish an alliance including all sectors of society, not least in order to minimize the challenges faced at the moment. This consideration applies to the political, administrative, cultural and economic domains.

While for the people as a whole the refoundation of the state implies the creation of something fundamentally new, for indigenous peoples it equally implies the incorporation of pre-Hispanic elements that are important for them. Fundamentally, the construction of this new hegemony has to be negotiated with non-indigenous peoples. In recent times the reformist approach of European social democracies has attracted the attention of most Latin American countries due to their less radical and hence less problematic approach. The question, however, is whether such an approach is fundamentally adequate to address the most important challenges facing them today.

DR. RAQUEL YRIGOYEN, INTERNATIONAL INSTITUTE ON LAW AND SOCIETY, LIMA, PERU. CONSTITUTIONAL RECOGNITION OF INDIGENOUS CUSTOMARY LAW IN LATIN AMERICA: FROM MULTICULTURALISM TO PLURINATIONAL STATES—TRENDS AND CHALLENGES

I will look specifically at constitutional recognition of indigenous customary law in Latin America, with an emphasis on the policies pursued by Latin American states in recognizing indigenous law, which later becomes indigenous customary law. First of all, a brief look at the historic, demographic and social importance of indigenous peoples for the building of Latin American identity.

In some countries such as Guatemala and Bolivia, indigenous peoples constitute the majority—around 60 per cent—of the population. In Peru the figure is 40 per cent, in Ecuador it is 30 per cent. Although only a small proportion are found in Venezuela and Colombia (2 per cent), in the latter the indigenous population inhabits a large area, around a quarter of the country’s territory. Some of the current conflicts in relation to indigenous peoples can be explained by the location of significant natural resources such as mining, gas and petroleum in the areas they inhabit.

The conquest of Latin America began in the 16th century and lasted until the 18th century. The process of achieving independence began in the 19th century, at the same time as many African countries began to be colonized. The independence process created a political situation in which native peoples effectively became subordinate nations. Legally speaking, indigenous peoples become minors, as this provided the Spanish with a justification for their war of conquest against the Indian population.

Because of their attributed status as minors, the Spanish claimed the right to ‘educate’ them in religion and reason. Policy in relation to indigenous law was formulated within this framework. Initially, a policy of effective legal segregation was pursued, which involved one law for indigenous peoples and another for the Spaniards. The indigenous population was consigned to so-called Indian towns, within which a form of Indian rule was recognized in order to govern people more effectively. Thus indigenous authorities were given a limited set of powers: they were put in charge of tax collection and organizing the mining workforce; those in charge, known as *Curacas*, enjoyed certain privileges. They had

These constitutions represent a new movement because they are effectively recognizing the existence of a plurinational state.

the right not to work, for example, were exempt from taxation and attended *Curaca* schools.

This form of indirect rule was also used by the Portuguese in Africa and elsewhere: indigenous authorities were used to govern small towns because in large colonies it was impossible for the colonial powers to run every municipality themselves. In other words, recognition of indigenous authorities was not the result of a desire to preserve their autonomy, it was simply an easier way to govern colonies.

Thus the laws promulgated in the 1500s by the Spanish ruler Charles V state that the laws of the Indians that governed them prior to the conquest must be preserved. It recognizes that the Indian population used to have laws, in other words, but goes on to say that now that they have converted to Christianity they no longer have laws but rather what are described as ‘uses and customs’ that are consistent with Catholic norms and practices. The term ‘customs’ thus implies that the indigenous peoples’ previously existing norms are not seen to contradict either colonial laws or the Roman Catholic religion—a form of subordinated colonial-era legal pluralism.

The indigenous law of subordinated local authorities is thus reduced to the status of ‘uses and customs’, and recognized to the extent that it is not in contradiction with the colonial order. Indigenous authorities’ jurisdictional powers are recognized with respect to minor issues, and only in cases among Indians and within their territory. For instance, if a Spaniard committed a crime in an indigenous town the local authorities were powerless to arrest him/her. If, however, a slave or gypsy escaped and entered an indigenous town the local authorities had the right to capture and deliver him/her to the colonial authorities.

Colonial-era policy in this respect changed dramatically during the republican era, the independence wars of the 19th century. Towards the end of the colonial era the *Curaca* authorities organized themselves and instigated riots when the Spanish monarch raised

taxes. The Creole population, the descendants of the Spaniards, were fearful of the *Curacas*. Thus following the independence of Bolivia, one of the first countries to reach this goal in Latin America, a decree abolished both the *Curaca* authorities and communal properties.

Thus when Latin American countries achieved independence in the course of the 19th century it was Creoles who led the process of state creation—not only without the involvement of the Indian population but also in opposition to them. In this sense it can be said that alienated republics based on indigenous exclusion were created. Since this was also the Napoleonic era, the notions of one state, one nation, one culture, one language and one legal system—the monistic idea of law—were imported. Institutional forms were imported wholesale from Europe and the USA, and legal monism based on the notion of separation of powers was entrenched.

Thus the judiciary was accorded exclusive control over the administration of justice. As a consequence even the indigenous peoples’ limited power over administration of justice within their territory, which they had previously enjoyed, was now eradicated. Additionally, where Spanish law had allowed indigenous peoples to use their ‘uses and customs’, after independence, for example, the constitutions developed during 1918-23 state that parliament has the exclusive right to pass laws. The same thing also happened with respect to the judiciary: during colonial times indigenous peoples had retained limited jurisdictional functions, but in the republic only the judiciary had the power to administer justice.

As a consequence of this legal monism, indigenous peoples’ legal systems began to be actively repressed. In northern Peru, for example, the local justice system had traditionally dealt very effectively with most issues: anyone found guilty of robbery, for example, would be obliged to work during the day and to patrol the community during the night. Once a constitution was introduced that stated only judges were able to administer justice, however, there is clear evidence that a policy of active repression against such local practices began.

By the end of the 20th century this approach had begun to change. First of all, there were some social reforms to constitutions, in particular formal recognition of indigenous communities and lands. The most important constitutional changes, however, have occurred over the last 30 years. Today Latin America

is characterized by pluralistic constitutions, partly as a consequence of the rise of indigenous movements within the region but also due to international trends in relation to the recognition of indigenous peoples, multiculturalism and so on.

At the same time, recent decades have witnessed two opposing trends in Latin America. On one side there is the recognition of indigenous peoples, rights and movements and the democratization of states following periods of military rule. On the other side there has been widespread implementation of neo-liberal policies, which in practice leads to contradictions. The emergence of multiculturalism began with the first cycle of constitutional reforms in the Americas. In 1982 Canada changed its constitution to recognize its multicultural inheritance. During that period several Latin American constitutions were amended in a similar manner. For example, in 1985 Guatemala changed its constitution to recognize the multiethnic, multilingual and multicultural characteristics of its society. In 1987 Nicaragua recognized both the right to cultural diversity and some measure of autonomy for indigenous peoples, and Brazil also changed its constitution to recognize indigenous rights.

Acknowledging the fact that these nations were born saying that they have one language, culture and state, the new constitutions effectively embody recognition of the fact that there are several languages and different cultures within their countries. During the 1980s the constitutions did not yet recognize customary laws, as there was still a fear that this could lead to the creation of 'states within states'. Accordingly, recognition was limited to the question of cultural diversity. The major change came after the promulgation of ILO Convention 169 which, as Guillermo explained earlier, recognizes the right of indigenous peoples to determine and have control over their own institutions, including the right to use customary law within their own territories or among their own peoples.

As a result, a number of inter-American codes were also amended to recognize the rights of indigenous peoples. With the exception of Chile, Argentina, Mexico and Paraguay, national constitutions were changed in all countries with Indian populations. Several constitutions were amended during the 1990s. Colombia, for example, approved a new constitution in 1991 that recognizes and protects the ethnic and cultural diversity of the Colombian nation. Similar measures were passed in Bolivia (1994), Peru (1995), Ecuador (1998) and Venezuela (1999). Colombia,

Women also have the right to culture, and we have no right to tell them that a particular cultural institution and everything related to it is fundamentally bad.

Peru, Bolivia, Ecuador and Venezuela have all formally recognized legal pluralism.

These constitutions thus recognize both that indigenous authorities have jurisdictional functions and that they will administer justice according to their customary law, subject only to the limitation that they do not violate human rights. Thus we have the emergence of multicultural, pluricultural nations and states. These constitutions also state that not only individuals but also all *cultures* have the same dignity, and establish some related political rights such as representation quotas, consultation, political participation and recognition of legal pluralism. Legal monism, the idea that one state, one judiciary and one parliament alone produces and administers the law was thus effectively abandoned.

The last and most radical change to occur is reflected in the new constitutions of Bolivia and Ecuador. These constitutions represent a new movement because they say not only that indigenous peoples are diverse cultures, but also that they are *nations*. In other words, they are effectively recognizing the existence of a plurinational state. The constitutions say that indigenous peoples participate in a new pact, which creates a new state in which indigenous people are no longer viewed as subordinated peoples, but rather as actors in this pact; on the basis of this, a plurinational state is created. These constitutions were passed after or during discussions of the UN Declaration on the Rights of Indigenous Peoples, which was approved by the Human Rights Council in 2006 and passed by the UN Assembly in 2007.

The UN Declaration states that indigenous peoples have the right to self-determination, and the Bolivian and Ecuadorian constitutions embody the same basic notion. Other new rights acknowledged include the equal dignity of the indigenous 'nations' along

with formal recognition—in the first article of the constitution—of legal pluralism and customary law. These provisions influence the constitutional definition of democracy. Specifically, three kinds are recognized: representative democracy, which is the classic form found in most countries; direct democracy, meaning direct participation via consultation, referendum and so on; and communitarian democracy, meaning that within their own territory ‘nations’ have their own means of decision making. For example, democratic decision making is generally realized through the exercise of universal franchise. In indigenous towns, however, everybody—the old, the young and children—has the right to participate in the local assembly. A very old lady may speak to a very young person, for example, and probably neither has a national identity card. In democracy based on universal franchise, however, to be able to vote you will need an ID card. The constitution excludes people below a certain age from voting, but among indigenous peoples everybody has the right to speak. These examples illustrate the fact that the Bolivian constitution has recognized customary law across a wide range of issues, including medicine and education for the management of land, forests and territorial administration.

Clearly this new recognition also implies many challenges, such as how to accommodate these new institutions within the country as a whole. To make institutions such as the judiciary more pluralistic, nominations for positions must now include indigenous representatives. Conflicts related to human rights, between indigenous and ordinary law, or between indigenous and ordinary legal jurisdictions are supposed to be resolved by a constitutional tribunal. According to the new constitution, this tribunal must be composed of representatives of indigenous authorities as well as ordinary lawyers. Challenges notwithstanding, it is important to emphasize that the fundamental project here is the ending of colonialism and the view of the indigenous as people to be subordinated, with no control over their territories or their lives, and as a group without the right to their own law. In this sense these constitutions allow us to glimpse the possibility of a new state in which all people possess the same dignity.

RESPONDENT

Dr. Jorge Vargas Cullel. A striking aspect of Guillermo’s paper is the emphasis on including the customary as one of the organs of the state—what he calls the ‘revised Montesquieian principle’, whereby

the traditional organs of the executive, legislative and judiciary are expanded to include the customary, either separately or within these organs. The paper also referred to four pillars, the most important one being self-determination. For indigenous peoples to be truly recognized they must be given the right to self-determination, whether within the parameters of one nation or by having their cultures not only protected but also promoted. The promotion of indigenous peoples’ culture is realized either through research or by facilitating native language instruction to children to avoid promoting any sense of inferiority.

Raquel talks about the colonial administration bringing laws to indigenous communities. I strongly believe, however, that whether in Latin America or Africa all indigenous communities have their own laws, even if they have not been written down, because this is a basic matter of the ‘dos and don’ts’ of any society. Prohibiting people from doing wrong in itself signifies the existence of laws. This is why colonial administrations in Africa established what was called indirect rule. In doing so they recognized the chiefs’ power to rule on their behalf and the capacity of existing structures to work for them. However, they did not want to make them into codified institutions that people could be formally taught about in order to ensure that the next generation follows the same practices. Thus, if the aim is to both ‘customize the democratic’ and ‘democratize the customary’, does this cover only customs that are written down or does it also include those that are taught to people informally so that they are followed within a particular system?

PLENARY DISCUSSION

Brendan Bromwich. We know that customary structures are very important for identity: southern Sudan is currently making great efforts to integrate customary law. The gender field has long been preoccupied with the notion that culture is bad, and that customary laws—indeed anything customary—is essentially bad for women. These presentations highlight the importance of the right to culture and cultural diversity. And that includes women: women also have the right to culture, and we have no right to take that away, or tell them that a particular cultural institution and everything related to it is fundamentally bad.

A new trend is emerging in the gender field, in which perceptions have been turned around and rights to culture are understood. This new approach comes much closer to what you have been describing, that it

is much more about how to create a space for women to exist within their communities and culture, to maintain their culture but also to participate in its definition, and on this basis contest practices that are bad or negative for women. This approach encourages to do so on the basis of being part of the culture, not simply dismissing it as negative and trying to fight it.

Dr. Patrick Molutsi. The issues raised here appear to be a little different from those discussed earlier in the African and Indian contexts. In some Latin American states—Bolivia, Ecuador and Guatemala, for example—ownership of the state is the fundamental issue. The majority of the population has no ownership of the state, which goes back to the issue of internal colonialism. This is similar to what used to apply in South Africa with the white minority.

