The Relationship between Traditional Laws and Modern Law in Africa: A Comparative Study of the Tswana, Xhosa, and Oromo

by

Jan Galip Erk

Submitted in fulfilment of the requirements for the degree

LLD

In the Faculty of Law,
University of Pretoria

May 2021

Supervisor : Professor Charles Manga Fombad

TABLE OF CONTENTS

Chapter 1:
General Introduction

PART I

---

1. THE MAIN SCHOLARLY COMPONENTS OF THE THESIS

The main scholarly goal of this thesis is to identify the different types of relationship indigenous traditional laws and traditional governance structures have with the laws and institutions of the modern state in Africa. The aim is to distil lessons, insights, and observations which have comparative relevance for the study of non-Western constitutions and constitutionalism. We examine three case-studies from Botswana, South Africa, and Ethiopia as part of a search for patterns which hold across both time and place. Our investigation is, thus, **a)** *a comparison across these three case-studies*; but it is also, **b)** *a historic comparison across time*. That is, each case-study contains a comparison of the different legal and political mechanisms managing the relationship between the traditional and the modern during the different constitutional phases spanning precolonial, colonial, and post-colonial periods.

In the course of the investigation for each case-study, we start with the highest level of analytical abstraction and then move down successively through the intermediate levels eventually reaching the local. Each case-study begins with a general historical overview of relevant factors at the international and regional levels with an eye as to their national consequences. It is the national level of analysis which forms the main part of the investigation. After examining nation-wide constitutional and political factors for each case-study, we sharpen the focus on three select locations: **i)** the Bakgatla Batswana of Botswana; **ii)** the Transkei amaXhosa of Eastern Cape, South Africa; and **iii)** the Guji/Borana Oromo of Ethiopia. The in-depth investigation of three select ethno-linguistic groups is carried out in order to identify potentially generalisable patterns for the comparative study of constitutions and constitutionalism.

Notwithstanding the incorporation of scholarly literature from a number of different (sub)disciplines, it is comparative constitutions and constitutionalism on which the theoretical framework of the thesis rests. One of our main goals is to integrate non-Western cases into the main debates and discussions in the scholarly literature. This means that it is imperative to address constitutions and constitutionalism directly in this introductory chapter before we proceed to the discussion of the relevant strands of scholarly literature (Chapter 2), theory and methodology (Chapter 3), and the three case-studies. Before addressing constitutions and constitutionalism directly in section 2 below, we should quickly provide an overview of the main scholarly components of the thesis:

1.1. Introduction and Background

Macro constitutional study of indigenous law and governance is the foundational background to the study. Instead of picking and choosing delimited areas to focus on – say – the current customary laws regulating family affairs in one local community or the past of traditional governance structures of another tribe in another jurisdiction, this macro perspective leads us towards bigger questions about law and governance and home-grown constitutionalism. The cross-disciplinary perspective combining political, legal, social, philosophical aspects of constitutions and constitutionalism gives the thesis a pronounced holistic outlook. Framing African indigenous law and governance in the context of comparative non-Western constitutionalism allows us to pursue such big questions, but it also means that we have to trek across the uneven grounds of different political and legal systems, covering both their present and past.

It is essential to note that what we study has been called something else across time and place. Some of this is just the natural recourse of language changing over time, but sometimes the changing labels indicate real differences, and sometimes similar labels can carry different political connotations. 'Native Law', 'African Law', 'Tribal Law', 'Traditional Law', 'Customary Law', or 'Bantu Law' are some of the more historically recent labels.[1] Before that, terms that have now acquired pejorative connotations were used, such as 'Primitive Law', 'Pre-Modern law', 'Preliterate Law', and 'Laws of the Savage'. The question of terminology will be addressed in the context of each case-study, but at this

[1] Depending on the specific national context and time-period, notwithstanding the overlap, these terms can come to denote slightly different things of course. It is especially the South Africa case-study where we will encounter various different official labels of what we study.

moment of introduction, it is important to highlight that we will use the more generalist label of 'Traditional Law and Governance'. Amongst all the labels that have been used in official and academic sources, this one attains the lowest common denominator of descriptive accuracy, accessibility across different scholarly (sub)disciplines, and a potential to withstand shorter terms fluctuations in academic fads and their preferred terms. One other benefit of using 'Traditional Law and Governance' as general label is that it has the potential to cover future comparative case-studies, in Africa and elsewhere.

1.2. Problem Statement, Objectives and Justification of Study

The identification and analysis of the different types of relationship indigenous traditional laws and traditional governance structures have with the laws and institutions in three case-studies is the main scholarly goal steering the thesis. Under this general research question, there are a number of more specific ones listed below. Chapter 3 is devoted entirely to relevant theoretical and methodological issues guiding the research. Since the research is framed in macro terms including political, legal, social, philosophical aspects of constitutions and constitutionalism, there are numerous strands of scholarly literature which need to be incorporated. Chapter 3 distils relevant theoretical and methodological from this diverse literature covered in the chapter before. To quickly list the five building blocks of the theoretical framework guiding the research: it is **1)** holistic, **2)** historically grounded, and **3)** cross-disciplinary; **4)** it pursues a mix of the theoretical and applied scholarly goals, **5)** and does this by couching the investigation in the terms of the study of comparative constitution and constitutionalism.

1.3. Research Questions

The main overarching research question concerns the macro relationship between indigenous constitutional orders on the one hand, as reflected in systems of traditional law and governance indigenous to the land, and the institutions, laws and constitutions of the modern state on the other hand. The macro angle is not only in terms of holistically framing comparative constitutions and constitutionalism to incorporate legal, political, and social factors but also macro in terms of covering the long term history and the geopolitical elements within.

The more specific research questions address traditional law and governance indigenous in the three select case-studies. What are the long term, macro consequences, of constitutional recognition continuously in place and uncontested across various political episodes and across the different area of the law? What are the long term macro consequences when this very relationship is ad hoc, partial, and non-linear? And finally, we ask what happens when traditional laws and governance structures indigenous to the land are excluded from the modern institutions, laws, and constitutions of a country? Our three case-studies help us address these specific research questions.

1.4. Methodology

It is the second part of Chapter 3 where the five building blocks listed in the Problem Statement above are employed to identify and expose the unique aspects of African constitutionalism, and the methods to study these. Detailed discussion on the relevant research methods appropriate for this topic – in

particular the use of *ideal-types* in the form of the three case-studies as heuristic benchmarks comparative scholarly inquiry are provided in that chapter.[2] Also included in the detailed discussion on methodology is the use of relevant primary and secondary sources.

1.5. The Scope of Study

The long-term historical approach spanning pre-colonial, colonial, and post-colonial time-periods defines the approach to the three case-studies. This means that at this moment of introduction, we have to unpack a notion this central to the thesis. The long-term approach to histography is originally labelled *longue durée* history and is associated with the French *Annales* school.[3] Rather than looking at specific personalities, incidents, and locations in history, the Annales school advocated attention to broader macro patterns which hold across different time-periods.[4] Given our scholarly interest in the macro patterns defining the relationship between the traditional and the modern across the different constitutional phases in each case-study, the necessity of this approach becomes clear. The methodology section in Chapter 3 discusses the relevance of this approach to the current research in more detail. What should be emphasised in this introductory overview however is that this is not a thesis on history; it is a thesis on comparative constitutions and constitutionalism which rests on the investigation into the *longue durée* history of the politics of law.

