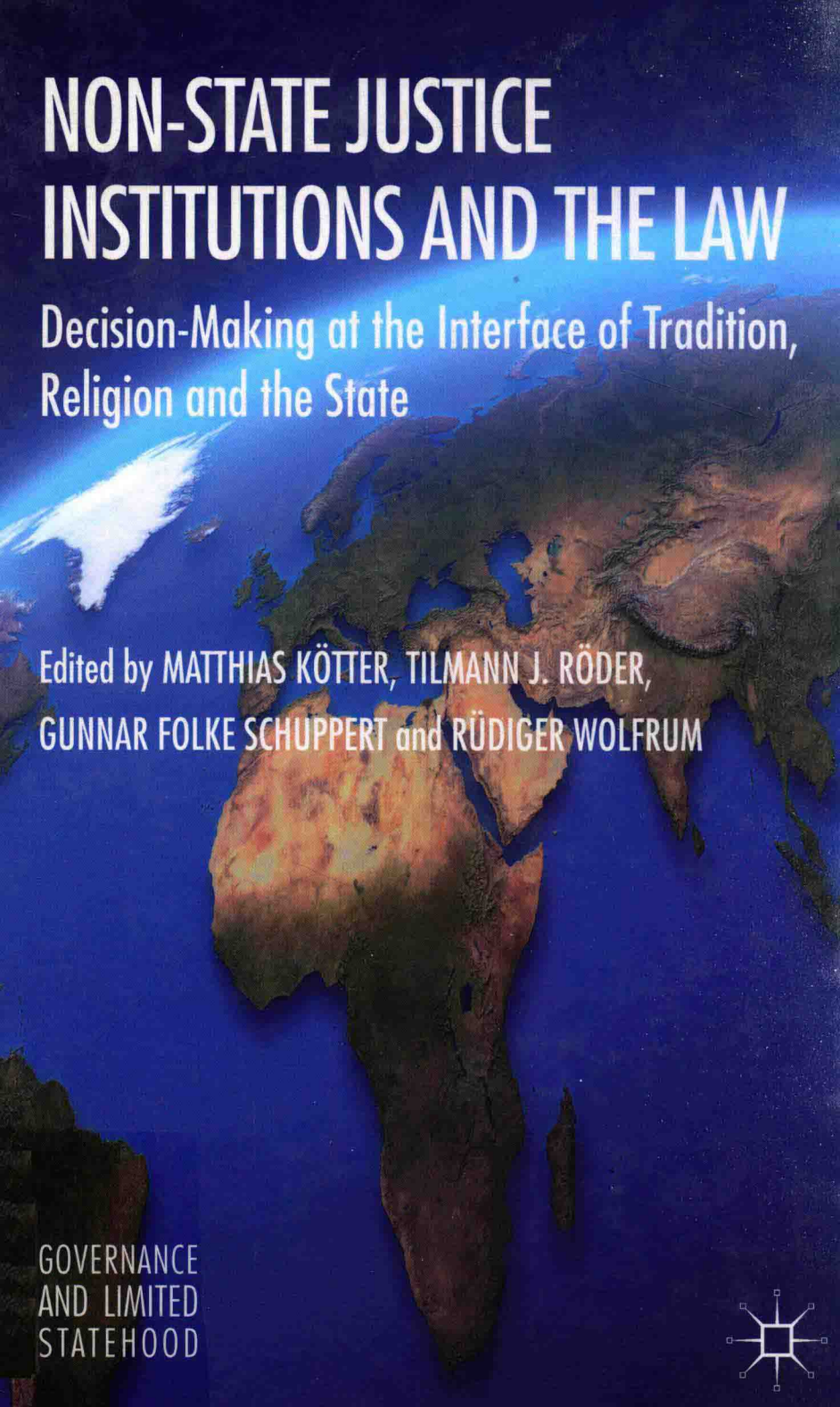
NON-STATE JUSTICE INSTITUTIONS AND THE LAW

Decision-Making at the Interface of Tradition, Religion and the State

Edited by MATTHIAS KÖTTER, TILMANN J. RÖDER, GUNNAR FOLKE SCHUPPERT and RÜDIGER WOLFRUM



GOVERNANCE AND LIMITED STATEHOOD

Non-State Justice Institutions and the Law

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Edited by

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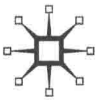

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Preface and Acknowledgements

Non-state justice institutions are a phenomenon of modern statehood. Informal norms and mechanisms for their assertion have existed all along since the institutional setting of the modern state became the ruling structure in many societies of the world, however, with varying degrees of autonomy. In the North, with its strong tradition of consolidated statehood, the majority of such non-state justice systems were gradually marginalized, but still today the churches may regulate their own affairs and have their own jurisdiction. In many countries with colonial history, formal state judiciaries were only developed for the first time under colonial rule, whereas traditional forms of regulation and dispute resolution persisted. They were both formally recognized and used for indirect rule, or they remained a social fact against all state-building initiatives ever since.