Consequently the democratic issues and challenges facing these countries are fundamentally different; they require not reforms but the total recasting and transformed ownership of the state. This is why the process involves more political struggle than state expansion and reform, as is the case elsewhere. In other countries where the indigenous population constitutes a smaller section of society—Australia, New Zealand and Scandinavian-type countries—the emphasis is on reforms, accommodation and to some extent developing consociational-type democracies of the kind we see in Belgium and a few other countries.

Overall, this rich discussion points to the need for a number of focus issues with respect to democratizing Latin American societies. Contrary to what some participants argued earlier, there are some critical differences between African and Indian societies compared to Latin American countries that have been victims of significant internal colonialism, and which, comparatively speaking, remain in need of a different type of decolonization.

Indigenous peoples are not only including women, they are also helping to ensure that all different sectors of society understand that women have equal rights.

What is common to all these discourses is the point that comes up clearly in the Latin American context regarding the need for decolonization, particularly decolonization of the mind.

Dr. Peter deSouza. The papers bring out the contrast between Latin America, Africa and India, which begins with mapping the demographics. In Latin America, discourse relating to the customary and traditional applies to indigenous peoples who are essentially a minority, even if in some states they constitute 30, 40 or 60 per cent of the population. In Africa, however, the discourse of the customary, the indigenous and the tribal relates to the majority population—almost the whole population in fact. In India the customary and traditional are located not within the indigenous peoples but among the country's dominant social fabric, and the indigenous people's lack of a voice is effectively a criticism or indictment of the Indian approach hitherto.

What is perhaps common to all three discourses is the point that comes up clearly in the Latin American context regarding the need for decolonization, particularly the decolonization of the mind. This takes us to the basis of Boaventura's work, which appears to be central to both presentations and which is valid for Africa, India and Latin America: namely, the need to create a new epistemology of the South. What should such an epistemology look like? Does it have to break away from the dominant one? The papers seem to suggest that an alternative approach is not needed, that the dominant epistemology can be redefined to accommodate the new language of political movements.

You say that the state needs to be refounded, but behind this is the question: refounded on the basis of what epistemology? What should an 'epistemology of the South' look like? Boaventura himself sees an epistemology of NATO, the North Atlantic World, as the dominant one, and he wants the new 'epistemology of the South' to be located in and around the Indian

Ocean. Is that the project of decolonization in which you are inviting us to participate?

Mónica Novillo Gonzáles, Coordinación de la Mujer, Bolivia. The change process in Bolivia is so interesting because it involves a range of movements—of the indigenous, those of African descent, peasants and women. The women's movements' involvement means that some important feminist concerns have been included in debates over the new constitution. This includes both discussion of customary law and a questioning of what is traditional or not, including identification of some elements of the culture that need transforming. Among highlands indigenous people, for example, there is a debate over notions of complementary relationships between women and men, as sometimes these notions appear to mask repression and subordination that gives women a lower status, and even denies them the right to participate in communities in some instances.

Nationally, the women's movement has been involved in the discussion of subsidiary laws following approval of the new constitution. There are now laws governing the participation of women in the judicial, constitutional and parliamentary systems. As a result, the next elections will result in at least 50 per cent women's representation in the senate and the congress. Involving women in the decentralization process is one of the most important outstanding challenges. It is a major issue for the women's movement, because at least at the level of discourse there is a linkage between the decolonization and decentralization processes.

Dr. Jorge Vargas Cullel. Isn't it dangerous to be reviving essentialism at this point in history? How can essentialism be reconciled with the pluralism and belief in dialogue in which democracy is rooted? And for Raquel: given the differences among Latin American sub-regions to which you referred, should plurinational constitutionalism nonetheless be seen as the end goal of political development for *all* Latin American countries, with redrafting constitutions as the fundamental present task?

Mohammad Musa Mahmodi. It is clear to me that we are talking about two different issues here: 1) indigenous versus popular practices, and 2) customary laws as they are applied in countries like Afghanistan. The presentations clearly indicate that it has taken 200 years to get to where Latin American countries are today with respect to indigenous peoples, and this has happened alongside a trend towards recognition

It is not necessary to codify customary law because that would probably ruin it. The idea is rather to recognize indigenous peoples' own system of regulation on their own terms.

of struggles for individual, national and indigenous rights and following the incorporation of new national constitutions. How do you see the importance of time in arriving at this stage in other contexts such as Afghanistan and India? Are there prerequisites? Do you have to have a certain condition before you arrive at this stage?

Prof. Carolyn Logan. The first country to reform its constitution in the 1990s was Colombia, where only 2 per cent of the population is indigenous. Would it make sense to argue that they were first because making these changes did not really threaten the existing order? Not all countries of the region were mentioned either, which leads one to assume that they have not undergone similar reforms. What is happening elsewhere, and what are the practical implications of these differences in experiences? And what do these changes mean on the ground? Is it a case of indigenous peoples already being essentially governed by their own systems, and now they are receiving formal recognition? Or are the reforms going to mean real changes on the ground in the ways in which communities are governed?

PRESENTER'S RESPONSES

Prof. Guillermo Padilla Rubiano. Regarding an epistemology from the South, which is perhaps the most important element of current developments in Latin America, I would like to quote the Argentinean thinker Walter Mignolo, who distinguishes between the way knowledge is produced in the North and the South. According to Mignolo there are two ways of producing knowledge: one is the scientific, rational approach that currently enjoys hegemony throughout the world. The other is gnostic—not scientific but still highly important. It is precisely this approach which is being uncovered at all different levels of society today in Latin America, and which leads us to a different

approach towards the planet. It is this knowledge that treats the earth as a subject of constitutional rights and that makes sense of the strategic essentialism referred to earlier.

This, moreover, is one of the principles underlying the new international legal instruments such as ILO Convention 169, and it also informed consultations in the run-up to the 2007 UN Declaration of the Rights of Indigenous Peoples. Both documents demand that indigenous peoples be consulted before any kind of project is developed within the territories. Why should indigenous peoples, and not others, be consulted in this regard?

Behind this principle lies the idea that there are different ways of producing knowledge. We have been trapped in a hegemonic epistemology that contends that the only important form of knowledge is that which can be rationally, scientifically proved, leaving behind another way of knowing that regards the dominant rationality as just a means to the end of exploiting the planet. Indigenous peoples do not see the land, or indeed the planet, that way. Rather, they see it as a mystical place that is a bearer of rights, as a conscious subject that should be questioned, presented, respected and secured in life. We should think about this approach as a way to defend the planet while we still have the opportunity to do so. Some years ago I was invited to a *Maloca*¹⁸ in the Colombian Amazon to drink a tea produced there called *ayahuasca*.¹⁹ After drinking the tea and participating in the indigenous peoples' ritual dance and music, I understood the validity and importance of their means of knowledge production.

Strategic essentialism is not contradictory to pluralism. There is no 'complete' existing culture: the only way in which they are improved is precisely through the inter-cultural dialogue in which, thanks to indigenous peoples' struggles and achievements, we are now immersed in Latin America.

Indigenous peoples in Latin America have introduced a new discourse that not only includes the rights of animals and the earth, a new approach to democracy and the role of state, but also, very importantly, the rights of women. In a country such as Guatemala in

which indigenous peoples are active, 36 years of civil war resulted in more than 200,000 deaths, most of whom were male. In addition the country suffers from the poverty characteristic of Latin America that forces the indigenous poor to migrate northwards to the USA. As a result, many local communities now consist almost exclusively of women, elders and children. Women are taking up leadership and forming the new authorities: they are the ones that are to a significant degree representing the indigenous voice on the international stage, for example in the UN indigenous working group.

Women are playing a very important role in the formation of new discourses in these fora. They are bringing a new discourse back to their communities that incorporates women's rights as a fundamental component of social transformation. Indigenous peoples are not only including women, they are also helping to ensure that all different sectors of society understand that women have equal rights. That is the case in Bolivia, for example, where President Evo Morales' *Movimiento al Socialismo* has made a point of ensuring a minimum 50 per cent representation of women in congress, the constitutional assembly and elsewhere. This is an example to a dominant society that still excludes woman. There remain important ways in which indigenous peoples still do not treat women appropriately, but this is an open subject of debate throughout Latin America and in overall terms women's lives are improving tremendously.

Colombia was indeed a pioneer of transformation, and remains a paradigm for state approaches to indigenous peoples. It is probably correct to say that the small number of indigenous peoples was a key factor in this regard. The ruling class in Colombia do not stress their hegemony. The last 20 years of indigenous peoples' struggle has affected the state as a whole due to a reinterpretation of the role of indigenous peoples, combined with the need to create a new kind of state that will solve the root problems underlying the violence Colombia has been suffering from for so many years.

In the constitutional courts, there are some brilliant lawyers who interpret indigenous rights in a way that effectively proposes a new paradigm. Even today the Colombian constitutional court's rulings are examples that are followed by other countries, and indigenous peoples all over Latin America have adopted their legal interpretations as the basis of proposals in their own countries.

¹⁸ An ancestral long house used by the indigenous peoples of the Amazon, notably in Colombia and Brazil.

¹⁹ Psychoactive brew used for divinatory and healing purposes by the Amerindian peoples of Amazonian Colombia.

Dr. Raquel Yrigoyen. When customary law is recognized by a constitution, this does not necessarily mean that the law is written, or that it must be codified. The conclusion of much discussion on this subject in Latin America is that codifying customary law would probably ruin it. The idea is rather to recognize indigenous peoples' own systems of regulation on their own terms: the way people select or nominate their own authorities, produce their own norms, the principles underlying those norms, their procedures and the way they resolve conflicts.

Thus recognition is not about a specific norm or set of authorities, but rather the power to have your own authorities, produce norms and administer justice. As mentioned earlier, this is important in relation to women. The Bolivian constitutional assembly was the first occasion in which so many women and indigenous peoples participated—totally different from the process surrounding the initial creation of the country. It is, however, also true that there is tension within some communities regarding a number of women's rights as they are perceived by indigenous women's groups: cases of domestic violence are one problem area, as is alcoholism, a potent symptom of people's subordination within Bolivian society.

Feminist groups used to train indigenous women to go to the police and the courts. A lot of money was invested in this in the 1970s and 1980s, but it didn't produce any real benefits for women. If a woman went into the city to present her case to the police, they would go to her small town to investigate what was happening. As a result the woman was often beaten and nobody was prepared to protect her. Today there are some projects working with indigenous authorities to break the prevailing patriarchal pact because if men are in power, men will protect men. If a woman presents her case locally, men will say 'I cannot deal with this case because my wife will accuse me as a result'.

This kind of patriarchal pact exists everywhere. The way to break it is to force indigenous authorities to deal with issues such as domestic violence. In Guatemala, 90 per cent of the cases received by the main organization for the defence of indigenous women relate to domestic violence. At the beginning they sent women to the police and the courts but this simply did not work. Thus in Peru, for example, there

is now a network of women's defence workers within indigenous communities that brings cases before the indigenous authorities with the threat that if the authorities do not resolve them, they will ensure that the police get directly involved; this has significantly changed attitudes.

In addition, as mentioned earlier, particularly in Ecuador and Bolivia, women participated actively in the constitution-making process. Thus the new Ecuadorian constitution says that indigenous law is recognized insofar as it does not violate women's rights. Naturally, the major challenge is translating such declarations into practice. The overall trend, however, is to harmonize collective indigenous rights with the recognition of new women's rights.

Concerning decolonization, it is important to remember that during the colonial era, entire countries were subjugated in important respects, and became sources of natural resources with a subordinated role within the global economy. In this context, indigenous peoples were in turn considered as sources of natural resources for the nation. This remains one of the key problems and contradictions. In Bolivia or Ecuador, for example, due to the resulting pollution, indigenous peoples are not fighting to increase mining or petroleum activities within their territory, but rather for new forms of energy and a new overall vision.

As a result President Morales, who is indigenous, has a problem. The state's main source of income is from gas, and he needs to increase production to generate resources to distribute among indigenous peoples. So there is a tension. And unless humanity as a whole succeeds in finding other sources of energy he will continue to face such conflicts. At a practical level the key problem is the Morales government's unwillingness to consult indigenous peoples. They continue to want to treat them as they were treated in colonial times—'this is our national territory so we will take natural resources from here without consulting you, without paying any attention to your vision of development'.

Should all Latin American countries move towards the idea of a plurinational state? Latin America was born in opposition to indigenous peoples: they were incorporated by force, without their consent; the sooner they can participate in constitutional design, the better.

SESSION 6:

CUSTOMARY GOVERNANCE AND DEMOCRACY

BUILDING: AN OVERVIEW FROM THE ARAB WORLD

GIHAN ABOUZEID, MINISTRY OF FAMILY AND POPULATION AS WELL AS CAIRO UNIVERSITY, EGYPT. *DEMOCRACY BETWEEN POLITICAL POWER AND CUSTOMARY GOVERNANCE IN THE ARAB REGION*

First, some background information on what is going on in terms of democracy in the Arab world. The Arab League has 22 member states, 14 of which have political parties. With the exception of Libya, all countries have either presidential or parliamentary elections. Parliamentary membership is secured in one of three forms: by election, appointment or a combination of the two—Egypt is an example of the latter category. Except in Lebanon, and for previous short periods in Algeria and Sudan, citizens are not able to change the government. The judiciaries in the region are not independent, which among other things has a significant impact on citizenship issues. Elected parliaments can be dissolved, as happened in Jordan earlier this year. Throughout the region political systems are able to limit political reform, and over the last 50 years peaceful transfers of power have been all too uncommon.