Immersion in the time-period painted by contemporary sources and archival evidence means that we can attain an even-handed and more nuanced understanding of the complex issues involved, which helps temper the human tendency to frame past things in current terms. The term for this is *presentism*; that is, the tendency to automatically project assumptions and interpretations from today onto the past without due consideration for the proper historical context of the time-period under investigation. What is more, regardless of how distasteful current sensibilities might regard the contents of what is investigated, we cannot superimpose our preferred present terms onto what exists in original historical documents. Chapter 3, sub-section 1.4. addresses the sensitive question of research on historical material containing terms that have since become either offensive, condescending, pejorative, or indeed, irrelevant. In the final Chapter 13, which looks back at the three case-studies and reflects on the lessons, insights, and observations they contain, we take a final stock of terminology matters.

1.6. The Literature Review

The scholarly foundations on which the thesis build is wide-ranging, containing different strands of literature including: **i)** studies that focus on traditional forms of law and governance in Africa; **ii)** different theoretical approaches to comparative (indigenous) law and governance; **iii)** political and historical studies on each of three case-studies; and **iv)** the methodological aspects of cross-

[2] In addition to the label of 'ideal types' (*Idealtypus*), the German Sociologist Max Weber who had developed this approach also used the phrase 'mental images' (*Gedankenbilder*) as another label for these heuristic devices. Weber, Max (1949) [1904], "Objectivity in Social Science and Social Policy" in E. A. Shils and H. A. Finch (ed. and trans.), *The Methodology of the Social Sciences*, New York: Free Press, p. 90.

[3] The French term 'longue durée' means long duration / long term. The label 'Annales' associated with this approach derives from the journal which came to be the main venue for this approach to histography.

[4] Braudel, Fernand (1958), "Histoire et sciences sociales : La longue durée", *Annales, Économies, Sociétés, Civilisations*, Vol. 13, No. 4, pp. 725–53.

disciplinary case-study research. The reach cuts across disciplinary divides, theoretical approaches, methodological preferences, applied concerns, geography, and time; but as mentioned earlier, it is constitutions and constitutionalism which holds the separate strands of literature of the thesis together. Different schools within legal studies, such as Sociology of Law, Legal Realism, Legal Anthropology, Historical Jurisprudence, Law and Society, Socio-Legal Studies, Conflict of Law, Legal Pluralism, and Law in Context, are all covered to the extent of their relevance and applicability to the constitutional study of traditional law and governance.

The next chapter is devoted to a review of this wide and varied scholarly literature, organised under 10 separate sub-headings and covering the historical period starting from the colonial era to the present. The main reason why the thesis devotes an entire chapter to these various different strands of scholarly literature is the quest to construct a cross-disciplinary, integrated, and holistic framework appropriate for the study of non-Western constitutions and constitutionalism – here, for our three case-studies, but also as the foundation for future comparative studies in other parts of the world. The uncodified, unrecognised, and unofficial workings of indigenous law and governance cannot be captured if one delimits the focus to the formal laws of one national jurisdiction at one given time. It is, thus, not the particular formal designation of the laws and governance structures we focus on, but their workings and functions. Sections 2.2. of Chapter 3 lays out in more detail the components of this integrated framework of analysis for non-Western constitutionalism.

1.7. Organisation of the Chapters

This introduction, the following literature review chapter, and Chapter 3 on theory and methodology constitute the first part of the thesis. These three chapters are then followed by three separate case-studies, all comprised of three chapters each. The first chapter of each case-study provides a general overview of the history of the politics of law in the country under study. The second chapter of each case-study focuses on the traditional laws and traditional structures of governance indigenous to the select ethno-linguistic community. It is in the third chapter of each case-study where we trace the *longue durée* relationship between traditional law and governance and the modern state and its laws. While each case-study concludes with its own observations, the final Chapter 13 directs the spotlight on the lessons and insights for the comparative study of constitutions and constitutionalism.

PART II

2. CONSTITUTIONS AND CONSTITUTIONALISM

In the recent three decades following the collapse of the communist Eastern Bloc and the victory of the West's liberal capitalist democratic political model, the international understanding of constitutions and constitutionalism have increasingly embraced the Western variant as the universal benchmark for evaluating other systems of law and governance. The long history of constitutions and constitutionalism however contain many non-Western cases where, instead of the rights and responsibilities of the individual, a more group-oriented variant of constitutionalism with home-grown versions of checks-and-balances and divisions-of-powers had historically been more common.

The end of the Cold War at the time had led some to hail "the end of history", meaning that, with the defeat of communism, there no longer was an alternative to the liberal capitalist democratic Western model: "That is, the end-point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government".[5] The former communist countries of Eastern Europe one after another ended up with similar new constitutions modelled on the West. These all contained detailed provisions on executive, legislative, and judicial powers; clauses on the protection of minorities; and legal guarantees of individual human rights. Along the way, the rich, complex, and varied history of constitutions and constitutionalism was relegated to the peripheries of academia; and subsequently, came to be viewed as a topic of interest only to specialist historians.

It is time we have to challenge this one-size-fits-all approach to constitutions. The euphoria of Western triumphalism has faded since its heyday of the 1990s. What we now need is not the end but the re-embrace of history. The restoration of the heterogeneous history of the politics of law to current scholarly debates and discussions on constitutionalism is not an exercise in historical excavation with no relevance or applicability to the present and future of constitutionalism. There are many potential applied benefits which we will revisit in the final chapter, but the biggest such benefit is the sense of legitimacy for homegrowns variants of constitutions which might deviate from the seemingly universal Western benchmarks. The incorporation of non-Western case-studies to the scholarly literature can empower homegrown forms of law and governance and help them occupy a legitimate place next to the received modern constitutions modelled along the West.

It is for this reason that we should broaden the study of constitutions and constitutionalism; first, through comparisons across continents, regions, and countries; and secondly through comparisons across time. At the end of the day, as its etymological origins attest, the constitution is indeed the foundations of what constitutes a polity. It enumerates the prerogatives of the different constituent bodies of this polity. It can be one single Basic Law or a combination of foundational documents, principles, and precedents. Framing comparative constitutions and constitutionalism in a way that does justice to its heterogeneous history makes the incorporation of traditional systems of law and governance indigenous to Africa into the scholarly discussions and debates easier.

2.1. A History of Constitutions and Constitutionalism

In its earliest guises laws and forms of governance were unwritten in all parts of the world, and in every human-polity. From early primitive hunter-gatherer societies to sedentary agrarian ones, there were of course established and structures ways of doing things. These various forms of law and governance constituted the foundations of every social organisation.