Recently, non-state justice institutions have been enjoying a great deal of attention. Considered as a means for decentralized ordering whose legitimacy and effectiveness may even exceed the state judiciaries' ability to resolve conflicts, they have become an important aspect in the political and academic debates on law and development and, in numerous cases, of constitution-making and judicial reform. With regard to the protection of cultural and political rights of indigenous peoples and other ethnic or religious minorities, official recognition of non-state laws and justice institutions is considered a core aspect of self-government. In September 2012, the United Nations General Assembly in its Declaration of the High Level Meeting on the Rule of Law at the National and International Levels has acknowledged that "informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone [...] should enjoy full and equal access to these justice mechanisms". Also, since 2012, the World Justice Project's Rule of Law Index names informal justice as one out of nine key indicators to measure the rule of law. Within a short period of time a body of scholarly literature has emerged, which analyses how and under which conditions non-state justice institutions work.

To be considered a key indicator to measure the rule of law, non-state justice institutions have to fulfil rule-of-law functions. From a functionalist point of view, "rule of law" does not necessarily require state law

made by state institutions, especially by parliamentary legislation or adjudicated by state courts. The focus is rather on such state and non-state justice institutions that contribute to the fact that social ordering and conflict-resolution occur by way of the law (i.e. authority is being exercised on the basis of generally known and predictable laws) and the rationality of legal rule replaces the arbitrariness of personal rule. As far as non-state institutions provide legal solutions for social problems, they can improve access to justice and will not provide only "poor justice for the poor" as is often presumed. However, to keep up the connectivity of non-state justice institutions with the law and legal discourse a functionalist approach will not suffice. The law is a normative concept, and thus it will be required to determine a normative minimum standard to be upheld in legal structures beyond the state to be able to speak of legal systems or justice institutions. This is the biggest challenge among many difficult questions concerning non-state justice institutions; but one has to always remember that many state law systems also raise questions of rights and legitimacy and of a normative minimum standard.

The widespread assumption that non-state justice institutions tend to violate human rights – particularly those of women, children and other less powerful groups – has been supported by empirical research in many countries. Therefore, the aim to protect human rights forms the starting point of many approaches towards dealing with non-state justice systems. However, the case studies and analyses presented in this book indicate that focusing on this objective alone would not be sufficient to meet the complexity of any of the situations at stake. Adequate concepts have to consider, firstly, the problem of access to justice where the state is weak and thus formal state institutions do not apply; and secondly, the claims of indigenous communities to be entitled to regulate their own affairs and settle their disputes according to their customs and traditions. To reach an adequate solution for this triangular conflict of aims is a difficult task in each individual case. They may be reconciled either by an institutional setting that inter-couples various legal and judicial branches and can integrate traditional justice institutions into the official stages of appeal, or by discursive procedures that allow determining the demands of mutual appreciation of different legal systems. To reach mutual appreciation on all sides of a pluralist situation is the crucial point. Conflicts will not be resolved by imperative regulation where implementation is ineligible or autonomous self-regulation is to be respected.

In this volume, the focus is on decision-making by non-state justice institutions at the interface of traditional, religious and official state

laws. In a number of countries, legislation was passed only recently to ensure that such institutions deliver their judgements with respect to the rule of law and to a prescribed minimum of human rights protection. The introductory chapter depicts the current debates on non-state justice institutions and the law, and discusses them in relation to legal pluralism discourse and their implications for the rule of law (Brian Z. Tamanaha). The five chapters in the first part of the volume present case studies that represent changing degrees of interconnectivity and interaction between the non-state system and the state judiciary. They cover a broad spectrum from the case of Pakhtun *jirgas* in Pakistan (Tilmann J. Röder and Naveed A. Shinwari) to various degrees of interconnectivity within various statutory and constitutional frameworks, in the case of chief courts in South Sudan (Katharina Diehl, Ruben Madol Arol and Simone Malz), to social courts and Sharia courts in Ethiopia (Girmachew Alemu), to traditional courts in Bolivia (Lorena Ossio Bustillos), to the very elaborate system of incorporation of traditional leaders' courts in South Africa (Christa Rautenbach). These case studies elaborate on the question of embedding non-state justice systems into the official legal system and bring up some difficult theoretical problems of the provision of legality and justice including the construction of culturally fair and inclusive but also well-functioning justice systems. The three chapters in the second part of the volume build upon the case studies, but approach the topic conceptually from different perspectives. The five cases represent various forms of formal recognition and incorporation of non-state justice institutions into the formal state governance structures, but they also signify the context preconditions that co-determine how to best reconcile the justice systems (Matthias Kötter). Focusing on the plurality of norm enforcement regimes, the need for conflict of laws and regulations becomes apparent (Gunnar Folke Schuppert). The international regime on human rights provides no claim for complete harmonization, but gives room for some pluralism (Rüdiger Wolfrum).