With regard to customary institutions, Arab countries display a wide variety of tribal, religious and sectarian affiliations. Sectarian and tribal considerations play a significant role in the selections of government ministers in many countries of the region. In Lebanon, for example, the state has adopted a system of allocating presidential, governmental, parliamentary and army positions according to sectarian religious affiliation; each religious group has a specific quota. For example, the president must come from one Christian faction, the head of parliament from another, the prime minister from another and so on. Loyalty to religious and tribal groups is stronger than adherence to the rule of law.

Relations between customary institutions and the state are also based on differing models. In the first model

In Lebanon and Iraq some parties are virtually closed around a specific tribal entity, and in this sense have become an extension of tribal institutions.

traditional institutions control the political regime, as is the case in Yemen. Yemeni traditional institutions enjoy significant power, and tribes play a central role in running local communities throughout the country. President Ali Abdullah Saleh, who came to power in 1978, represents the largest and most important tribe. A year after his accession to power, Saleh appointed a number of other tribal chiefs. Some of them are engaged in business and are extremely rich as a result, other receive monthly salaries. In this sense the head of the tribal chief is organically linked with the regime, and in a different sense this is also what has happened in Jordan.

In Yemen the political system is republican, while Jordan is a kingdom. In the forthcoming Jordanian election the tribes are expected to try to distribute parliamentary seats both prior to and during the first round of voting. The election law was amended a few months ago, the effect of which is to effectively increase the power of the tribes. In Lebanon and Iraq

some parties are virtually closed around a specific tribal entity, and in this sense have become an extension of tribal institutions.

The second model, in which traditional forms of authority run parallel to some kind of democratic system, is very common in the Gulf, albeit with varying characteristics. In Bahrain, the most progressive country in the region, for example, there are political parties and movements. The same is not true in the United Arab Emirates (UAE), Saudi Arabia or Oman. Overall in the region it is more common to see a traditional, hereditary-based political system co-existing with different forms of bureaucratic authority. In Kuwait, the strongest political system in this region, there is a robust parliamentary structure. Traditional forms of authority are exercised in tandem with various forms of democratic rule. In the UAE the 'free door' system significantly limits the power of inherited traditional structures. Generally speaking, former colonial powers keep the two systems—traditional and representative—together.

The third model—impossible to categorize—is found in Egypt²⁰. Here the state deploys two differing strategies vis-à-vis the tribes. First, there are the Bedouin tribes in Sinai and the border area with Libya; second are the Arab tribes in the south of the country. The state's relationship with the Bedouin tribes is characterized by suspicion. For example, the Egyptian police regularly accuse the Sinai Bedouin tribes of involvement in arms trafficking and goods smuggling to Israel and Gaza, even though they are effectively protecting the country. This in turn explains the major 2009 strike in Sinai.

The southern Arab tribes extend along the Nile from South Sudan to Cairo—almost half of the country,

²⁰ On 25 January 2011, Egyptians rose to protest the death of Khaled Said, a young Egyptian man who was beaten to death by two police officers in Alexandria. Until 11 February, the streets of Egypt would witness daily protests, demonstrations and strikes that would forever change the history of Egypt. For 18 days, Egyptians protested across the nation demanding the resignation of former president Hosni Mubarak, who had been in power for 30 years. Women, men, children and the elders chanted 'peaceful, peaceful', calling for a nonviolent pursuit of Mubarak's ousting. Of the main demands, Egyptians sought and chanted for the end of police brutality, state of emergency, lack of fair elections and freedom of speech, and economic growth. On 11 February, former president Hosni Mubarak announced his resignation to give Egypt a new hope of a free nation. Most notably, the Revolution witnessed and led to a tremendous change in Egypt's politics. New political parties have and are emerging in an unprecedented manner. Unlike upper Egyptian tribes, Sinai's tribes were active participants in the Revolution.

and around 37 per cent of the total population. They have a large population, a long-standing historical presence and strong internal coherence, all of which oblige the state to choose the path of dialogue with them rather than the confrontation that characterizes relations with the Bedouin. The southern Arab tribes are economically strong, and access to resources is another critical factor differentiating the way the state deals with them. One writer estimates that 70 per cent of the stories enacted throughout the country during Ramadan come from the southern Arab tribes, and in this sense tribal culture has influenced all Egyptians.

The fourth model relates uniquely to Tunisia²¹. When I used to travel regularly to Tunis I always asked: where are the tribes? People used to claim that they didn't exist anymore, but I don't think this is true. Like Egypt and Syria, Tunisia is a highly centralized country: it acquired independence from France in 1956 and initially had a highly progressive leader who changed much. Traditional culture can be found today, but not in urban areas. This relates to a broader point about tribal communities in the region. In general, traditional culture is strongest in rural areas, and weakest among urban communities that are more affected by modernization, formal education and the availability of infrastructure.

With regard to the regional condition of democracy, balanced as it is between customary governance structures and the realities of political power, some political parties based on sectarian and ethnic realities have flourished. In Jordan, for example, tribal customary governance structures have gradually taken over political parties and political life in general. Elections are not run among competing political and ideological trends; they take place between competing sectarian and tribal groups. The Iraqi model is also highly relevant in this context. Sectarianism is part and parcel of the political system, and political parties are

²¹ In December 2010, Tunisia broke out in protests after Mohamed Bouazizi, a 26 year old street vendor, set himself on fire after having his wares confiscated and being humiliated by a municipal officer. For 28 days, Tunisians protested former president Ben Ali's government marked by high unemployment, food inflation, corruption and lack of freedom of speech. On January 14th, after thousands chanting "Ash-sha'b yurīd isqāṭ an-niẓām [the people want to bring down the regime]", a slogan later becoming central in other revolutions around the world and a symbol of unity, former president Ben Ali officially resigned after fleeing to the Kingdom of Saudi Arabia, ending his 23 years in power. Tunisia has experienced significant political change since Ben Ali's resignation, including the dissolution of the Constitutional Democratic Rally (CDR), Ben Ali's political party.

controlled by specific tribes or religious sects. To date the state has not proved adept at dealing with political parties of a different tribal or religious affiliation.

Before the Egyptian Revolution, 12 political parties' applications for registration were rejected. Currently there are 24 political parties legally operating, but few of them are active. Except the ruling party, all suffer from a lack of financial and other forms of support. The same applies to civil society organizations, with the notable exception, of course, of those run by the Muslim Brotherhood and some nongovernmental organizations controlled by specific tribes. After 25 January, many political parties were established, some of them belonging to the Muslim brotherhood, while others were formed by *salfism*. Secular and leftist groups created their new political parties as well.

With regard to how human rights are dealt with by the twin institutions of customary structures and the state, it is useful to look at gender issues in particular. The prevailing lack of women's rights can be attributed not only to customary institutions or political systems but also to a number of other factors. Let me illustrate the situation by recounting an interview with a woman who planned to run for election to her local council in Sinai, and who was refused permission to do so by her tribe. The men do not want to be dominated by a woman, she had been told, and as a woman you cannot represent the tribe. Did you argue back or oppose them, I asked? She could not, she replied—not because she is a weak person, but because she understands exactly what the tribal system can and cannot offer.

If the state extended a helping hand through positive discrimination that would help, she continued—and since then an electoral quota system has indeed been adopted in Egypt. Such a system can be accepted to the extent that it is not perceived as threatening inherited values. Since then she has run for election, and her sheikh agreed to this because she would not be competing against any men from her tribe. At the same time she underlined that she could not go against the

*The tribe plays a central role
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views of her tribal sheikh because he had been the one who had previously supported her when her husband refused to let her go to work, and convinced him to allow her to do so. Thus she remembered everything, and also emphasized what was said in the last session about traditional culture not always being against women.

What are the sources of power of customary institutions in the Arab world? First and foremost, the tribe plays a central role in running local communities. They are doing this largely in the absence of the state. Yemen is a case in point in this regard. Currently there are moves to enact a new law prohibiting the practice of early marriage—currently marriage to girls aged 8 or 9 years old is permitted. The new law is being discussed in parliament, and the group that has opposed it to date is the tribal chiefs.

A UN colleague maintains that the tribal chiefs would agree to the change if the state generally dealt with them in more intelligent ways. The Yemeni state has given tribal chiefs the authority to be the arbiter on issues of marriage and divorce. If a tribe lives in a remote area, for example, people do not need to go to state offices. They can go to their tribal chief, who can decide if a girl is allowed to marry or not; this is very common in Yemen.

An additional source of power for customary institutions relates to legitimacy. Sources of legitimacy vary in the Arab world, but most are connected to inheritance. This is the case with traditional authority in the Gulf States, for example, and even in some republican systems such as Syria and Egypt—in the latter case, despite the existence of a parliament. By the same token, most people within traditional institutions genuinely trust their leaders. And as was mentioned with respect to Uganda, chiefs refuse to receive money or salaries from the state, since they view this as undermining their legitimacy.

Moreover, when people know this and compare it with what they hear every day concerning theft and corruption within the government, it is clear that they do not see the same corruption within traditional institutions. Traditional institutions are also boosted by what might be called their appeal to horizontal citizenship, the emphasis on sectarian and tribal identity at the expense of reinforcing vertical citizenship. States have effectively permitted this wherever they have failed to integrate traditional institutions. Transparency is another important source of legitimacy, since compared

to the political regimes of the region, traditional institutions are highly transparent.

Regarding integration, I recently interviewed an Egyptian MP who emphasized the role of education in this respect. Within the current education system, he noted, the tribes and their historical role and so on is never mentioned. Unfortunately it is true that they are excluded. Another, no less problematic, education model is found in Lebanon; currently there are more than nine history books being used in the state school system, each one relating to a specific sect or religion. One can imagine the type of citizens that this system will produce. What is needed is an integrated education system whose starting point is a basic acceptance of all the varieties in our communities. Basic service provision is no less critical, the MP added; in many remote areas of Egypt the state is absent, and the only source of basic services is the tribe with its leaders. Thus there is also a need to build the institutional dimension of the state's relationship with customary structures, what might be called a credible social contract.

There were some examples of this in Iraq, but they were seriously undermined by successive wars. Overall, there is clearly a need to build institutional relations with customary institutions, to respect them and their rights; a vertical citizenship that expresses the institutional relations that pertain to citizens and the state through the overall system and the legislative, executive and judicial institutions in particular. In this respect the state bears the major responsibility for the management of institutional diversity and for harbouring and creating policies for social integration.

RESPONDENT

Abdulla Al-Nibari, Kuwait Democratic Forum.

While most people in the Arab world speak Arabic and in this sense belong to Arab civilization and culture, the region's political systems are very diverse. In producing her paper, Gihan also faces an additional challenge, because there is not much empirical material—studies, analyses or data banks—to refer to on the subject. In addition it is a highly controversial area: there are different evaluations even of the basic nature of the realities in focus. By talking about customary governance and democracy building, we limit ourselves to strategies for attempting to integrate or reconcile the two systems. This assumes that there is a basic democratic framework. In the Arab world, however, the story of the democratic framework is a sad one. Unfortunately democracy was, prior to recent

The key problem in the Arab world is not how to integrate those who are excluded or underprivileged, but how to reform the basic contours of the political system.

developments, appearing to be going backwards in the region,²² to an even greater extent than was the case 60 to 70 years ago.

Gihan mentioned that democracy as defined by Western standards is either nonexistent or just a semblance in the Arab world. In countries where it doesn't exist there are no constitutions or elections, and the government or regime is run either by a family or on the basis of one-man rule, as in the Gulf. Where there is the appearance of democracy, it is fake: there are elections but the results are determined beforehand, and the parliament's composition guarantees a comfortable majority for passing legislation including amendments to the constitution, while leaving a margin for notionally independent or opposition groups, parties or individuals. There are very few exceptions. The only country with an arrangement that resembles a genuinely democratic system is Morocco, where elections are not necessarily free of interference but there are at least competing parties and an alternation of power.

Countries that at least hold elections are Kuwait, Lebanon and, lately, Iraq. In Lebanon, as Gihan said, there is a quota system based on sectarian distribution. Kuwait is one of the smallest countries in the region,

²² The Arab Spring has been a wave still in motion of demonstrations, protests and strikes, beginning with the Tunisian Revolution and followed by revolutions in Egypt, Libya, Yemen and Syria, and major protests in Bahrain, Algeria, Iraq, Morocco and Oman. Since the success of the Tunisian and Egyptian revolutions, both countries now face major changes and are in the process of building democratic nations; moreover, they have become victorious symbols to struggling nations such as Libya, Yemen and Syria. Unfortunately, in Libya and Yemen a lot of blood is being shed and both regimes are trying to fragment social structures using tribal rivalry. Due to the structure of both societies, their futures remain vague compared to Egypt's or Tunisia's, which are supported by their relative homogeneity. In Syria, the regime uses the ethnic division to stay in power and create unrest between the country's different ethnic groups.

but its democratic experience goes back more than 40 years, and by default the Kuwaiti constitution is the oldest in the Arab world. It is a good constitution: it includes basic rights for citizens and allows for progress towards meaningful democracy, even a constitutional monarchy. But the implementation hasn't gone far, due to both practice and the practitioner.

In relation to customary governance and the role of traditional institutions, the situation in the Arab world is thus unlike that in Africa, Latin America or even in Asian countries such as India and Pakistan. The region has a long history of a central state; most of the Arab world was part of the Ottoman Empire for more than four centuries. This rule was replaced by Western colonization in the 20th century and preceded in Egypt's case by the rule of Muhammad Ali's dynasty from the early 19th century onwards. The state and centralised state power is entrenched in the region; it is not new as in Africa. And under the Ottoman Empire the Arab world was ruled as a set of Islamic countries, so this is not formally considered as occupation, colonization or rule by a foreign power.