Two Mesopotamian civilisations were the first ones to record the various laws which regulated the relations among the social groups constituting their polities. Two fragments of Sumerian tablets dating

[5] Fukuyama, Francis (1989), "The End of History", *The National Interest*, No. 16, p. 4. The article was later expanded into a book: Fukuyama, Francis (1992), *The End of History and the Last Man*, New York: The Free Press.

back to the 21st century BC discovered in present-day Turkey are the earliest known such laws.[6] A more complete collection of recorded laws of a polity date to three centuries after the Sumerian ones and come from the Babylonians spanning the territories of present-day Turkey, Syria, and Iraq. It is for this reason that the Babylonian King Hammurabi is often credited with being the first political leader who brought the various forms of customary law practiced in the kingdom together into written form in the 18th century BC.[7]

In the two millennia since the Sumerian tablets, written compilations of the laws of other polities were put together various parts of the world. Yet, perhaps because of the unbroken historical link Christianity forms between the ancient times and the present, the literature on constitutions and constitutionalism usually takes Roman Law as the first written laws of human history. During the time of Emperor Justinian, Rome undertook a comprehensive process of codifying the variety of customary and religious laws, jurisprudence, and legal precedents into a single set of laws was conducted in the eastern half of Rome in 6th century AD (the Emperor's name is derived from the Latin root of the word 'just'). What we nowadays call Roman Law has its origins in these very Justinian reforms.

Eastern Rome – also known as the Byzantine Empire – was an imperial amalgamation of a number of different ethnic groups, religions, governance systems, directly ruled provinces, vassal states, tributary tribes, and allies since it could not establish undisputed dominance the same way (western) Rome had done previously. After the Ottoman conquest of Byzantium, Roman Law was kept in effect for the Christian subjects of the Ottomans in the Balkans, the Middle East, and North Africa. In fact, Muslim Ottoman Turks continued with most of the intra-imperial constitutional set-up of Eastern Rome.[8]

During the medieval times when a modicum of political stability started to slowly replace the anarchy of the Dark Ages which had followed the fall of (western) Rome, there were various clerical attempts in France to compile, standardise, and codify the various customary laws practiced in different parts of the kingdom.[9] The *Ordonnance de Montils-les-Tours* of 1453 was the first complete, systematic, and comprehensive nation-wide compilation. Reports on local laws were drawn by the kingdom's bureaucrats, local nobility and clergy and sent to the capital Paris.[10] Here these were scrutinised and discussed by the *Parlement* (not a democratic parliament in the modern sense, but a venue for high-ranking feudal lords to express their views – derived from the French verb root *parler*, i.e. to speak). Eventually these local reports would arrive at the King's Privy Council for final revisions before being amalgamated into the uniform laws applicable throughout the kingdom.

[6] Both of Sumerian tablets are on display, as part of the permanent collection, at the Istanbul Archeological Museum, Istanbul, Turkey. Visited by author July 2018.

[7] A terra cota fragment of the Hammurabi Code is on display as part of the permanent collections, Ancient Orient Museum, Istanbul, Turkey. Visited by author July 2018.

[8] The complex intra-imperial constitution and the jurisdictional diversity of the Byzantine Empire, and its apparent continuation by the multi-faith, multi-ethnic Ottoman imperial successor await more scholarly attention from the field of comparative constitutional history.

[9] The reports of Beaumanoir, Pierre de Fontaines, and Jacques d'Ableiges are the relatively more comprehensive ones among numerous incomplete attempts at recording and codifying.

[10] For a more detailed overview of the codification process see, Vanderlinden, Jacques (1957) "The Recording of Customary Law in France during the Fifteenth and Sixteenth Centuries and the Recording of African Customary Law", *Journal of African Law*, Vol. 3, No. 3, pp. 165-175.

Others view the 1215 Magna Carta where British Lords were able to get their King, who was weakened and bankrupted by wars, to put in writing checks on his powers as the first modern constitution. But it was the various additions in the coming centuries which turned Magna Carta into a more comprehensive constitution on the separation of executive and judiciary (with the *Prohibitions del Roy* of 1607 establishing that the King could no longer be the judge in cases against the Crown), on due process (with *The Petition of Rights* of 1628), on unlawful imprisonment (with *The Habeas Corpus Act* of 1679), on the legislative prerogatives of the Parliament (with *The Bill of Rights* of 1689), and only later in the 19th century on the extension of political rights to non-nobility (with the three-phased *The Representation of the People Act* of 1832, 1867 and 1884).[11]

Now, we cannot do full justice to 4,000 years of constitutionalism in these few pages of course. But before we proceed to the discussion of home-grown varieties of constitutions and constitutionalism in Africa, it was necessary to quickly revisit the big, complex, and nuanced picture of the history of law and governance in a way that tempers the appearance of a simplified dichotomy of modern Western democratic constitutions enshrining individual human right versus unwritten traditional ones focusing on groups indigenous to Africa.

Our times are marked by the preponderance of modern written constitutions which regulate the rights and responsibilities of individual citizens uniformly. However, what the history of constitutions and constitutionalism contains was more group-oriented – and where legal differentiation across different social groups was in-built into the foundations of the polity. A collection of the unwritten customary laws and written religious ones regulated the various human relations within their polities, defined the various social groups constituting their polities, established the respective rights and obligations of commoners, aristocracy, clergy, merchants, soldiers, artisans, servants/slaves, and outsiders. Constitutions were the way polities defined the foundations of who they were.

2.2. The Meaning of 'Constitution'

The English and French use of the term is based on the Latin nominative *constitutionem* (derived the verb root *constituere*, i.e. to establish, to settle). In German-language, during the years preceding political unification, the German equivalent *Konstitution* was used for the collection documents, precedents, principles of jurisprudence in effect in the various German kingdoms, principalities, bishoprics, and city-states across Europe. Pan-German unification – firstly democratic and short-lived in 1848, later in 1871 imperial under the lead of the Prussian Crown – came with efforts to write a single and uniform constitution for the German nation similar to the French one. The term *Reichsverfassung* (a compound noun formed by noun *Reich*, empire, and the verb root *verfassen*, to put in writing/to finalise) was then adopted. During the Cold War division of Germany into the federal republic in the West and a socialist people's republic in the East, the western half opted for the term

[11] Albert Venn Dicey's influential *Introduction to the Study of the Law of the Constitution* traces the principle of 'rule of law' to the original Magna Carta of 1215. While his thoughtful unpacking of the component parts of Britain's unwritten constitution provides insights relevant to this day, the historical accuracy of his claim is perhaps more open to contestation. One has to of course place A.V. Dicey's work in its time: The publication of his work came at the zenith of British imperialism and during competition with other major powers for global influence. The publication of the book was also designed to coincide with the final phase of 1885's *The Representation of the People Act*. Dicey, Albert Venn (1885), *Introduction to the Study of the Law of the Constitution*, London: Macmillan.

Grundgesetz, basic law, highlighting the transitionary nature of the divide until reunification while the east continued with the word *Verfassung* derived from the verb to put in writing/to finalise.

The changing geopolitical and constitutional landscape in Europe defining the decades following the post-Napoleonic settlement at the Congress of Vienna in 1815 signed between the conservative monarchies who had defeated the French armies and their Republican ideology witnessed a lively scholarly debate on constitutions and constitutionalism often closely related to national and pan-European political concerns. The intellectual vibrancy came to an end with the outbreak of the First World War in 1914.

Chapter 2 we review in more detail two scholarly literatures from this time-period, i.e. Historical Jurisprudence in Britain and Sociology of Law (*Rechtsoziologie*) in mainland Europe, which have relevance to our study of indigenous law and governance in Africa. The study of constitutions and constitutionalism is inseparable from the historical context within which this takes place of course. As we trace the diverse historical antecedents of constitutions and constitutionalism in legal studies here, it necessary to look at three such authors before next chapter's literature review: Britain's Sir Henry Maine closely associated with the theoretical approach of Historical Jurisprudence; the Austrian legal scholar Eugen Ehrlich who wrote a number of books advocating a more society-based approach to constitutions and constitutionalism; and the German constitutional scholar Karl Friedrich von Savigny whose writings valorised homegrown versions of constitutionalism over adopted foreign ones.