The chapters were composed in cooperation with judges, traditional authorities and other experts from the examined legal systems. The authors participated in a conference in Berlin in May 2011 that was hosted by the WZB Social Science Center, Berlin and the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. The study of non-state justice institutions and their relation to the legal institutions of statehood constitutes the research focus of both of these institutes. As a member of the collaborative research centre

SFB700 on Governance in Areas of Limited Statehood, the WZB examines the factual and normative conditions of legitimate and effective rule of law and focuses on the effects of normative pluralism and functional aspects of jurisdiction. The Max Planck Institute has conducted several projects in Afghanistan, Pakistan, Somalia and South Sudan to support constitution-making processes and contribute to rebuilding and stabilizing new legal orders by training judges and other law professionals. Its off-spin, the Max Planck Foundation for International Peace and the Rule of Law, is currently supporting the development of a new framework for non-state justice institutions in Afghanistan.

This book shows that non-state justice institutions and their coupling with official state law are not only a legal issue, but also an issue of governance and political structure. The chapters reflect the problems and methods of coping with them from a mainly juridical perspective. As far as deficits in the validity and enforceability of the law are described, the studies, on which the contributions are based, were not designed to meet the methodological demands of empirical social research. By stressing the relevance of the issues for legal policy, we hope to activate further empirical research. It will have to be closely tied to conceptual considerations on governance and the rule of law.

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Introduction: A Bifurcated Theory of Law in Hybrid Societies

Brian Z. Tamanaha

1. The recent turn to non-state justice institutions

In recent years, development organizations have finally begun paying greater attention to non-state or informal justice systems. This shift should have occurred long ago. Countries with non-state justice systems in their midst have grappled with their implications for many years, and legal anthropologists and sociologists have been studying and writing about these systems for decades. But development organizations have mostly ignored them, focusing their activities instead on state legal systems. Now, non-state justice systems are taking on primary importance for development agencies and policy-makers.

1.1. Urgent geo-political events

Two main factors have contributed to this enhanced attention. The first factor relates to global geo-political events. The US-led invasions into Iraq and Afghanistan altered or destroyed existing institutions of legal and social ordering. The military forces could not depart these countries until stable institutions that would prevent a slide into social chaos were in place. It became imperative to find or create institutions that would maintain order and resolve disputes, but this proved to be highly problematic.

General Stanley A. McChrystal, the commander of coalition forces in Afghanistan, gave a speech in 2009 recognizing that an essential element of defeating the Taliban insurgency is providing people with access to a fair system of dispute resolution (Dempsey and Coburn 2010). However, the Afghan state legal system was weak, dysfunctional, plagued by corruption, stained by a history of despotic rule, distrusted by the

people and had very little presence in rural areas where most people live (Barfield et al. 2006). It was quickly realized that building the state legal system to meet the needs of the populace was an immensely difficult project that would take decades to complete.

The obvious alternative was to turn to existing non-state institutions. The United States Institute of Peace (USIP) issued a publication in 2010 advocating this approach:

> [T]he majority of civil and criminal disputes in Afghanistan are resolved locally through traditional means, including tribal and community councils that have operated in local communities for centuries. These councils (often called shuras or jirgas) generally consist of community elders and other respected individuals sitting together to reach equitable resolutions of disputes and to reconcile the disputants, their families and the community as a whole.
>
> (Dempsey and Coburn 2010: 2)

Traditional justice mechanisms are familiar to the population and are less costly and more accessible than state courts. Decisions made by local *shuras* and *jirgas* are generally consensual, and reach a final resolution much faster than state courts. The focus is on making the parties whole through equitable outcomes rather than adversarial courtroom proceedings that have winners and losers. Traditional justice resolutions are also more likely to obtain compliance and enforcement because respected elders have authority within the community and disregarding their decisions can disrupt social harmony. Support for non-state justice systems, for these reasons, became an essential element of US policy in Afghanistan (Dempsey and Coburn 2010).

1.2. The failure of law and development efforts

The second factor driving the recent turn to non-state justice institutions is the general recognition that little improvement has resulted from over a billion dollars spent on developing state legal institutions in the past two decades by law and development organizations (Tamanaha 2011b).

Law and development work is carried out by major international and national institutions, public and private, prominently including the World Bank, the Ford Foundation, the Carnegie Endowment for International Peace, the American Bar Association, the United

Nations Development Program (UNDP), the US Agency for International Development (USAID), the Inter-American Development Bank, the European Bank for Reconstruction and Development, the UK's Department for International Development, the Asian Development Bank, the Japan International Cooperation Agency and many more.