As a consequence it is very hard to distinguish what is Islamic from what is customary. There was no social conflict in these countries between Ottoman rule and what can be considered customary governance; the same probably applies to the rule of Muhammad Ali's dynasty in Egypt. Moreover, the Arab region faces a far bigger challenge than tribal or customary groupings: ethnic and sectarian problems, for example with the Kurds, the Southerners in Sudan and the Tamazight²³ in North Africa.

Importantly, there is no formal structure in traditional rule, even within the tribes, with respect to the election of the sheikh, chief or king. Usually it is on the basis of inheritance, a branch of the tribe that at one time was strong—as a result of tribal wars or wealth, for example—and thereafter ensured that their sons would be chiefs. Not all chiefs, however, are paramount within their tribes. Thus the history of the state in the region, in particular the relative strength of the state apparatus, served to diminish the importance of relationships with traditional structures. This does not mean that such relationships do not exist, just that they do not have the same role and importance as in Africa, India or even in Latin America. Maintaining the power of the regimes in the Arab world—be they one-man rule or family based—chiefly depends

on military power and the security forces. Security systems are usually very advanced, so it is essentially through suppression that the regimes maintain their hold on power.

Ethnic and sectarian groups do not have independent power, but are integrated into the system; their power derives from their participation in it. In this respect the Yemeni model is unique to the region, probably as a result of its geography and history. Northern Yemen is a mountainous area, and the majority of the region's population is Shia, while the rest of the country and the other Emirates are Sunnis or Shafis. Even the northern Yemenis participate in national elections and the parliament, however, and the speaker of the parliament is the head of the northern Hajedi tribe, so they are very much a part of the political system.

Yemeni tribes also enjoy status benefits, although it is the head of the tribe rather than its people who benefits from this position. Tribal members are part of the army and the police, and the president is from the same majority tribe. In this sense both the president and majority tribe members are an integral part of the system and yet enjoy their own independence. This situation has no parallel in any other Arab state.

In addition to the presence of strong tribal affiliations all over the region (including Iraq), there are also sectarian Muslim affiliations—principally Sunni and Shia—as well as significant ethnic groupings such as the Kurds. Within the Sunni and Shia populations there are also different tribal affiliations, but these are largely integrated within the existing political systems. Tribal affiliation is used to strengthen people's presence within the system, but they do not try to work outside the system as such. Sectarian groupings have their own distinct, often complex, religious structures led by Imams, Muftis and so on. The basic affiliation is to the sect, and on this basis sects can influence participation in both the election system and in the government as a whole.

In the past the Sunni were the ruling sect throughout the region, but today it is mostly Shia, because they constitute the majority. Within all Arab countries (with the possible exception of Yemen) common law is largely prevalent—even in Upper Egypt, Sinai, the Gulf countries, Iraq and Syria, for example. The crisis in the Arab world is the absence of genuine democracy. In this sense the key problem is not how to integrate those who are excluded or underprivileged, but how to reform the basic contours of the political system. The

²³ Commonly known in English as Berbers.

constitutions, for example, are tailored to the ruling elite's needs: this is the clearly the case in Syria, Tunisia and Jordan.

In Jordan the distribution of electoral districts is organized to favour the minority tribal community; the electoral system is manipulated to gain support for the dominant elite. The key problem in the Arab world is not that there are exclusions, the lack of women's or minority rights, for example, but the problems faced by the majority. It is the majority who are facing crisis in the Arab world because of elite uses and abuses of power and their backing by repressive forces; in some cases they also have support from foreign powers.

Another important characteristic of the Arab political system is inheritance. We all know that monarchies are inherited systems, but the Arab world's innovation—borrowed from elsewhere but enriched by us—is that after a president has lasted for decades—in Tunisia's case, 22 years—he has to ensure that he will be succeeded by his son. This is what has happened in Egypt, Syria, Yemen and Libya, and the rest are mostly already inheritance-based monarchical systems. The Arab world's predicament is thus that it consists of either non-democracies or fake ones.

In Kuwait, contrary to Gihan's contention, tribes are not predominant: rather, within the electoral system candidates depend on tribal support. In parliament, however, they do not vote along tribal lines; in the first instance they are Islamists, Muslim Brotherhood, liberals and so on. Moreover, it is not necessary to vote in parliament as they are all pro-government, or at least leaning towards its position. So while MPs may be elected on a tribal basis, their behaviour in parliament is not governed by their tribal affiliations.

PLENARY DISCUSSION

H.E. Robert Ladu Luki Lwoki, Southern Sudan Land Commission, Government of Southern Sudan.

Gihan's presentation goes to the heart of the matter. One key issue is Arab nationalism, the view that any person who speaks Arabic is an Arab, although this approach has now backfired in many countries. For instance, in Sudan the definition of Arabism, of Arab culture, tradition and behaviour is based on Islam, but this rests on a confusion that has caused many problems. In Somalia, for example, which officially joined the Arab world in 1980, the population are Muslims but not Arabs. Today Somalia is fragmented into clans and sub-clans fighting each other, and there is

no functioning political system. The same issue prevails in Sudan. Sudan joined the Arab League in 1956 even though about 72 per cent of its population is African and 15 per cent Arab: not all Sudanese who speak and write Arabic are Arabs. When I speak English, I am not an Englishman. I am a Catholic, but I am not an Italian or a Roman, I am Sudanese.

In many countries of the Arab world—Sudan and Somalia, for example—they identify themselves as an Arab country instead of building up their own culture. Take the Darfur issue: the Southern Sudanese are not majority Muslims, but between the tribes they speak Arabic. Darfur is more Islamic than the elites in Khartoum, but now they are all at war with each other. This causes a lot of fragmentation, Islam on one side and Arabism on the other side. Countries have failed to create their own patriotism and sense of national identity, living instead within the notion of simply being Arabs.

Even the Bedouin are traditionalist Arabs who live in the desert according to their traditional ways. The real issue is political domination and economic disparity. For example, Southern Sudan is campaigning for self-determination; if politicians talk about unity in this context they will be exposed to personal threats. So there is a likelihood of Southern Sudan seceding, although we cannot be sure of this yet.

If minority languages and cultures are suppressed the end result will be secession, civil unrest or open conflict. This is the essential problem we face as people who are usually lumped into the Arab world. Throughout East Africa there are tribes who speak Arabic and profess Islam as their religion, but when you go to their villages you don't speak Arabic there. On one occasion I played some Arabic music and one of my nephews told me, 'this song makes me angry, I don't feel well when I hear it'.

It is up to the Arab world to clarify what it means to live in that world. If Arabism is invoked then it becomes a question of Shia versus Kurds—Iraqi Kurds, for example, say they are not Arab. And even with the Shia, they are Muslims and can be Arabs, but they are nonetheless suspected of siding with Persian Iran.

Brendan Bromwich. Gihan was the first person to make a distinction between rural and urban customary governance structures. I would like to go a bit further. Would you see urban rule and, for example, nomadic systems as fundamentally different when it comes to

customary governance, thus requiring us to analyze and focus on different kinds of issues?

Dr. Martin Rupiya. First, a reflection on the contradictions within the respective democratic templates in the Arab world and Sub-Saharan Africa. There is always tension between the Arab League and the African Union: countries pick and choose supporters within the two bodies or in relation to particular issues when they want backing. When we talk about Africa, in other words, in fact it is two different worlds. Second, from the perspective of the international community, the yardstick for democracy in the Arab world is different from what is required of African states. Take the 1991 elections in Algeria, for example: elections are elections, and Islamist fundamentalists won them on this occasion. Thus the dynamics are not only local; they are also informed by international paradigms.

Ranjana Kumari. Gender is a linking thread in the discourse about customary democracy. Look at the way customary practices got codified into the formal legal system in India and the impact of that on women. Women are still denied the right to property, for example, whether on the basis of the modern democratic constitution or customary practices. How do you see this developing in the Arab world?

Dr. Patrick Molutsi. If you look at the historical origins of democracy, there are always driving social forces. Institutions are the embodiment of a specific group's interests, and in this case we are focusing on tribal and religious leaders. Why then do tribal structures appear to be so intact, homogenous and immune to change? In addition, Abdullah's argument concerning the role of the security services and military is not wholly convincing. All around the world we can find examples of powerful militaries that have been defeated by peasants in struggles and revolutions. Why is it that education and other forces of change are not penetrating the Arab world and breaking down the tribal structures? The explanation for this remains unclear. Religion is insufficient, since in countries such as Nepal powerful religious systems have effectively been dismantled by new social forces of change. What is blocking the emergence of new social forces that will change the Arab world?

Brendan Bromwich. With respect to relationships, some societies can be characterized as high choice/low obligation, others as high obligation/low choice. When assessing the disenchantment with democracy

as applied in Africa since independence, it may be that the European high choice/low obligation model does not fit with African people and culture in the way it does with Western individualism. In a sense this may also be how things work in the Arab world.

PRESENTERS' RESPONSES

Gihan Abouzeid. Religion is everywhere in the region, in customary and state institutions. The new feature is that some Islamic movements have now become highly active. These movements are very good at linking up with both modern institutions and customary structures. It is easy for them to find the right language to secure access, since customary structures relate to culture. In this sense Islamic movements are able to 'blend in' with customary and state institutions, and we need to consider how the Islamist trend will affect relations between the two.

Similar considerations apply to the issue of citizenship. Islamic movements are exploiting the gap left by the weak citizenship structures prevailing in countries of the region. So, for example, while I may not feel fully Egyptian, I can be Egyptian and fully Muslim, Sunni or Christian. In general, Islamist movements are also financially well off. They genuinely support poor communities—indeed sometimes they are the only institution that secures people's basic needs in times of crisis—and this obviously gets people's attention. Moreover, if the cost of this for women is that they have to cover their hair, the answer is straightforward: 'No problem. I am poor, what am I going to do with my hair anyway?'

I am part of a network of female writers. Currently we are trying to collect old stories about women from our traditions, and we have already found some fantastic stories supporting women's rights and have

Islamic movements are able to 'blend in' with customary and state institutions, and we need consider how the Islamist trend will affect relations between the two.

presented them in a very strong and positive light. The dominant contemporary culture, however, has not allowed this positive traditional image of women to come through. In this sense we need to re-read or even re-write customary tradition in a different, more profound way.

Abdulla Al-Nibari. Political Islam is a complex question. Proponents of political Islam emerged after the 1967 Arab-Israeli war, for example, and Egyptian President Sadat used the Muslim Brotherhood against nationalist and secular leftist forces. Then there was the 1979 Islamic revolution in Iran and the growing complexities of the Palestinian question, underscored by what was perceived as increasing—not to say unlimited—US and Western support to Israel. Added to that is the rise of new ideological Islamist thinking, most probably originating in Pakistan, as well as the old question of Afghanistan; during the Russian occupation the USA became the biggest supporter of the Islamic volunteers assisting the Afghan insurgents. All of these developments have contributed to growing Islamist tendencies in general and a resurgence of religious observation in particular.

The resurgence of religious observation is reflected in the question of the *hijab*. On a recent visit to cosmopolitan Alexandria I was surprised to see women wearing the Saudi rather than Egyptian-style *hijab*. The Saudi *hijab* provides the most extreme form of female protection: you can see it in France today. The confrontation between political and secular Islam continues, and this may help explain the relative lack of political resistance in the region. Simply put, there is continuing fragmentation of the popular base.

People in the region certainly are tribal, but more in terms of behaviour than structure. There is social pressure to belong to a tribe, but there is no structural mechanism of tribal regulation. Tribal loyalty can be bought these days—there is loyalty to certain regimes due to the potential benefits this brings. In my view tribes are neither homogenous nor coherent today.

The tribal population of the Sinai Peninsula, for example, is only a small proportion of the country's total population—200,000 to 300,000 people—so we should not generalize on that basis. Education and joining the labour force weakens the connection that individuals feel with their tribe to a certain extent.

Internationally speaking, the USA supports human rights and democratization in China and elsewhere—but not in Egypt or Saudi Arabia. The USA would probably accept the holding of some form of elections in Kuwait; nothing more, and certainly not democracy, is required by US expectations. That is the nature of international involvement in the region. Why the persistence of repressive regimes and the absence of popular resistance in the Arab world? One important factor could be the pervasive corruption of intellectuals in the region, and the tacit agreements they have reached with the regimes. This morning in the media, for example, on what is officially known as UN Democracy Day, an Egyptian academic was supporting the official line that the transition to democracy should be gradual—yet Egypt had democracy in the late 19th century, and its 1923 constitution is regarded as a model for all Arab states.

Gihan Abouzeid. There is resistance in the region, but it differs by type and level, as well as timing. Egyptians are famous for making jokes about the political system in general, which can be viewed as a type of resistance. If by resistance we mean revolution or completely changing the political system, that will happen eventually. In the meantime there are a lot of new groups and movements, for example of youth, so something significant already exists in this respect. Also, it is important to emphasize the distinction between customary institutions and culture. Customary culture is truly thriving in Egypt: people believe in the traditional tribal practices that came to them from Upper Egypt, and wish to be able to practice them. The same holds true in many other countries of the region.

SESSION 7: LESSONS LEARNED FOR THE INTERNATIONAL COMMUNITY

Moderator: Mark Salter. By way of introduction to this session it is worth emphasizing that we are interested in developing a two-fold approach to the central themes of this conference. First, to support and stimulate further empirically grounded research in particular countries and regions as well as on important thematic issues. Second, to address the real needs and concerns of the donor community, international agencies and other stakeholders involved in democracy promotion, state building and post-conflict reconstruction efforts around the world. In this respect a key challenge is to translate the results of this work into something that these actors can use to help improve overall efforts to support democratic consultation on the ground.