In his various writings during early 20th century, Eugen Ehrlich developed the idea that the constitution of a polity rested on the combination of two related and complementary sources: firstly, the country's own past defined by its historical jurisprudence and precedents, and secondly what he regarded as the 'living law' which was based on the country's social foundations and represented the rules of conduct in practice.[12] What he was doing with these twin ideas was a challenge to legal positivist approaches which rested on the idea that formal written rules were the only legitimate source of law. His ideas resonate strongly within some of the discussions on indigenous constitutionalism we discuss in the next chapter. A few decades before Ehrlich, and perhaps without a similar degree of systematic and comprehensive reasoning, Friedrich von Savigny had laid down the foundations of this line of thinking. According to him, for the modern state to be effective, its system of law and governance had to reflect the homegrown social foundations. Von Savigny called this the popular/national spirit (*Volksgeist*). Like Ehrlich, we can see how the application of von Savigny's ideas to present debates on constitutionalism would support empowering indigenous forms of constitutionalism.[13]

The ideas of both Ehrlich and von Savigny remained at the scholarly level, but it was the British legal comparativist and historian, Sir Henry Maine who was able put his constitutional theory similar in spirit

[12] Ehrlich, Eugen (1913), *Grundlegung der Soziologie des Rechts*, Munich and Leipzig: Duncker and Humblot; Ehrlich, Eugene (1903), *Freie Rechtsfindung und freie Rechtswissenschaft*, Leipzig: Verlag von C. L. Hirschfeld; Ehrlich, Eugene (1918), *Die juristische Logik*, 2nd edn. Tübingen: Mohr Siebeck. For an English-language collection on Ehrlich's ideas, see Hertogh, Marc (ed) (2009), *Living Law, Reconsidering Eugen Ehrlich*, Oxford and Portland: Hart.

[13] This is an inference also made by Sanders in a piece published during apartheid years that has not received due scholarly attention. We devote a sub-section of the literature review chapter to apartheid era scholarship on indigenous law and governance. Sanders, AJGM (1987), "How Customary is African Customary Law", *Comparative and International Law Journal of Southern Africa*, Vol. 20, No. 3, pp. 405-10.

into real action.[14] As a colonial legal counsellor in India, Sir Henry had helped lay down the ideas that would officially sanction the recognition of local forms of law and governance under the imperial umbrella. According to Coel Kirkby, Maine was the intellectual source of what came to be known as the British colonial policy of indirect rule which was "created in India, transplanted to Africa".[15]

Up to this point in the discussion we painted a general background picture of the diverse historical antecedents of the concept of constitutionalism, but the concept indirect rule is directly applicable to the subject matter of the LLD project and will be covered in more detail in sub-section 4.2. later. What we should add to this general account however is that while Sir Henry was advocating the recognition of local forms of group rights and indigenous forms of constitutionalism, in Britain itself the constitutional heritage of collective rights of social groups was being replaced by a more individualist version of constitutionalism and representative politics.[16]

3. INDIGNEOUS CONSTITUTIONALISM AND BARRIERS TO ABSOLUTISM

There seems to be a pervasive *presentist* belief that chieftaincy in Sub-Saharan Africa in precolonial times was an arbitrary system of personal rule by a despotic hereditary chief. Section 1.2. in Chapter 3 on Theory and Methodology is devoted to directly addressing the risks of such ahistoricism in more theoretical terms. And the case-studies themselves go further in-depth into the precolonial history of the three ethnic communities under focus to ensure the analysis is firmly grounded in their respective histories. That being said, it is still imperative to quickly paint the background of indigenous constitutionalism during precolonial times as early as possible in the narrative before we proceed further with the analysis. The following three sub-sections highlight three general areas where *presentist* assumptions and interpretations must be tempered.

Put simply, traditional political office did not mean the exercise of arbitrary power since the chief was expected to conduct certain procedures in governance (frequently combined with ceremonial procedures), seek the opinion of elders and spiritual leaders, and consult the members of the community-at-large during public gatherings. What is more, in addition to adjudicating and settling disputes among individuals, a big part of indigenous law was also about keeping social peace. There was little that was arbitrary – there were established and structured ways of doing things respected and followed by all members of the community. Violation of these faced a variety of sanctions in a range of criticism, ostracism, opprobrium, fines, banishment, and physical punishment. For many traditional communities, there was a type of an indigenous system of checks-and-balances in place, with certain differences across ethno-linguistic communities as well as the tribal and clan components within. Notwithstanding the differences in their respective systems of law and governance across the continent, the ethnic communities of Africa often had both principled and practical limitations on the

[14] Maine, Henry James Sumner (1861) *Ancient Law, Its Connection with the Early History of Society and its Relation to Modern Ideas*, London: John Murray.

[15] Kirkby, Coel (2012), "Henry Maine and the Re-Constitutions of the British Empire: Review of Karuna Mantana, 2010, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton University Press", *Modern Law Review*, Vol 75, No. 4, p. 656.

[16] For a historical account of this process of gradual constitutional change see, Maitland, F. W. (1948), *The Constitutional History of England*, Cambridge: Cambridge University Press.

exercise of political, legislative, and judicial power. As T. Olawale Elias puts it "in the less organised African societies as well as in some organised ones, *processes* rather than *institutions* are the things upon which attention must be concentrated". [italics in original]." [17] Lord Hailey's 1951 Report *Native Administration in the British African Territories* provides a fuller description of the in-built barriers to absolutism in Africa's indigenous forms of law and governance:

> "African sentiment attaches special importance to the due observance of procedure by which all members of the community concerned are able to have some voice in determining issues which are of major interest to it. It is rare to find in British colonial Africa any instance in which the indigenous form of rule previously in force could be described as autocratic, and there are not many cases in which it could be described in a strict sense as authoritarian. It was a prevailing characteristic of the indigenous system of rule that whether power was vested in the hands of individual chiefs or of a ruling class, these had (unlike the absolutist regimes of a certain stage in European history) no machinery by the use of which they could enforce obedience to their orders". [18]

In his 1956 contribution to the pan-African *Restatement of African Law Project* (RALP) F.D. Holleman corroborates Lord's Hailey's observations in the following terms:[19]

> "To the Law and Regulations the *Rule of Chiefs and Headmen* is invariably of a *single-headed*, *autocratic* character, while as a matter of fact, in Bantu political life all regular authority of a chief is an authority of chief-in-council, which may vary from a casual and informal consultation with some chiefs of the other component groups of the major community on every-day matters, to a formal deliberation-in-council with all his co-chiefs, even together with the community assembled *in toto*, but it is never of a single-handed and autocratic nature" [italics in original].[20]

Taken together, these were all in-built barriers to absolutism which existed in various indigenous forms of constitutionalism across Sub-Saharan Africa. (Throughout history and across the continent there were of course instances when some chiefs in some tribes sought political domination and instances when they institutionalised such autocracy). There were also barriers to absolutism which emanated from the limitations of the powers the premodern state could project in the territories under its jurisdiction. Before the constitutional barriers covered in the sub-sections 4.2. and 4.3., we first start with the limits to governance in premodern Africa.