By most accounts, the actual improvements in law realized from these efforts have been meagre. Thomas Carothers, director of the rule-of-law project for the Carnegie Foundation, offers this assessment:

> The effects of this burgeoning rule-of-law aid are generally positive, though usually modest. After more than ten years and hundreds of millions of dollars of aid, many judicial systems in Latin America still function poorly. Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction. The numerous rule-of-law programs carried out in Cambodia after the 1993 elections failed to create values or structures strong enough to prevent last year's coup. Aid providers have helped rewrite laws around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement. [...] Efforts to strengthen basic legal institutions have proven slow and difficult. Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact.
>
> (Carothers 2006: 11–12)

Matters are worse than this passage lets on, unfortunately, because he omits the most disheartening failures (a catalogue of the widespread and persistent failures can be found in Stephen Golub 2006). In excess of a 100 million dollars has been spent in Africa on law and development, with results that have been characterized as "pretty depressing" (Piron 2006: 289).

A long-time participant confided in Carothers that "we know how to do a lot of things, but deep down we don't really know what we are doing" (Carothers 2006: 15). "The lessons learned to date have for the most part not been impressive and often do not actually seem to be learned." (Carothers 2006: 27)

This dismal assessment is widely shared. A review of three recent notable books on law and development observed that "[a]lthough the contributions to these volumes reflect decades of both practical

experience with and scholarly reflection upon legal reforms in developing countries, at the end of the day they are remarkably inconclusive. None of the authors represented in these volumes seem strongly optimistic about whether legal reforms are likely to promote development (at least early in the development trajectory)" (Davis and Trebilcock 2008: 897).

The most an optimist can say is that it is premature to draw overly pessimistic conclusions. It "will take many years or even decades before it becomes clear whether and to what extent sustained impact transpires" (Golub 2006: 125).

In the face of this lack of progress, it is no wonder that development organizations have begun to take a serious look at non-state justice institutions. An influential background paper for the 2006 World Development Report was produced by the World Bank Legal Department, urging that development practitioners engage with customary or informal legal systems. The authors concluded that the almost total neglect of these systems by the international development community makes little sense given their dominant role:

> In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone." *Customary* tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana [...]. In many of these countries, systems of justice seem to operate almost completely independently of the official state system.
>
> (Chirayath et al. 2005: 3)

There are separate sets of negative reasons for people to turn away from state legal systems, and positive reasons for their affirmative preference of customary systems. State legal systems frequently are seen as corrupt, dysfunctional, biased, too expensive, too distant, too delayed, or too unfamiliar and unaccountable. Whatever the combination of reasons, state legal systems often lack legitimacy in the eyes of the populace. In contrast, people may prefer non-state institutions because they are more accessible, more accountable, better understood and resolve disputes more effectively to the satisfaction of

the people involved. Hence, informal systems are often seen as more legitimate.

Recent case studies of Indonesia, Liberia, South Sudan, among other places, reveal that the majority of the population, at least in rural areas, express a preference for non-state justice systems (World Bank 2008; Isser et al. 2009; Leonardi et al. 2010; Isser 2011).

1.3. The problems with non-state justice institutions

But non-state justice systems raise serious questions and problems. Were it not for these issues they would have received greater attention from development organizations long ago.

(1) *Detrimental to state-building project* – One problem is that it has long been a prevailing assumption that every state must possess a well-developed legal system, necessary for economic development, to help maintain social order, to control government corruption and to create the rule of law. The state has a monopoly over law; and in the modern view, is perceived as a unified system backed by coercive enforcement.

Enhancing the role of customary or informal institutions is seen as potentially in tension with the state-building project: they might be rivals to the state for power and popularity, and they disrupt the uniformity of the legal system. Even when the state officially incorporates or recognizes these informal institutions, as many states have done, they might still be perceived as alternatives to the state rather than aspects of it.

A report on informal systems in Afghanistan noted the ambivalence of legal professionals about these systems. On the one hand they can help reduce the strain on the state legal system by handling cases. The report observes, however, that many in the legal profession are concerned that recognition of customary systems might reduce the status and prestige of the formal system and its agents. Successive Afghan governments have opposed formal recognition of customary law institutions in part because the state wanted to exert its exclusive right to make and execute laws (Barfield 2006).

(2) *Violations of constitutional and human rights* – A second major problem is that customary systems may be inconsistent with the national constitution and violate human rights or women's rights. These problems were also noted in the Afghan report:

> Some traditional practices violate Afghan and international law, including honor-killings, forced and underage marriage, and payment of blood money in lieu of punishment. Women rarely, if ever,