DR. TANJA CHOPRA

I want to focus on how the international community has started to think about these issues. I am a social anthropologist, and I started by spending a year in the deep jungle of Eastern Indonesia. The community there did not even know that they lived in Indonesia, so the question of customary governance as such did not arise. I was the only outsider, and I did awkward things and thought awkwardly. In Eastern Indonesia, as in surrounding societies in general, there is a fundamental struggle between fertility, war and political authority: the whole world is viewed along those lines. As an outsider I was imposing political authority while the tribes, who lived ‘inside’, were protecting the fertility of the ground and so on. I played a role in that I was integrated into the cosmos: the world was in order, and I had to learn that order.

When war broke out between Muslims and Christians in 1999 I had to leave in a hurry. I happened to end up in East Timor in 1999, the year that East Timor decided not to become an autonomous region of Indonesia, but rather to opt for independence, after having been occupied by Indonesia for nearly 25 years.

The UN took me on board simply because I spoke Bahasa Indonesian, which was very useful in the circumstances. East Timor was the most extensive UN peacekeeping mandate thus far because it effectively functioned as the government of the country, with all the related powers and authority. Physically speaking the country had been completely destroyed by the Indonesian army and militia and everything needed to be rebuilt from scratch. Indonesians who had previously run the local administration had left or had been thrown out of the country, which left only junior-level Timorese in the civil service. This was what the UN found in the context of its mandate of building democratic government in East Timor while at the same time administering the country.

The arriving UN staff were thus not just ‘helping out’; they were becoming government ministers, running whole departments and so on, which was a new story for everybody involved. People from over 100 countries came to this tiny place with a population in the hundreds of thousands to try to build a government; everybody had their own ideas about what that government should look like. One thing that was completely neglected, however, was to try and find out what already existed at the local level.

The presumption was that there was an absolute vacuum—that nothing existed in governance terms. Having just come from a small Indonesian island, however, I knew what was likely to be there. Villages have very strong authority structures, and strong ideas of who should be in power and how conflicts should be resolved. For most of the UN, however, such things were not even on the radar screen. Instead, it went about trying to build ‘little Switzerland’ in South East Asia. The assumption was that once all these perfect structures were in place and functioning, and when local capacity had been built, the local people would just accept and run with all this, which was of course not what happened. As a result of completely

ignoring local ideas of authority, conflict resolution and so on, there was effectively a separation between state institutions and the reality out in the rural areas. People simply did not accept new institutions, and they were not made a part of them: this was the UN's worst mistake.

For almost three-quarters of the duration of the UN intervention, the authorities consisted entirely of internationals. Following strong protests, East Timorese were finally brought in—in an advisory capacity—to plan the governance system of their own country. This involvement came quite late in the game, however. By this stage the Timorese were so appalled by what they were seeing that they wanted the UN out of the country as fast as possible. So there was serious friction. I was watching all of this from the perspective of the various capacities in which I was working in East Timor, and it was quite shocking.

Most suggestions that there were legitimate village-level people or structures were met with absolute rejection. For example, it was proposed that the head of a specific clan or a village leader should be made the new sub-district chief. Sub-district chiefs can only be selected on the basis of merit, came the answer, and we happen to have this 25-year-old male with a high school education who is the most educated of all the applicants. That was why the UN put him in place. Unfortunately, however, he would have no authority in the eyes of the people because he was young and from the wrong clan. So the structure put in place by the UN simply could not survive. Interestingly, a new political party initiated by diaspora Timorese who were unfamiliar with local systems also started to gain traction within the country. Yet because of their lack of local understanding they were ultimately rejected as well.

Thus it took quite a number of years before customary justice and governance were taken seriously. In 2004-5 the UN Development Programme studied reform options for the local government system that was set up by the UN. Anthropologists were involved in advising them, which was a big step forward. As a result Raquel Yrigoyen came to Timor in 2008

In East Timor the UN went about trying to build a 'little Switzerland' in South East Asia.

and helped design a way for customary justice to be brought into the formal justice system. The process of getting to that point took a long time, however, and the consequences can still be felt; East Timor remains a very fragile state.

There have been some interesting subsequent developments. East Timor brought the issue of customary governance to the forefront, at least in the international community. Previously there had been small pockets of donors who were very interested in supporting studies in this area, but up until that point it had never been a mainstream discussion. Over the last five to seven years, two different debates have developed.

One is on local participation in peace-building and state-building efforts—in relation to the international community's role in post-conflict and fragile states rather than reform processes within peaceful countries.

The real impetus for the debate emerging from East Timor came when Sergio Vieira de Mello, head of the UN mission in Timor, went on to Iraq and began talking about the 'Iraqization' of the UN mission there. This was also around the time the Afghanistan UN peacekeeping mission was set up, and there was widespread talk of the 'light footprint' and local people's participation. At the 2004 Bonn Conference the Afghans were asked to contribute to the design of their country—a completely different approach to that applied in East Timor. This was a very important step, with significant ramifications for the local/customary governance debate, because one of the assumptions is that through local ownership of and participation in the design of institutions, you can incorporate existing ideas and value systems.

As a next step, the local ownership and participation approach received quite a lot of criticism. The main criticisms were first, that local values can readily be abused by political elites intent on pursuing their own power projects. Second, how far can you allow local values to be introduced, especially where they contradict international human rights standards on issues such as gender equity? Moreover, if you bring in local concepts of governance, customary authority and so forth, to what extent does that perpetuate existing power asymmetries? Is it not hindering rather than helping if your aim is to establish more equitable, democratic systems? These debates are yet to be resolved, and it will be important to follow where they are heading.

The second debate that has emerged since the East Timor disaster concerns a shift towards justice issues. At this point there are several studies on customary justice, so there are many debates about how to synchronize it with formal law. Overall the subject has become very popular—trendy in fact—over the last four years. The starting points here were the criticisms launched in East Timor and an important 2004 report from UN Secretary-General Kofi Annan on the rule of law in post-conflict countries, which basically said that we need to stop building the perfect rule of law since we know that we need to go at the local pace, using local ideas and input and so on. That was quite breaking news at the time, and has been the basis for lots of debates in the justice domain since.

While the justice debate is popular, in reality it represents only a fraction of what we are talking about, which is the whole question of authority, power, local values and structures. It is very important that we are now stepping, not away from the justice discussion, but rather towards broadening and integrating it with our understandings of governance. The ‘advantage’ of a narrow focus on justice issues is that they are much more readily understandable by the international community. A woman is beaten by her husband, for example, and she goes to the traditional chief, but he will not take the case. Yet under international standards this is a violation—surely this is easy enough for anyone to understand?

The essential problem that needs to be addressed here, however, is the presumed dichotomy between formal and local systems. When looking at customary governance we are really talking about local governance, which is more complicated than formal systems because it gets to the whole question of power. And this is also why we should not try to find the ‘10-point solution’ to the question.

To end, I’d like to note a few points about current trends in the justice debate that are useful to consider, for example, in relation to non-democratic or authoritarian government. One trend is that we simply stop the justice debate started by pitching customary against formal justice, and for years we tried to commission studies on customary justice and point out what does not work there. Conversely, the other trend is to point out how legitimate and (relatively) cheap it is.

So generally people either romanticize the notion of customary justice, or they argue that it should be wiped out because it is completely against human

rights. This basic dichotomy simply does not work in practice. Due to a growing understanding of this, over the last couple of years the notion of legal pluralism has been explored, an idea that has emerged from more academic rather than practice-based considerations over the last 20 years.

The idea itself is nothing new; it was only in the last couple of years that people have been starting to say ‘alongside customary justice there is a lot more out there—religious systems, and other reminders of conflict that have established new structures and ideas of justice’. This is all deeply connected to power structures: it is multifaceted, as opposed to simply trying to define and chop things up. This concept suggests that we should go down to ground level to understand the plural situation that prevails, in particular the following issues: first, how do people navigate the plural legal situation? What are the advantages and disadvantages of each system, and what do we do about them? Second, how do the different systems fare in themselves? Which systems discriminate against women or minorities? What is the non-discriminatory operational element, and how can we work with it?

We have to put aside the focus on strict dualism and begin examining the reality of legal pluralism, especially understanding it in more flexible terms and perceiving both local-level and national-level political dynamics. People will be surprised by the many new facets in the debate that are revealed by this new approach. One of the international community’s main arguments in support of customary justice has long been that it is more legitimate, people believe in it and therefore we should apply it. But there are much more complicated questions such as: legitimate for whom? Or legitimate in which way?

There is a tendency to see communities as units that have no divisions. Yet community politics are sometimes just as harsh as those operating at the national and international levels. If you go into a village you can see that there are numerous discussions, debates, politics and power struggles going on—and everybody, moreover, has a different version of them. So talking about the legitimacy of a single system is very problematic, and demonstrates a lack of understanding of the power politics operating at the community level.

One of the important lessons that has recently emerged in the justice debate is that, rather than

We are stepping, not away from the justice discussion, but towards broadening and integrating it.

pursuing the dichotomization of customary justice as good or bad, it is more useful to examine the different versions of how people define their culture, values and justice systems—and how to create space for contestation. This is one of the key issues: how do you discuss culture, value and justice systems, how do you bring in women to define their culture? And how do you include minorities to contest systems that are oppressive to them and so forth?

This also connects with the discussion of local participation and the extent to which people need to define their own system. In this context, creating spaces for contestation, where people can genuinely—and continually—define and contest, is critical. In other words, how do you build a system over many years that actually reflects society?

An important issue to consider here concerns codification. Currently there is a trend towards codifying customary law, but this is dangerous because it preserves the status quo permanently. Indeed, give the local system a place in the new system, but do not write up customary laws: rather, give ordinary people the space in which to contest and find these laws, because they are fluid. They are reflections of society and need to remain so, because that is where they make sense. In overall terms, the main aim is to promote debate, contestation and change, and that needs to be reflected in the system rather than us trying to paint the system into a corner or constantly tamper with it. In that sense I hope the international community will soon broaden the justice debate to include the governance debate: that would indeed prove very interesting.

RESPONDENT

Dr. Lansana Gberie, Institute for Security Studies, Addis Ababa. I will use some of Tanja's points to reflect on the African experience. The East Timorese case provides a useful vantage point for understanding interventions based on the assumption of a prevailing *tabula rasa*, providing conditions in which institutions

can be imposed on a society. The thinking leading to such impositions is not, however, limited to such situations. Some donors are changing: the UK's Department for International Development (DFID) is one of the few that now takes histories into account, but until very recently many donors did not have very long memories.

For example, at the end of the wars in Sierra Leone and Liberia, there were a lot of ideas flying around—within donors such as the UN, UNDP, DFID, USAID and so on—based on the assumption that these countries could be moulded into whatever political shape we want. At the same time some people were saying 'look carefully at this because you are a new comer. You will bring all the money, but are people really happy to have you here? History is stronger than fantasies or good will. If you do not consider history then you are going to make a lot of mistakes.' In the Sierra Leone case, there were people who believed that since almost all the chiefs were displaced at the war's end, and about half of them had been killed, you could simply do away with chieftaincy.

The first problem they encountered, however, was that a lot of people who had been displaced from their villages during the conflict did not want to return. So the British decided to bring in an ex-colonial official who had worked in the country back in the 1950s, and he devised a policy of encouraging the return of displaced chiefs. This approach was supposed to encourage villagers who were living in urban areas to return home, and prompt local businesses to move back to their villages. While this policy worked to some extent, it also had some other unanticipated effects. Simultaneously, the Sierra Leonean government decided to set up modern local governance institutions, which resulted in clashes with the returning chiefs. The government also discovered that establishing and running local governance institutions was far more costly than they anticipated.

The points made about justice—in particular the notion of a fundamental clash between customary law, traditional justice and the modern justice system—are very important, as this is simply not what happens at the local level. The Sierra Leone Special Court is a very good example in this respect. The court was set up as a result of the atrocities committed during the war, and there was a lot of interest in trying people from all sides of the conflict—people who for many Sierra Leoneans represented the 'good' side of the conflict as well as notorious rebel soldiers generally regarded as

extremely ‘bad’. The Special Court decided to try them all, the Civil Defence Forces (CDF)²⁴ included.

Tim Kelsall’s book on the Special Court²⁵ explains how Western notions of justice put the court on a head-on collision course with local beliefs and attitudes, particularly in relation to the CDF. Lawyers from the UK, the USA or Canada simply did not understand that the local population believed that the CDF were defending communities, and that their behaviour was morally superior to that of the rebels. Thus many Sierra Leoneans decided to support CDF members placed on trial by the Special Court, and around the same time the government that sanctioned the court’s establishment was voted out of power in the 2007 elections.

In this case, the internationally sponsored commissions did not take local values sufficiently into consideration. At the same time, it is important to ask whether traditional values can be adopted if they clash with prevailing sensitivities about human right issues, for example in relation to gender. Can we integrate some traditional values? The modern state cannot possibly adopt them completely. At the same time, the approach to some traditional values needs to be handled very sensitively, particularly with respect to nations in transition—for example, countries moving out of civil wars and/or away from state collapse, where the state has to be rebuilt with international assistance. We need more studies in this area that focus primarily on conditions on the ground.

Similar problems are being encountered in Liberia as well. People believe that donors are currently pouring a lot of money into the country, and in this context the emphasis is on the rule of law and rebuilding the economy. Yet we also forget to ask what the local people are talking about in Liberia today. Among the donors, Liberian President Ellen Johnson-Sirleaf is currently the most popular West African leader; in Liberia itself, however, she is not that popular at all. The Liberian Truth and Reconciliation Commission (TRC), for example, suggested that she should be banned from holding public office for 30 years.²⁶

²⁴ Also known by their traditional name, the Kamajors.