3.1. Limitations to Premodern Governance

[17] Elias, T. Olawale (1956), *The Nature of African Customary Law*, Manchester: Manchester University Press, p. 298.

[18] From Lord Hailey's 1951 Report *Native Administration in the British African Territories*, Pt. IV, page 2, London: HMSO. His more influential 1938 An African Survey is covered in section 2.1. of Chapter 2. The excerpt above is quoted in Elias, T. Olawale (1956), *The Nature of African Customary Law*, Manchester: Manchester University Press, p. 21.

[19] Section 2.6. of Chapter 2 discusses the *Restatement of African Law Project* (RALP) in detail.

[20] Holleman, F. D. (1956), "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique : Symposium-Colloque Amsterdam 1955*, Leiden: Universitaire Pers Leiden, pp. 243.

The first *presentist* assumption we will address concerns the very capacity to project governance in premodern times – in Africa as well as other parts of the world. Sub-section 4.3. below covers the limitations to the powers colonial state. While enjoying technological, economic, and military superiority over indigenous chieftaincies, kingdoms, confederacies, and alliances, the reach and range of colonial governance was limited due shortages of bureaucratic and military personnel; deficiencies in communication and transportation networks; and shortages in supplies in colonial outposts – especially those that were far from ports with maritime links to Europe.

Indigenous leaders were playing with home advantage, but their respective limitations were about the level specialisation in political, legal, and economic organisation of their polities and the attending deficiencies in what we might today call state capacity. Some African states were more advanced in state capacity than others; notably the Asante Kingdom in present-day Ghana, the Buganda Kingdom in present-day Uganda, the Kingdom of Dahomey with territories spanning the most of present-day Francophone West Africa, the Abyssinian Empire in present-day Ethiopia and Eritrea, and the Emirate of Kano in present-day northern Nigeria.

In comparison to the Western powers who were in the process of colonising the African continent, indigenous forms of governance were still quite behind. Most lacked a professional fulltime state bureaucracy specialising in different aspects of governance. Many did not have standing armies, but instead relied on men of fighting age who would join a citizen/tribal militia under their indigenous leaders only when the need arose. Besides, there were no systematic forms of tax extraction powers to pay for the state infrastructure and the salaries of such bureaucrats and soldiers in any case. Weaker communication and transportation networks prevented the projection of undisputed governance to all corners of the territory. Even if a paramount chief or king held despotic leanings, he would lack to the governance capacity to turn this into absolutism. In addition to these practical limitations, there were also constitutional limits to absolutism in governance.

3.2. Local Forms of Checks and Balances

There were two general categories of limits to absolutism in African governance. The first was within the seat of governance at the centre. The chief's powers were held in check by other indigenous offices of leadership. He – on rare occasions, she – had to govern through what might be called an executive council composed of advisers, elders, religious leaders, and hereditary holy men and women. There was often a separate and temporary office of military leadership. At meetings of the communal assembly the chief and the council answered the concerns of the members of the tribe. The same assembly would also often be involved in the dispensation of justice as settlement and prevention of intra-tribal conflict. The second limit to absolutism was territorial. The powers of the centre were territorially balanced through regional tribal branches of the ethnic community and sometimes smaller tributary and vassal communities outside the tribe.

Our case-study on South Africa contains numerous passages from various historical documents from the 19th century, but here let us pick one of the earliest observations on indigenous law. Reverend H. H. Dugmore, whose mission in Mount Coke was situated on the uncharted eastern frontier borderlands of the Cape Colony, had put to pen his observations on local law and governance which were then published during the course of 1846-47 in the journal *Christian Watchmen*. The Dugmore

papers were later included in Colonel Maclean's 1858 *Compendium of Kafir Laws and Custom*.[21] (The term, which nowadays is a racial slur in South Africa, was officially used at the time as a designation for the various Xhosa tribes inhabiting the eastern frontiers of the Cape Colony and further east beyond. And the word 'Xhosa' – transliterated *Xosa* at the time – was the name used for only one of the existing tribes at the time and during early19th century it had not yet become the designation for the entire ethnic community).

Reverend Dugmore had observed the two limitations on absolutism in governance we highlighted above: "In the case of Kafir chief, the principal checks to the despotic inclinations which the possession of power always induces are, first, the division of the tribes, and secondly the existence of a very influential council".[22] His observations note the local forms of check and balances in the borderlands and beyond before colonial intrusion into the indigenous forms of law and governance:

> "It is common to talk of the despotism of Kafir chiefs. If by the use of this term it is intended to be implied that the will of the chief is the sole law of the nation, it is incorrect… The government of the Amaxosa and Abatembu tribes is a sort of mixture of Patriarchism and Feudalism".[23]

Across all constituent tribes of the Xhosa, the main indigenous check on chiefly absolutism was the advisory council, the *Amapakati* – literally the "middle ones". The Amapakati played a mediating influence on the power of the chief as these were commoners who had made a name for themselves for their skills in debates, their memory of customary law, knowledge of tribal history, judgement, and wisdom. Especially in cases when there was a young and inexperienced chief, these counsellors could end up ensuring constitutional continuity.

The indigenous forms of checks and balances were not identical across the continent of course. Reverend Dugmore notes that, compared to the various Xhosa tribes, the Basotho and Zulu had more hierarchical social systems with strong chiefs.[24] The lands then officially known as Kaffraria lacked a centralised political system akin to neighbouring King Shaka of the Zulus to their north-east or King Moeshoehoe of the Basothos to the north – which had their own local forms of checks-and-balances. But for the inter-tribal loose political union amongst the Xhosa tribes, which would be best be described as a confederacy in present terms, the political, legal, executive, and religious division of power at the seat off governance was combined with a territorial one among the various constituent tribes. The internal political diversity, and the long history of various attempt of political interference which often contributed to this very diversity, render the resilience of Xhosa laws and governance structures an interesting comparative case-study to examine. What is more, the amaXhosa were to be

---

[21] Colonel Maclean (ed.) (1858) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers.

[22] Reverend H. H. Dugmore's papers, in Colonel Maclean (ed.) (1968) [1858], A Compendium of Kafir Laws and Customs, London: Frank Cass, p. 24.

[23] Reverend H. H. Dugmore's papers, in Colonel Maclean (ed.) (1866) [1858], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers, p.23.

[24] Reverend H. H. Dugmore's papers, in Colonel Maclean (ed.) (1866) [1858], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers, p.23.

the first in South Africa to get their ethnic homeland under apartheid, and the first to declare nominal independence.

Our case-study on Ethiopia covering the Oromo show a more pronounced variant of the territorial limit on absolutism to the extent that there is a little political power which rested in central institutions of their tribal confederacy. Although the overwhelming majority of the Oromo are now sedentary, their nomadic/ pastoralist history defined by geographic mobility has a key role in defining their indigenous system of law and governance.

One additional territorial limit to absolutism in African governance was the historic underpopulation of the continent, and how numbers meant economic strength, workforce, tributes/taxes, and militia capacity. All three case-studies unpack how this impacted their early histories, but at this point we should highlight how the availability of the option of splitting from badly governed tribes and moving away with one's extended family and allies was an additional check on bad governance.

These limits two absolutism we identify, i.e. one at the centre and one territorial, are for heuristic purposes in scholarly analysis. Throughout the continent, and over their respective history, ethnic communities would experience variation both in the principles and practice of law and governance. Like political history everywhere in the world, reality was marked by more complexity and ambiguity of course; and personalities mattered – whether in the form of compromise-inclined and stability-seeking chiefs versus those with expansionist adventurist inclinations; capable and reliable advisors seeking the good of the entire tribe versus wily self-centred ones plotting with enemies. But ours is not an in-depth history of one single tribe. Instead we seek comparative generalisable patterns that apply across. And a degree of complexity and ambiguity, combined with an interconnectedness in both the principles and practice of law and governance, is indeed one characteristic of African indigenous constitutionalism. The Legal Anthropologist Max Gluckman's writings on the Barotse give us a glimpse of this complex, and often ambiguous, interconnectedness.

The Barotse ethnic community of the historic Lozi Kingdom in present-day southern Zambia have been the subject of Gluckman's research into indigenous African constitutionalism. One noteworthy political office in the indigenous system is the chief councillor, Ngambela. Instead of presenting the Ngambela as an esoteric tribal title among the Barotse of southern Zambia, Max Gluckman portrays it as a component part of the indigenous system of constitutionalism. The office of the Ngambela acts as a check on the Barotse King's executive powers: "The Ngambela seems to be at once an executant and a thwarter or softener of the will of his principal. With the Barotse, this ambivalence is consciously acknowledged and seems natural".[25] (We should also note that such complexity and ambiguity in separation of powers between the *Trias Politica* have indeed also been present in the history of the constitutionalism in the West).

3.3. From *Trias Politica* to Indigenous *Multus Politica*

[25] Chapter 2's section 2.5 covers Max Gluckman and his colleagues' contributions to the study of indigenous systems of law and governance in details. Gluckman, Max (1965). *The Ideas in Barotse Jurisprudence*, New Haven and London: Yale University Press, p. xi.

From the Latin word for a 'triple/triad', the term *Trias Politica* is used for the legislative, executive, and judicial powers in modern polities. The separation of powers between these functions is one of the core pillars of modern constitutionalism. Its practice, even in some of the advanced liberal democracies of the West, does not always conform to the abstract constitutional principle however. For example, in the United Kingdom the executive, i.e. the government is in fact formed from within the lower chamber of legislative branch, i.e. the House of Commons. Before the 19th century constitutional reforms expanding popular franchise and representation, what was deemed the government used to be composed of the Crown's appointed officers and members of the House of Lords selected by their peers. Historically, the highest office of the judiciary was the Privy Council, formed from within the ranks of the unelected upper chamber of the legislative branch, the House of Lords. In France, the executive branch in the form of Presidency is separate from the legislative branch, that is, the National Assembly where laws are made, but the executive appoints the members of the judiciary. In sum, the practice and principle can diverge; yet the core idea remains in place: that is, a separation of powers between constituent elements of law and governance prevents absolutism. Consequently, one should infer that it is not form and appearance of *Trias Politica* but the function of separate powers – whatever they might be at the local level – against arbitrary rule.

Before the arrival of colonialism, in various forms African indigenous constitutionalism also contained a separation of powers but these very powers were different from the Western *Trias Politica* which has since become the only international benchmark for evaluating and judging non-Western political systems. The pre-modernisation period of our three case-studies show different indigenous versions of separation of powers. The Batswana and the amaXhosa have some similarities in this regard; perhaps reflecting the fact that both are part of the Nguni southern Bantu ethno-linguistic family and thus share some general cultural traits. As part of the Cushitic ethno-linguistic family of East Africa, the Oromo share little with their Nguni cousins in the south of the continent. Chapters 5, 8, and 11 are precisely on such indigenous forms of constitutionalism, but at this point, we should briefly note that religious and military powers were often separate from that of the office of political leadership, and these were inherently structured against monopolisation of governance power.

Notwithstanding the interconnected nature of most indigenous forms of *Trias Politica*, perhaps the term is best replaced with the nominative form of the Latin word 'multiple'. It was the African *Multus Politica* which held the leaders to account. As a South African scholar of indigenous law, A.C. Myburgh, puts it: "That the chief cannot make laws, fulfil judicial functions, or call an assembly of the people without his council's cooperation are rules of public law".[26] Law and governance was not monopolised in the personal powers of the paramount chief or king.

The representative element in modern polities, epitomised by elections of the executive in presidential systems and the legislative branch in parliamentary systems, at first glance appears to be completely absent in indigenous systems of law and governance. Yet, once we move beyond the form and appearance and reflect on the function expression of popular opinion and representation, we see that there are indeed various channels through which the representative element was expressed.

[26] Myburgh, A.C. (1985), *Papers on Indigenous Law in Southern Africa*, Pretoria: J. L. van Shaik, p. 2.

"A chief becomes a chief through his people" (*kgosi ke kgosi ka batho*) is the expression of this phenomenon in Setswana. Put simply, lacking the infrastructure and capacity required for despotism, traditional leaders could only govern through popular support and elite consensus. The lack of Western notions of separation of powers does not mean power was arbitrary. An example of this was noted in the context of Shona law in Southern Rhodesia (present-day Zimbabwe): "The chief, as overall judge, plays an essentially passive role in these proceedings; indeed his judgement should conform with the opinion expressed by the community, as far as possible, otherwise he will gain a reputation for arbitrariness".[27]

Across the continent leaders needed popular support in order to govern effectively; there were advisors and elders who would remind others important episodes from tribal history to steer governance in the path of constitutional continuity; there were counsellors with extensive knowledge of indigenous laws and precedents to ensure popular approval of governance decisions; in addition to the paramount chief and king, there were other offices of indigenous leadership, intermediaries, and subchiefs – be it at the centre or in the regions; there were religious leaders who would provide spiritual and ceremonial approval to constitutional continuity and who also had the power withhold such approval in cases where there was a violation of the indigenous constitution; and finally the people at-large had an innate first-hand knowledge of the procedures and ways of doing things were established and would disapprove and even oppose transgressions by those holding leadership offices. As we stated in the start to this discussion on indigenous constitutionalism, there was little that was arbitrary in all this.

4. THE COLONIAL STATE AND CONSTITUTIONALISM

The second part of the general historical context painting the background for the coming investigation is of course the nature of the colonial state and imperial constitutionalism with which the varieties of indigenous constitutionalism we have sketched above would eventually come into contact. And just like section 3 above there are three component parts to this overview.

An important historical factor we have to note is that colonialism was not a constant during the course of the two centuries we are covering. The very character of colonialism and its practice would change course during the 19th century moving from a partial and uneven intrusion along the coastal and more easily accessible parts of the continent carried out by a diverse set of private and official players into a more comprehensive state-driven occupation of all corners of the continent. It is also important to note that even as the entire continent was being completely parcelled out among colonial powers toward the end of that fateful century, internal jurisdictional complexity still defined colonial constitutionalism – particularly that of the British.[28] And what came to be known as British colonial policy of indirect rule – briefly mentioned in the introduction earlier and expanded below under sub-section 4.2. – played a central role in the degree of recognition granted to indigenous forms of law

[27] "From An Anthropological Approach to Bantu Law (with special reference to Shona law)", *Rhodes-Livingstone Journal*, x , 3 and 20, reproduced in Bennett, T. W. and T Vermeulen (1980), "Codification of Customary Law", Vol. 24, No. 2, *Journal of African Law*, p. 216.