²⁵ *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, 2009).

²⁶ This recommendation, which appeared in the TRC’s final report released in 2009, stemmed from Johnson-Sirleaf’s early support for war crimes indictee and former Liberian President Charles Taylor, something she herself acknowledged in her personal testimony to the TRC.

Liberia does not have citizens in the traditional sense. Rather, it has people who have been subjugated and a state that is imported from abroad, the values of which have yet to be assimilated and incorporated by the majority of the population. In the past people suffered because they never benefited from the state. Thus to come back and build institutions that look very similar to those of the past without properly engaging with the majority of the population is a serious problem, and one that may yet cause more difficulties for Liberia in the future. Overall, the past needs to be taken into consideration very carefully.

PLENARY DISCUSSION

Prof. Guillermo Padilla Rubiano. It is important to consider practical experience in the context of local communities being given more power to resolve problems by applying their own rule of law. The best way that people can learn is by experimenting, and by assessing how they deal with their own mistakes. Globally speaking, one of the most important outcomes of education is that people are learning how not to make mistakes. Making mistakes is widely viewed as something terrible that people should avoid—yet it is precisely from our mistakes that we can learn the most. In this sense the right to make mistakes is one of the most important. A Colombian philosopher argues that the original sin is not to have been told to leave paradise, but rather to want to return to the condition of everything being perfect.

When local communities are finally allowed to be responsible for their own justice, the whole community stands to learn from its own actions, including any mistakes. Hopefully the UN has learned its lesson from East Timor in this respect. The experience in Guatemala also illustrates the flawed approach of trying to impose perfection and preventing people from learning from their own mistakes.

Prof. Kripa Ananthpur. In one of Tanja’s articles she focuses on the inherent tension between peace building and state building. How does this point relate to the connection between developed customary governance structures and state building?

Mohammad Musa Mahmodi. The most recent example discussed is Afghanistan, where the international community has learned a lot of lessons through both its mistakes and achievements. Let us hope it will apply these lessons as and where they are relevant in other contexts. In Afghanistan the international community

has been involved with the customary governance system. Afghan customary participation mechanisms operate in a number of ways. For example, the 2002 emergency *Loya Jirga* represented the beginning of the Afghan contextualization of democracy, and has been applied to the process of electing the president and vice-president, forming the government and adopting decisions concerning the political process. The concept was very unique as the *Loya Jirga* is a historical institution that has controlled the country's national politics for almost two centuries; it started in 1747 when the *Jirga* appointed the country's first king.

The first Afghan constitution was adopted by the *Loya Jirga* in 1919, as was the failed 2001 constitution.

The 2004 *Loya Jirga* adopted and ratified the country's new democratic constitution, which led to a very successful election in 2004 and successful parliamentary elections in 2005 and 2009. Thus the *Loya Jirga* concept has been used to acknowledge and legitimize new democratic institutions; using this approach as a basis paved the way both for successful elections and an overall democracy-building process in the country.

Another key area of international community engagement in Afghanistan that involves customary governance structures is the local *Shura*, a decision making committee of tribal elders which has given hundreds of villages access to electricity, water or irrigation systems. As emphasized previously, while this initiative still needs to be evaluated, to date it appears to be a highly successful experiment. The other experiment is with respect to customary justice mechanisms. All stakeholders involved—the international community, local and national government, and civil society—are struggling to find a way to make the customary justice system compatible with the people's need for justice, as there are a lot of deficiencies and inadequacies in this respect.

In addition, customs vary widely between different tribes, and even from village to village, so the system does not have the capacity to apply universal standards that will clearly define the consequences of various actions. A lot of money has been poured into this project, with few (if any) visible results to date. At the same time, moreover, this concentration on the customary justice system has diverted attention away from building the capacity of the formal justice system.

The international community in particular emphasizes the value and importance of customary justice

Creating spaces for contestation, where people can genuinely—and continually—define and contest the customary, is critical.

mechanisms. The question, however, is: do they want customary mechanisms in order to provide better justice to people, or simply to acknowledge the status quo, the mechanisms that exist? If the intention is to improve the provision of justice, then customary mechanisms need to be examined from a different perspective. If instead, however, the international community is effectively saying: 'OK, we have had our own failures, so by recognizing the customary justice system let us give it a chance. It will fix itself over the passage of time,' this mindset is equivalent to the mistake of assuming that the market will fix itself. Yet outside intervention is required to *fix* the customary justice system; the international community has failed to understand this in the context of Afghanistan. In particular, it has failed to grasp the nature of the lenses the people and the community—and especially the beneficiaries of traditional structures—may have recommended.

Prof. Carolyn Logan. With respect to in-depth, local-level conflict resolution, southern Somalia in 1993 demonstrates how much the international community can mess up the situation in a local community. By contrast, if we look at conflict resolution in Somaliland we can see that the process led by the Guurti was a completely traditional one. One of the reasons this worked, and continues to work, is that the international community was not paying attention and was essentially absent. The local people understood the rules, what was going on and the relationships involved, so you did not have players involved who did not understand what was going on.

Prof. Kripa Ananthpur. What is the mindset of the international community in deciding on different agendas for different societies? There is an agenda for poverty alleviation, for human rights, for democracy building, and also one each for peace building and state building—so what drives these agendas? Most of the lessons learned really depend on what you are

looking for in the first place. Is the mindset what one might call the denotative drive to see that things are right all over the world? Or is it more driven by guilt—we did something wrong to this society that we should now try to set right? What drives the international community towards these different kinds of interventions?

Prof. Sheila Bunwaree. To what extent has thinking about customary governance infused the UN Peace-building Commission, given the pertinence of its role in post-conflict societies? Is attention being paid to mainstreaming this thinking and factoring it into the commission's deliberations?

Dr. Raquel Yrigoyen. Sometimes it is difficult to understand why mistakes are repeated so many times. Perhaps there is a need to ascertain the interests underlying policies and the way the international community intervenes? Why, for example, are they repeating the same mistakes in Asia that we made in Latin America 200 years ago—copying the legal framework from other countries and effectively conducting legal transplants? If you look carefully at what some donors and international agencies did when they came to, for example, Cambodia or East Timor, the first issue they wanted to address was setting up a legal framework, for instance acceding to certain international treaties. Copying the criminal code from one country, the civil code from another and establishing a legal framework regulating and facilitating international trade was neither innocent nor a mistake.

There are economic interests underlying their actions. They are not interested in the wellbeing of the people of a country; most international actors are paying more attention to the lobbyists of large multinational corporations who want a legal framework that allows them to do business. The UN is currently involved in a commission on legal empowerment for the poor. The concept underlying the commission is unashamedly based on capitalist principles, in the first instance the recognition of private property. The most important rights are defined as those to property, business and labour. They want to increase people's ability to sell land, their work and everything that it is possible to sell. Indigenous communities have a major problem with this approach, however, because they do not want to sell their lands or their lives. Overall it is time to review the agendas underlying such approaches, otherwise the same mistakes will simply be repeated.

Dr. Kojo Busia. I am struck by the insistence on putting power relationships at centre stage. That is a very important and fundamental proposition: power relations, moreover, meaning not only the distribution of power or access to it, but also, more importantly, its exercise. The focus on power relationships has the effect of deifying the whole international 'mission' rather than building more symmetrical relationships. The key challenge is not building institutions, but creating different power dynamics, with the aim of developing more symmetrical power relationships that are amenable to the concept of human dignity and freedom. Beyond that one has to identify what can realistically be done in practice; what follows from that is a less maximalist overall approach. This approach will help prevent the awkward situation in which many peace and state builders treat power as simply an external parameter of institution building, something that can be corrected later on if necessary—a big mistake.

The challenge arising from this perspective is that it implies that everything—knowledge, potential solutions and so on—is contingent on local power relationships. Where does this leave us in trying to draw general lessons? At the end of the day, can one have any guidelines? How to influence power relationships in East Timor is extremely different from Sierra Leone, or from the Amazonian region of Peru. The locus of power is much more sensible to consider; it has much more texture. But what is the place for general reflections—is there any room for them?

Mónica Novillo Gonzáles. In Bolivia we are in the middle of a national debate about customary law. The stated aim of the debate is to regulate and make positive customary justice compatible with the formal legal system. All the country's major nationalities are being consulted to develop this compatibility, and women's organizations have also gotten involved in the debate. The surveys undertaken so far indicate that customary justice is as discriminatory as the formal justice system. While it seems clear that customary justice is discriminatory, even a potential risk for women, at the same time it is important to remember that the existing legal framework in many of our countries is at least as discriminatory as customary justice in this respect.

Brendan Bromwich. In law we have to be very clear when talking about jurisdiction. We have the subject matter, the pecuniary and the territorial. Not all cases should be decided at the customary level. In Sudan murder cases are not taken to the chiefs because some of his tribe may have been involved in the killing.

Do we want customary mechanisms in order to provide better justice to people, or simply to acknowledge the status quo, the mechanisms that exist?

On the other hand, in conflicts involving inheritance or marriage, customary procedures have to take precedence over municipal law. Every law is intended for a specific purpose or the interest of the people of a particular country. The challenge comes if a law conflicts with human rights that are understood to be universal, inalienable and indivisible. For example, in the traditional set up you may be told that women do not sit in court, and legal decisions are made in their absence, meaning that in cases of adultery the woman is always on the 'wrong' side, even though she may have been raped by a man. So there are some human rights issues that have to take precedence over customary law.

Dr. Don John Omale. The international community needs to understand that most conflicts in Africa, particularly in West Africa, have inter-generational roots. Resolving these conflicts implies the need for investigative analysis prior to any intervention, because most of the time, former victims later become offenders. For example, ethnic minorities that have long been victimized without external assistance take the law into their own hands, form militias and begin to kill—at which point the international community starts to describe this as genocide. In doing so, it is victimizing the victims. For local people to benefit from the work of international donors, detailed investigative analysis of a conflict needs to be conducted before imposing an external intervention.

PRESENTER RESPONSE

Dr. Tanja Chopra. Do we learn from our mistakes? This is very difficult. Every year, new people come into organizations such as the UN and repeat the same mistakes that older colleagues have already made. Too often there is no communication or organizational learning going on. On the peace-building/state-building tension, in northern Kenya I noticed that the peace-building community—including the UN Peacebuilding Commission—has an interest in local

structures. They are way ahead of the state builders, and indeed anyone else using local structures in this respect, because when dealing with a conflict you have to go with what is legitimate, otherwise you will not have any impact or resolve the conflict.

Thus dealing with local structures is now an important tool in conflict management. In northern Kenya, for example, the use of traditional structures within peace building is being formalized into legislation. The contradiction with state building is that on the one hand, donors are investing lots of money into formal justice sector development, while on the other they are also putting resources into peace-building work that fosters local conflict resolution mechanisms that in some cases are in complete contradiction with the formal legislation. Nobody seems to mind about contradiction. It is a serious problem, however, because if we really push the traditional structures, where does this leave the state?

So there is going to be a problem here, and there is a lack of communication between the peace-building, state-building and governance communities. Botswana is a positive example of where the processes have been reconciled. Where we internationals come into the picture is to support impact evaluations, because this is where understanding remains very low. There are lots of examples of what can be done, but understanding of their implications—whether, for example, they lead to the creation of credible structures or genuine peace—is almost non-existent. This is also where funding support for further research is required, not least in the justice sector where the big gap remains. There is little, if any, empirical evidence of what works and what does not work.

The key challenge is not building institutions, but creating different power dynamics, with the aim of building more symmetrical power relationships that are amenable to the concepts of human dignity and freedom.

On Afghanistan, there is no single solution you can use in every country and Afghanistan is a particularly complicated case. One thing worth noting here, however, is that the initial UN planning document for Afghanistan involved anthropologists, and this was clearly a result of lessons learned from East Timor—a case of ‘let us integrate some people that actually know something about the country, local structures and so on so that they can inform the international community on these issues’.

It is not clear to me how far this has translated into practice on the ground, but what has certainly been a rather awkward outcome is the US military’s use of the UN system. What the US military has done in Afghanistan is to put social scientists—sometimes top researchers, sometimes not such good ones—on the front line. They are given a gun and put out there on the front line with the task of assessing local community structures in order to understand what is happening at the community level.

In one sense this is very smart, because if they want to gather good intelligence, that is how to do it. The question, however, is who do you do it for, and how is it used? Their argument, of course, is that the US military can learn to do better community development work and so forth. And indeed, after the East Timor experience, in one sense this was an attempt by the military to latch onto the ‘local structures’ approach. It certainly provoked a major discussion in the USA, and many anthropologists absolutely rejected it.

On organizational motivations and mindsets, within the UN you are working with many different nationalities, and everyone has a different understanding of what they are doing there. When you look at the different policies of the UN agencies, moreover, you can tell there is a range of different mindsets behind them.

As for power relations at the centre of the action, the problem is that until recently the dominant line, within the UN and World Bank for example, was that they are ‘non-political’. ‘We are building a state, we are the government, but we are non-political.’ Yet it is clear that, for example, every dollar we spend in a

If we really push the traditional structures, where does this leave the state in the last analysis?

village has a political impact on that village, and that fact really needs to be acknowledged. We always need to understand the political background—the history and all this specifics of a country—to make decisions. And those decisions themselves are political.

The point about recognizing that the formal legal system can be just as discriminatory as customary justice systems is a very important one. At UNIFEM we recently did a study in Kenya on women’s access to land rights. It was fascinating because the working assumption was that the customary justice system is against women having any land rights and we need to push the formal system accordingly. What we found, however, was that at every step there is a customary system, there are hybrid courts and the formal system. And women are denied their land rights no matter what legal framework is in operation. The reason is that society does not accept women owning land. This is a social problem, and implies the need to change these social values and understandings. Unless that happens, every institution will intervene to prevent women realizing their rights.

One of the ongoing discussions with African colleagues concerns the role of ‘the old’: where are the old structures? We have had this discussion in, for example, the Sudanese context. But how do we actually know what happened before the colonials came? Do we really need to know? Or is the issue really more the current reality, and what the best decision is at the moment? The argument about village-level customary law always revolves around the question of what the ancestors said: this is what gives customary laws their legitimacy, and from this perspective is what is important. But I do not think we really have to understand what the Sudanese did before the British came.

CONCLUDING SESSION: KEY ISSUES IDENTIFIED AND CRITICAL AREAS REQUIRING FURTHER INVESTIGATION

Prof. Guillermo Padilla Rubiano. One of the key issues is precisely how do we address local realities and listen to and identify what people are thinking? How can we act based on these realities, rather than relying on predetermined answers? You can find this question running through the different approaches from Africa, the Arab world and Latin America. Regarding critical areas for future investigation, the fieldwork of anthropologists and sociologists is currently at the forefront. We have to abandon pre-organized solutions and conduct field research seriously, without any kind of prejudice, and bring the opinions and realities of ordinary people to the table and learn from them.

Prof. Kidane Mengisteab. African societies are mostly traditional societies with fragmented institutions and modes of production. It has become extremely difficult for the state to govern in this context. The theoretical framework is that the fragmentation of these institutions has led to marginalization in terms of resource allocation, which in turn results in poverty, poor political participation and in particular the under-representation of groups that operate predominantly within traditional institutional systems.

Consequences of this marginalization include inequalities and conflicts as well as all the problems of nation building and state building. The ultimate goal is thus to facilitate the economic transformation of marginalized groups. Enhancing their participation in the political process means progress with nation building and state building, as well as the mitigation of conflict and promotion of democratic governance. Peter deSouza talked about decolonization of the mind, to which I would also add ‘decolonization of the institutions’, because African countries are mostly operating within colonial institutional constructs.

At the same time, we have not really learned enough about the nature of African traditional institutions. We should avoid the idea that integrating chiefs and

What we are really reporting on here is the different strategies the modern state has developed in different regions to deal with ‘the traditional’.

leaders means integrating institutions. Chiefs and leaders are the executors of these institutions: they cannot execute anything if you bring them into parliament or integrate the institutions. Thus the main research focus should be: ‘What are the institutions? How do we integrate them?’ Following this, the leaders could also be integrated, but it has to begin with the institutions. Integrating leaders without the institutions is simply a form of political appeasement.

Dr. Tanja Chopra. First, there is no doubt that the topic in focus here is important—at least as important as the justice debate, if not even more so. Second, discussions here have underlined the fact that the issues are highly contextual. General lessons are very difficult to draw—something that we really need to appreciate. Lessons are contextual, not just between regions and countries but also at the country level. In terms of the future research agenda, we need to get away from country studies and move down to a local-level focus.

We need to think about a flexible approach that will allow us to pick specific topics of interest that we see in different places, try to elaborate on those and build on the existing knowledge base. And what is most important and always forgotten in these initiatives is to think about methodology. The things we talked about here—for example how to understand complex dynamics, power relations and realities—are difficult issues, and there are plenty of ongoing debates about

how best to address them. So in parallel to picking more specific, contextual issues there is also a need for lively, outspoken debate about the methodology we are using.

Dr. Peter deSouza. I agree with Tanja, that the exercise we are undertaking here is highly important. The emerging research and specific case studies that have been presented contain a lot of potential for the global democracy discourse. I disagree with her over case studies: we definitely need more country studies because they will allow us to extract general issues from them.

The first general issue is the simple point that we need to locate our studies historically. Second, what emerges from the different regions is that the term ‘traditional’ implies several meanings, from monarchs and chiefs to indigenous groups, tribes, traditional practices and so on. Because of these diverse meanings, a modern state under construction has to work out different strategies to deal with these traditional aspects.

Thus what we are really reporting on here is the different strategies the modern state has developed in different regions to deal with the ‘traditional’. This can mean accommodation and negotiation, as in the case of Botswana, a kind of contemporary compromise in the case of Uganda, toleration in the case of India, or refounding as in the case of Latin America. This is what our research is contributing to within the global debate on democracy.

On a more theoretical level, what emerges from the justice sector debate is a self-confident defence of legal pluralism. The modern constitutional order can accommodate multiple legal forms, which constitutes an important advance for the democratic debate. In other words, legal pluralism is a modern development, not a regressive concession.

In terms of thematic specifics, one important issue is institutional innovation, whether we are looking at adaptive institutions as in Botswana, or new institutions emerging as in Latin America or India. This is a ‘big idea’ that needs to be bolstered by more empirical research. The second issue is: if legal pluralism provides us with a theoretical framework, then the question of jurisdiction—where one jurisdiction ends and the other begins—becomes important in relation to the modern state’s accommodation of the traditional. In addition, there is the question of the sources of legitimacy. In many of the countries we are looking

at the state suffers from a legitimacy deficit or crisis, and the legitimacy it does have comes sometimes from the traditional order, and sometimes from the modern.

This in turn leads to the question of trust. Where does trust come from in connection with the modern state? Does it stem from, for example, a prevailing background trust with respect to the performance of institutions? In Scandinavia, for example, there is a lot of quantitative data confirming people’s high overall trust in political institutions. In other words, institutions work well when there is good background information and trust. But how do you get to the background information and the trust? Is it a cultural feature, or does it develop because institutions are performing well? This becomes a circular argument. When institutions perform well people trust them, and because people trust them they perform well.

The question of trust becomes very important, particularly because we are looking at issues of legitimacy and governance. And this leads to the paradoxical question raised by Kidane: if your society is in transition how do you create transitional institutions to manage the process? As institutions acquire a political rationale or basis, do they want to remain transitional or to become permanent structures?

The mindset of the international community is a big question, but perhaps we need to stop thinking that any institution has a single mindset, as this is really not the case. Moreover, looking at the issue in terms of modernity versus ‘the traditional’ may be the wrong binary construct. Boaventura, for example, talks in terms of an *alternative* modernity, specifically the suggestion that the politics of the global South are presenting an alternative modality. In other words, the story of European modernity is not the story of the whole world. There is an alternative modernity—and even in Europe there are many routes to it.

The Latin American story is particularly important here, as we need to search for new conceptual categories that will inform this alternative modernity. Thus, for example, concepts of human rights have acquired a different, broader resonance in Latin America. And within the framework of an alternative modernity Bhutan is perhaps trying to do something similar in proposing a different conceptual category for the economic system. They have replaced ‘gross domestic product’ (GDP) with ‘gross national happiness’ (GNH).

This sounds very utopian and is deeply steeped in Buddhist philosophy, but if you look more closely you will see that it is just as hard headed an approach as GDP. They have indicators, measurements, aggregates, all the things involved in GDP calculations; all the categories within the dominant discourse have been re-created within an alternative construct.

This provides the foundations of an epistemology of the global South that is at the same time a political statement. In the search for new categories that are emerging in Latin America, GNH is perhaps another. In addition, Gandhi's concept of trusteeship has tremendous potential with respect to relationships with the natural world. Within the African universe, too, there are similar categories that need to be brought into the debates surrounding the construction of an alternative modernity.

The dominant modernity has produced an ecological crisis, a financial crisis and a world full of conflict, and in this sense traditional democratic constitutionalism is not the answer. By contrast, there may be answers to some of the critical challenges facing humanity contained within the alternative modernity framework. For those to emerge clearly, however, the kind of collective exercise we are undertaking here is extremely important, and International IDEA and UNECA should truly be thanked for making this possible.

Dr. Kojo Busia. This has been a rich experience, and I hoped this project will continue and take even larger shape at the very highest possible level. The insights enumerated by Peter deSouza are very useful. In this context we should perhaps be thinking about a global mapping of the different typologies in evidence in different regions and contexts. The next step would be to group the researchers and practitioners involved in those typologies on a cross-regional basis. This could produce some very interesting perspectives that could concretely inform both this debate and practical policy formulation.

Prof. Kripa Ananthpur. One thing that came out very clearly in the South American presentations is the importance of historical legacy. Historical legacy is the context in which customary governance institutions have both evolved and are currently interfacing with democratic institutions, and an understanding of this context is needed to take this work further. With respect to critical issues it is essential both to bring in gender perspectives and to work on genderizing customary institutions. If the gender issue is not put centre

stage, it will continue to be problematic to develop a working model of democracy that accommodates both customary and formal institutions. We should also challenge the dominant denominative model of democracy that continues to be pushed onto the global South, and point out that there are alternative models of democracy that can actually work.

Dr. Patrick Molutsi. The line of thinking proposed by Peter deSouza is particularly important; it indicates that the fundamental problem we have faced in the past is not so much the importance accorded to templates as their narrow basis compared to the existing empirical richness. Thus there is a need for both more case studies and further regional comparisons, out of which we need to generate templates. The resulting templates will have a far richer empirical background than most existing Western models of democracy. It is also very encouraging to hear how people are continuously pushing the boundaries of the modern democratic state in order to open it up further and use the resulting political space to address real social and economic needs.

The point about further developing an 'epistemology of the South' is also very important. In this context, and particularly coming out of the discussion of the Arab world, there is a real need to further assess the role of religion in general and religious institutions, in particular within the overall framework of the customary and the traditional. When, for example, does religion become a political factor that either hinders or promotes democracy, and under what circumstances?

Finally, we need to pay greater attention to the demographic changes occurring around the world. Someone reminded us earlier of the emergence of a new generation of customary leaders: modernized and/or hybridized customary institutions create a completely different type of leadership, which on the one hand is totally at home within the modern state and on the other makes a strong appeal to tradition. This is fundamental, because we know that in the last analysis, human agency determines the quality and types of existing institutions.

Prof. S.D. Muni. We have been talking a lot about institutions and structures, as if these were the main actors. The Bolivian example, however, shows that this is not the case. In some situations in the three last decades Bolivian social organizations became political organizations, and social movements became political

movements. The importance of the actor needs to be stressed. When we think about institutions and structures we tend to assume that they are strong, closed entities, but in this context we need to adopt a more open-textured perspective.

Dr. Jorge Vargas Cullel. We are not in the process of micromanaging specific country developments. Societies are evolving; neither they nor states can be ‘made’. They evolve and there are thousands of other variables operating within this evolutionary process. We need to look at the broader tendencies at the regional level and remember, as was very rightly stressed earlier, that there is no one conception of modernity.

Looking at the regional level we can see that societies operate within a specific social and historical context, and are simultaneously coping with specific economic and strategic forces. Once we look at these broader tendencies we will be in a better position to ascertain those that are conducive to what we define normatively as progress and support them, rather than coming in with a pre-structured design. We need to be very flexible about and open to what is happening on the ground.

Mohammad Musa Mahmodi. Methodology is very important. Normally speaking, some researchers or consultants are sent off to African or Asian countries with a number of questions to ask: they do some focus group discussions and so on, collect their data and come back. And not surprisingly, their conclusions are often based on a rather naive point of view, a perspective that does not do justice to the complexity of, or dynamic interaction between, the issues involved. There is thus a need to develop new kinds of instruments and tools that can better grasp and capture issues on the ground as well as the differing perspectives of the various actors involved. Second, we must avoid having assumptions and predetermined interpretations of issues—‘OK, approach X will work for situation Y.’ Whatever hypothesis we use must be tested over and over again until we arrive at conclusions that will assist everyone.

Dr. Raquel Yrigoyen. It is important to consider the relationship between epistemology, axiology and political interventions. All of our operational categories need to be reviewed critically. With respect to customary, formal and informal law, for instance, the use of the description ‘informal’ is not innocent. It means something, it comes from within a framework, to describe one thing as ‘formal’ and another as ‘informal’. Behind each category there is an axiology,

a value that we transmit with that word. When we say that law is just the written law and everything else is customary, we are transmitting a value. When we say that something is informal, we are effectively transmitting the idea that it is inferior in some respect. And this has political consequences that need to be placed clearly on the table.

We call one thing informal so that the other is recognized, while the informal could be replaced. By the same token, customs are only acknowledged if they are not against the law, which means we are transmitting the message that the customary needs to be ‘controlled’, and in this sense we are reproducing colonialism. There is thus a need to decolonize epistemology and review the relationship between categories, values and the political consequences of those categories.

The second thing to stress is the importance of this South-South exchange. We have suffered the same processes, sometime centuries ago, and are in danger of repeating the same thing; in this sense we need to learn more from each other. Thirdly, in terms of future research we need to set a kind of ‘agenda for decolonization’ so that the critical reviews include these categories. At the same time we need to be very critical of the values we are transmitting and start putting some new ones on the table for discussion.

For example, behind the notion of decolonization is the idea that all people are equal. The Enlightenment brought with it the idea that all individuals—men and women alike—are equal. From this perspective all theories of subordinating people or individuals are part of the patriarchal system, the colonial point of view. The categories used and interventions undertaken in countries of the South need to be read and interpreted in this light, and in overall terms the South needs to recover control of the agenda of research and political intervention in our countries.

Today there is a lot of money in, for example, customary law studies, or formal and informal legal interventions in Asia. There is a lot of money in access to justice, legal empowerment of the poor and so on. But what—and where—is the agenda behind this development? Does it really respond to the decolonization agenda, or does it in fact have more in common with 19th century British anthropology? Anthropologists of that time pursued the same thing we are trying to undertake—understanding African societies, Burma and other countries. And why? Because they wanted to give tools to the colonizers.