[28] For a more comparative historical overview, see Benton, Lauren (2006), "Constitutions and Empires", *Law and Social Inquiry* Vol. 31, No. 1, pp. 177–198.

and governance. This present section on the colonial state and constitutionalism concludes with sub-section 4.3. reminding us that, despite the technological and military superiority over indigenous states, colonialists also faced certain limitations to projecting power.

4.1. The Empire and Jurisdictional Complexity

The historical course impacting the fate of indigenous law and governance in two our case-studies, Botswana and South Africa, is inseparable from the internal dynamics of British colonialism. Colonialism has adversely affected all of course, the but the specifics of the how and why differ. As the patchwork of British coastal colonies, territories under private commercial companies, allies, dependencies, treaty ports, and leased harbours were replaced by the unifying political authority of the Empire, so did the nature and the appearance of African constitutionalism change. But under the new comprehensive form of colonial constitutionalism there were still important jurisdictional differences between Colonies under London's rule, Dominions where settler communities had representative government, and Protectorates under the system of indirect rule where precolonial kingdoms, paramount chieftaincies, and emirates held a degree of internal autonomy under the imperial constitutional umbrella mostly unavailable to other indigenous communities in the Colonies and Dominions. Our case-study on Botswana shows how much the Protectorate status worked in favour of indigenous constitutionalism. And the case-study on South Africa shows how the status of Xhosa law and governance fluctuated with the changes in jurisdictional status under colonialism. For the Ethiopian case-study, we see a somewhat parallel pattern as Oromia was incorporated into the Abyssinian Empire during Ethiopia's expansion in the late 19th century.

John Darwin labels what the British established around the globe an 'unfinished empire' reflecting the confluence of competing and contradictory colonial goals of private commercial companies, settlers, missionaries, and imperial bureaucrats. "The result was an empire of hybrid components, conflicting traditions, and unsettled boundaries between races and peoples: a source of constant unease as well as extraordinary energy".[29] This was not only because of what took place in the overseas territories, but back in London the foundational principles of the Empire were also being contested. As Darwin puts it, "from its earliest beginnings, [the idea of empire in Britain] was an uneasy and sometimes contradictory amalgam of territorial ambition, administrative practice, legal procedure and cultural pretensions".[30] In an outstanding eight volume collection based on historical documents from imperial history, Frederick Madden exposes the absence of a standard colonial blueprint for governing the overseas territories of the Empire. Based on eight volumes of documents, Madden establishes:

> "[T]he forms of colonial government, the constitutional arrangements and framework, were largely intuitive and unplanned. Precedents were adopted and adapted… But the basic problem of imperial governance to establish law and order at a distance was always how to balance metropolitan supervision with frontier autonomy".[31]

[29] John Darwin (2012), *Unfinished Empire: The Global Expansion of Britain*, London: Penguin, p. xii.
[30] John Darwin (2012), *Unfinished Empire: The Global Expansion of Britain*, London: Penguin, p. 13.
[31] Madden, Frederick (ed.) (2000), *The End of Empire: Dependencies since 1948. Part I: The West Indies, British Honduras, Hong Kong, Fiji, Cyprus, Gibraltar and the Falklands, Select Documents on the Constitutional History of the British Empire and the Commonwealth*, Volume VIII, Westport, Connecticut: Greenwood Press, p. xvi.

As a result, the intra-imperial constitution of the empire became a heterogenous amalgamation of exclusive and cross-cutting jurisdictions, privileges, and prerogatives. What is more, different branches of the imperial government – in particular, the Colonial Office and Dominion Office – had a complex and ambiguous relationship of competition and collaboration where economic interests and geopolitical concerns interacted.

With the exception of France, which from its earliest forays into the continent established direct rule in its Sub-Saharan African colonies, other colonial powers went through similar steps.[32] Germany for example first established an indirect relationship in Tanganyika (the mainland part of present-day Tanzania) through the treaties German East Africa Company signed with locals, but this was followed by direct rule. John Iliffe characterises the colonial developments towards the end of the 19th century as the "transition from informal European influence to formal European rule".[33] As the entire continent was divided between Western powers, what would eventually become present-day borders were demarcated leaving no corner of Sub-Saharan Africa – with the exception of Ethiopia – unclaimed by a colonial power even when they had yet no physical presence in the lands they were adding to their overseas empires in these treaties.

One prevalent *presentist* view is that Sub-Saharan Africa's borders are arbitrary creations by colonial powers, and African states and ethnic communities are thus artificial constructs. The historical truth needs a little more nuance and fine-tuning. This view indeed holds for most instances when borders were drawn as a result of inter-state treaties between major powers, but not to instances of demarcating intra-imperial borders. It is also perhaps worth noting that artificial borders emerging from inter-state treaties were not uncommon in other parts of the world as well, including in Europe as the histories of Andorra, Belgium, Liechtenstein, Luxembourg, and Switzerland attest.

History shows us that whenever borders were drawn as the outcome of treaties between major powers, geopolitical concerns and inter-state bargaining did indeed create such artificiality. The straight line from the Indian Ocean coast to Lake Victoria which constitutes the border between present-day Tanzania and Kenya is indeed the result of power politics and bargaining between Britain (which ruled mainland Kenya as a colony and had the Emirate of Zanzibar with its coastal lands and the islands of Pemba and Unguja as its Protectorate) and Germany (which had taken over the political control of Tanganyika from the German East Africa Company). Similarly, the cartographic anomaly of the Caprivi Strip protruding eastward from the northeast tip of present-day Namibia was the result of bargaining between Germany and Britain without any concern for the communities inhabiting the region and the precolonial Kingdom of the Lozi which traditionally controlled this part of south-central Africa parcelled out between the Portuguese, Belgians, Germans, and British.

---

[32] French colonial policy was defined by a preference for unmediated direct involvement which sets it apart from the British policy of 'indirect rule' covered in the next sub-section For France's colonial policies towards indigeneity in French central Africa, see Jewsiewicki, Bogumil (1999), **"**Afrique centrale francophone entre au XXIe siècle: Citoyens et États, nations, régions face au monde**"**, *Canadian Journal of African Studies*, Vol. 33, No. 2-3, pp. 221-30; L.C.B. Gower (1967), *Independent Africa: The Challenge to the Legal Profession*, Cambridge MA: Harvard University Press, p. 8.

[33] Iliffe, John (1969), *Tanganyika under German Rule 1905-1912*, Cambridge: Cambridge University Press, p. 5. This was coupled with policies to dismantle chieftaincy and the traditional system; see Margaret Bates (1962), "Tanganyika", in Gwendolen M. Carter (ed.) (1962), *African One-Party States*, Ithaca: Cornell University Press, pp. 402-3.