In this sense we need to be critical because our research could unwittingly serve to reinforce colonialism. It is better for us to control this and ensure that our research genuinely assists the decolonization project. Customary law research or projects aiming at legal empowerment of the poor are a case in point. In Bolivia and Ecuador, for example, there is a tendency to say, 'OK, we will allow customary law as far as admitting that indigenous peoples can solve minor problems, but you cannot touch big Mining Corporation operating on your territory.' This kind of statement indicates there is an agenda in operation for customary law here, and we need to be critical of that.

Mark Salter. From an International IDEA viewpoint, a key element of our agenda is to facilitate the sharing of experiences from a comparative perspective, with a particular emphasis on South-South sharing and exchange of experiences. Viewed through this lens, the meeting has been a real success. In relation to the attempt to explore the relationship between customary governance structures and the democratization and democracy-building agendas, the outcome of this meeting is a much sharper understanding of the contextual differences not only between but within regions. A clear example of this was the reminder in the African context of the critical differences between the experience of Sub-Saharan countries and those of the northern part of the continent, in particular the Arab League member states.

The consequence of bringing the differences more sharply into relief, on the one hand, is the sense that it is even more difficult than we thought to extract broader lessons learned; on the other hand, in a positive sense it invites us to go further, to dig deeper in the exploration of those contextual differences. This is something we should take very seriously with respect to future work in this area.

Second, there is the simple fact of differences with respect to terminology. Within International IDEA, and specifically within both this project and a preceding one that looked at the role of traditional justice mechanisms in the response to violent conflict in African countries, there was—and is—endless debate over just about the whole range of possible terms and terminologies. In this context, moreover, this meeting has highlighted the fact that even if we accept the term 'customary' simply for the purpose of discussion, it is abundantly clear that we are in fact talking about very different categories and very different kinds of

institutions, traditional structures and so forth. This fact needs to be brought out more clearly in the way we take things forward.

Third, we came out of the previous consultation in Shimla referring to this notion of the importance of both 'customizing the democratic' and 'democratizing the customary'. What is increasingly clear is that while this is a relatively easy thing to say, what it actually means in practice is not quite so obvious. So we are unquestionably going to have to take up the challenge of exploring and elucidating the practical, policy-related dimensions of this area much more vigorously in the future.

In this context, the importance of opening up spaces for contestation within the customary was pointed out earlier. From a democratization perspective that is perhaps one of the most important areas we need to be looking at further. With respect to the all-important gender dimension, for example, rather than attempting to define the ways in which customary structures need to be reforming or democratizing themselves to become more gender inclusive, perhaps our focus should be more on encouraging the opening up of spaces within which people can debate, contest and hammer out the issues themselves, rather than trying to come up with all the answers ourselves, and in advance. Moreover, what we heard from our Latin American colleagues about the way those issues are being addressed in their region may provide some important pointers in the right direction.

Finally, while not neglecting the importance of taking the debate forward in a conceptual sense, it is equally important to keep focused on moving the policy development agenda forward. In this respect, work on justice sector reform, specifically attempts to incorporate an understanding of the role of traditional structures into the way justice issues are addressed within the framework of UN-led and other international interventions, offers both some hope and some useful pointers. Broadly speaking, the notion of legal pluralism is now widely accepted in the international community, and to that extent can be viewed as a practical example of the way the kind of approach we have been discussing here can be mainstreamed. Taking the point further, we may want to look in more detail at how the legal pluralism agenda has developed, and consider which—if any—of its elements could be applied to the customary governance and democratization agenda. Thank you all very much.

ANNEX 1

CONFERENCE AGENDA



ECONOMIC COMMISSION FOR AFRICA
COMMISSION ECONOMIQUE POUR L'AFRIQUE



CUSTOMARY GOVERNANCE AND DEMOCRACY BUILDING: EXPLORING THE LINKAGES

International Conference
15–16 September 2010
UN Conference Centre, Addis Ababa

AGENDA

TUESDAY, 14 SEPTEMBER

AM-PM	Participants' Arrival
19:30	Informal Dinner (Jupiter Hotel)

DAY 1

WEDNESDAY, 15 SEPTEMBER

08:30	Registration
09:00	Opening Remarks Dr. Abdalla Hamdok , Director, Governance and Public Administration Division, United Nations Economic Commission for Africa (UNECA)
09:15	Introduction Mark Salter , Senior Programme Officer, International IDEA

WEDNESDAY, 15 SEPTEMBER (CONT.)

09:30	<p>Session 1: African Perspectives</p> <p>Moderator: Dr. Kojo Busia, Senior Development Management Officer, Governance and Public Administration Section, UNECA</p> <p><i>Why Democracy Building in Africa Might Require Reconciling Modern and Traditional Institutions of Governance</i>, Prof. Kidane Mengisteab, Pennsylvania State University, USA</p> <p><i>The Roots of Resilience: Exploring Popular Support for African Traditional Authorities</i>, Carolyn Logan, Deputy Director, Afrobarometer, and Assistant Professor, Michigan State University, USA</p> <p>Respondents: Dr. Daniel Abiye, Organization for Social Science Research in Southern and Eastern Africa and Victor Shale, Researcher/Senior Programme Officer, Electoral Institute for the Sustainability of Democracy in Africa</p>
11:00	Coffee/Tea Break
11:15	Session 1: African Perspectives (continued)
12:00	<p>Session 2: Rooting Governance in African Realities</p> <p>Moderator: Mark Salter, International IDEA</p> <p><i>Rooting Governance in African Realities: Are Customary Institutions the Answer?</i> Frederick Golooba-Mutebi, Senior Research Fellow, Makerere Institute of Social Research, Makerere University, Uganda</p>
13:00	Lunch
14:00	Session 2: Rooting Governance in African Realities (continued)
14:30	<p>Session 3: Customary Governance and Democracy Building: The Case of Botswana</p> <p>Moderator: Ambassador Olusegun Akinsanya, Director, Institute for Security Studies (ISS), Addis Ababa, Ethiopia</p> <p>Dr. Patrick Molutsi, Tertiary Education Council, Gaborone, Botswana</p> <p>Respondent: Dr. Martin R. Rupiya, Executive Director, The African Public Policy & Research Institute, Pretoria, South Africa</p>
16:00	Coffee/Tea Break
16:15	<p>Session 4: From Rivalry to Synergy: Innovative Democratic Institutions and Customary Governance in Karnataka, India</p> <p>Moderator: Dr. Peter deSouza, Director, Indian Institute for Advanced Study, Shimla, India</p> <p>Dr. Kripa Ananthpur, Madras Institute of Development Studies, Chennai, India</p> <p>Respondent: Professor S D Muni, Visiting Senior Research Fellow, Institute of South Asian Studies, National University of Singapore, Singapore</p>
17:45	<p>Day 1 Summary & Conclusions</p> <p>Mark Salter, International IDEA</p>
19:30	Dinner (Jupiter Hotel)

DAY 2

THURSDAY, 16 SEPTEMBER

09:00	Session 5: Customary Governance and Democracy Building: Perspectives from the Andean Region Moderator: Marlene Choque Aldana , Researcher, CIUDADANÍA, Comunidad de Estudios Sociales y Acción Pública, Cochabamba, Bolivia <i>Latin America: New Political Actors, New Democracy and New State: The Role of Indigenous Peoples in the Refounding of the State</i> , Dr. Guillermo Padilla Rubiano , Researcher, CIESAS Pacífico Sur, Mexico <i>Constitutional Recognition of Indigenous Customary Law in Latin America: From Multiculturalism to Plurinational States: Trends and Challenges</i> , Raquel Yrigoyen Fajardo , Director, International Institute on Law and Society, Lima, Peru
10:45	Coffee/Tea Break
11:00	Session 6: Customary Governance and Democracy Building: An Overview from the Arab World Moderator: Mark Salter , International IDEA <i>Democracy Between Customary Governance and Political Power in the Arab Region</i> , Gihan Abouzeid , Policy Advisor for the Ministry of Family and Population, Egypt Respondent: Abdulla Al-Nibari , Kuwait Democratic Forum, Kuwait
12:45	Lunch
14:00	Session 7: Lessons Learned for the International Community Moderator: Mark Salter , International IDEA Dr. Tanja Chopra , Consultant Respondent: Dr. Lansana Gberie , Senior Researcher, ISS, Addis Ababa
15:30	Coffee/Tea Break
15:45	Concluding Discussion Moderator: Mark Salter , International IDEA Dr. Peter deSouza , Dr. Tanja Chopra , Prof. Kidane Mengisteab and Guillermo Padilla Rubiano
17:00	Closing Remarks
18:00	Reception (Jupiter Hotel)
19:30	Dinner—Yod Abyssinia Restaurant

ANNEX 2

LIST OF PARTICIPANTS



ECONOMIC COMMISSION FOR AFRICA
COMMISSION ECONOMIQUE POUR L'AFRIQUE



CUSTOMARY GOVERNANCE AND DEMOCRACY BUILDING: EXPLORING THE LINKAGES

International Conference
15–16 September 2010
UN Conference Centre, Addis Ababa

LIST OF PARTICIPANTS

IN ALPHABETICAL ORDER (BY LAST NAME)

Title	Last Name	First Name	Position	Organization	Country
Mrs.	Abate	Alemtsehay	Conference Administrative Co-coordinator	UN Economic Commission for Africa (UNECA)	Ethiopia
Dr.	Abiye	Daniel	Assistant Professor, Director of Publications and Dissemination	Organization for Social Science Research in Eastern and Southern Africa, Addis Ababa	Ethiopia
Mr.	Abdel-Latif	Jalal	Chief	Civil Society and Post conflict Section (GPAD), UNECA	Ethiopia
Mr.	Abdulla	Al-Nibari		Kuwait Democratic Forum	Kuwait
Mrs.	Abouzeid	Gihan	Policy Advisor	Ministry of Family and Population	Egypt
Dr.	Adejumobi	Said		Public Administration Section (GPAD), UNECA	Ethiopia

Title	Last Name	First Name	Position	Organization	Country
Ambassador	Akinsanya	Olusegun	Director, Addis Ababa Office	Institute for Security Studies, Addis Ababa	Ethiopia
Dr.	Akwetey	Emmanuel O.	Executive Director	Institute for Democratic Governance, Accra	Ghana
Professor	Ananthpur	Kripa	Assistant Professor	Madras Institute of Development Studies, Chennai	India
	Assefa	Shimels	Justice Advisor	Canadian International Development Agency/Embassy of Canada, Addis Ababa	Ethiopia
	Bakels	Lisa	First Secretary Political Affairs	Netherlands Embassy, Addis Ababa	Ethiopia
	Brendan	Bromwich	Darfur Programme Coordinator	United Nations Environment Programme, Sudan	Sudan
	Bunwaree	Sheila	Professor	Faculty of Social Studies and Humanities, University of Mauritius	Mauritius
	Busia	Kojo	Senior Development Management Officer, Chief	UN Economic Commission for Africa, Addis Ababa	Ethiopia
	Byers	Meagan	First Secretary and Country Program Analyst	Canadian International Development Agency/Embassy of Canada, Addis Ababa	Ethiopia
Dr.	Chopra	Tanja	Consultant		
	Choque Aldana	Marlene	Researcher	CIUDADANÍA, Comunidad de Estudios Sociales y Acción Pública, Cochabamba	Bolivia
Professor	deSouza	Peter	Director	Indian Institute for Advanced Study	India
	Engvall	Linda	Associate Human Rights Expert	UN Office of the High Commissioner for Human Rights, East Africa Regional Office	Ethiopia
	El Naggar	Samia			Sudan
Dr.	Gberie	Lansana	Senior Researcher	Institute for Security Studies, Addis Ababa	Ethiopia
	Golooba-Mutebi	Frederick	Senior Research Fellow	Makerere Institute of Social Research, Makerere University, Kampala	Uganda
	Hamdok	Abdalla	Director, Governance and Public Administration Division	UN Economic Commission for Africa, Addis Ababa	Ethiopia
	Houlihan	Shawn	Africa Director	Forum of Federations, Addis Ababa Office	Ethiopia
	Kebede	Emebet	Justice Sector Advisor	Canadian International Development Agency/Canadian Embassy, Addis Ababa	Ethiopia
	Kifle	Elshaday	Researcher	University for Peace	Ethiopia

Title	Last Name	First Name	Position	Organization	Country
	Kumari	Ranjana	Director	Centre for Social Research, New Delhi	India
H.E.	Ladu Luki Lwoki	Robert	Chairperson	Southern Sudan Land Commission, Government of Southern Sudan, Juba	Sudan
Dr.	Lawson	Adolphe	Executive Secretary	AU Advisory Board on corruption	Ethiopia
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How to best address the role of customary governance structures in a variety of current and potential future democracy-building contexts was the core question at the conference, jointly organized by the United Nations Economic Commission for Africa (UNECA) and International IDEA, in Addis Ababa, Ethiopia in September 2011.

In many contexts 'formal' and 'informal' governance structures cannot easily be separated. Participants at this conference recognized the need to develop an approach to democracy building that seeks to match and combine these seemingly parallel systems of governance while formulating effective ways of dealing with instances where they diverge.

In addition, the importance of 'customizing the democratic'—and at the same time 'democratizing the customary'—is essential if democracy is to be considered truly legitimate by the world's populations. A key conclusion of the discussions was recognizing and paying attention to contextual specificity; regional, national or local.

The conference brought together 70 experts from around the world, to develop a comparative analysis of the role and functioning of customary governance structures, promoting better informed and more effective democracy-building efforts.

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