Notwithstanding such artificiality of border demarcations between the respective colonial spheres of Western powers, it is important to note that, within colonial spheres attention was paid to ensure jurisdictional lines corresponded to existing territorial divides between indigenous the ethnic communities. Bureaucrats in fact tried not to split indigenous peoples across intra-imperial borders, and not divide the tribes.[34] This is of course not due to a principled respect to the locals, but due to intra-imperial pragmatic concerns partly emanating from the system of indirect rule. The more compact the tribe, the paramount chieftaincy, the kingdom, the emirate, the easier it was to outsource local governance to a co-opted traditional leader who could command the loyalty of his people. As the history of Botswana shows in Chapter 4, the concerns of imperial bureaucrats for such borders would often clash with the interests of private commercial companies and the annexationist impulses of settler-ruled Dominions.

4.2. Indirect Rule

We will see the British colonial policy of indirect rule in action in our case-studies on Botswana and South Africa. Earlier on in this chapter we had also discussed how the ideas of Sir Henry Maine had given the policy its scholarly foundations. We should note however that even before Sir Henry there were *avant-le lettre* versions of this pragmatic path to imperial governance where pre-imperial indigenous structures were granted internal autonomy in the British Empire. Lord Thomas Macaulay's 1833 House of Commons speech on the Government of India underscores how the policy was borne out of necessity and not a necessarily the result of principled ideals: "Our principle is simply this: uniformity where you can have it, diversity where you must have it, but in all cases certainty".[35] We should note that such constitutional uniformity was beyond reach even in the component parts of the empire close to home as Ireland, Scotland and Wales retained their intra-imperial constitutional distinctiveness.

It is the Nigerian Protectorates under the governorship of Lord Frederick Lugard where the practice of indirect rule gained official status as a part of the repertoire of intra-imperial constitutionalism in Africa. In many ways, Lord Lugard's life embodied the British Empire of the time. Frederick Lugard was born in India where Sir Henry Maine himself had worked as a colonial legal counsellor and where he had developed the scholarly foundations for turning indirect rule into a more formal constitutional tool for intra-imperial governance. After spending the early years of his life in India, Lugard was then educated in England and had served in various parts of the Empire, first as a military officer, and then as an imperial bureaucrat, eventually becoming the Governor General of the Nigerian Protectorates.

Lord Lugard was among the more scholarly-inclined imperial bureaucrats and wrote about what he called the 'dual mandate' underlying this constitutional arrangement.[36] According to him, part of this duality was the notion of society-based constitutional legitimacy representing a local mandate

[34] For a more detailed account of colonial borders seeking to retain the compactness of peoples and tribes, see Elliott Green (2012), "Explaining African Ethnic Diversity", *International Political Science Review*, Vol. 34, No. 3, pp. 245-6.

[35] July 10, 1833, House of Commons, reproduced in G. M. Young (ed.) (1935), *Selected Speeches*, quoted in Julius Lewin (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, p. 112.

[36] Lugard, Frederick (1922), *The Dual Mandate: British in Tropical Africa*, Edinburgh: W Blackwood.

(reflecting the line of thinking laid down by Sir Henry Maine, Karl Friedrich von Savigny and Eugen Ehrlich we discussed in sub-section 1.2. earlier). This was combined with a top-down form of constitutional mandate deriving its legitimacy from the Empire. Lord Lugard argued that it was this very dual mandate which brought legitimacy to indirect rule.

Since then much has been written about the British colonial policy of indirect rule whereby day-to-day governance remained in the hands of indigenous political authorities, be it kings, princes, paramount chiefs, emirs, and sultans.[37] The pragmatic underpinnings of the policy have sometimes been overlooked by those who came after Lugard. A scholar whose work covered the manner in which the policy was implemented in various parts of southern Africa, T.W. Bennett, notes that "it was for the most prosaic of reasons that the colonial governments felt constrained to recognise the law of the people they had subjugated".[38] But in the geopolitical context of the changes following the end of the World War II as home rule appeared on the horizon for African colonies, the policy was presented in somewhat more idealistic terms putting British colonialism on a comparative footing with other colonial powers suggesting more of a principled concern for local forms of constitutionalism. But history tells us otherwise:

Indirect rule was invariably the most flexible and cost-effective way of governance for an empire that was short on manpower and resources to subjugate large swathes of territory, but one which could easily dispatch a gunboat to punish the disloyal kings and sultans if need be. Lord Lugard himself had penned in a political memoranda that "if a native chief has lost prestige and influence to such a degree that he has to appeal to government to enforce the orders, he becomes not merely useless but a source of weakness to the administration".[39] Put simply, colonialism needed to outsource day-to-day governance to a functioning system of indigenous law and governance. This was partly because as an empire built on naval power, Britain did not have large land army at its disposal in its overseas territories. And it was partly because, even the most advanced states of the time, both at home and abroad in their overseas colonies, still fell short of the reach and range of governance capacity available to states of the 21st century.

4.3. Limitations to Colonial Governance

Compared to the current powers at the disposal of modern states, historically the capacity to project law and governance with a reach and range covering all territorial corners of one's jurisdiction was a lot more limited than what we have come to accept and experience nowadays.

Despite having superiority over indigenous states in terms of gunpowder, gunboats, standing armies, professional bureaucrats, tax extraction abilities, economic specialisation, infrastructural

[37] One of the most erudite observers of indirect rule in the African context has been Michael Crowder. Amongst a number of his publications on this, the following two are the most comprehensive: Crowder, Michael (1964), "Indirect Rule: French and British Style", *Africa: Journal of the International African Institute*, Vol. 34, No.3, pp.197-205; Crowder, Michael (1968), *West Africa under Colonial Rule,* London

[38] Bennett, T. W. (1985), *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta and Co, p. 39.

[39] Quoted in A. M. Yakubu (1993), "The Demise of Indirect Rule in the Emirates of Northern Nigeria", in Terence Ranger and Olufemi Vaughan (eds), *Legitimacy and the State in Twentieth Century: Essays in Honour of A.H.M. Kirk Greene*, Basingstoke: Palgrave, pp. 162-190.

development, communication and transportation means, the colonial powers of the 19th century could not project state power in a manner with which we are familiar today. Lauren Benton's study of the jurisdictional limits of the colonial state shows how what was claimed on maps and reality did not always coincide. Militarily accessible coastal regions, and geographically accessible flatlands and valleys, were where the colonialist state was able to establish its uncontested authority.[40] This is a historical insight James C. Scott echoes in his book *Against the Grain: a Deep History of the Earliest States* which traces this pattern back to the earliest versions of political governance. Throughout the world, state authority in the form of agrarian kingdoms flourished in the agriculturally productive, geographically accessible wet flatlands which were easy to politically dominate and militarily control. Swamps, marshes, mangrove coasts, deserts, and mountains were harder to bring under similar sort of permanent state control.[41]

Our case-study on Ethiopia shows how these dynamics also defined the Abyssinian Empire's southerly expansion into Oromia during the course of 19th century. Garrison towns inhabited by imperial bureaucrats, military personnel, and settlers from the empire's highland heartlands in the north dotted the more accessible regions, while elsewhere the presence of state authority was not permanent. But despite these limitations, there still was a land link between the imperial centre and the adjacent Oromo lands. But for the overseas colonies of the British Empire, the absence of such a direct link was a further impediment to the projection of state power. In addition to creating limitations on the reach and range of imperial authority, it is worth noting that this also brought a degree of local policy autonomy to the imperial bureaucrats governing the remote corners of the empire. We will see instances of this in the Botswana case-study. All this had direct consequences for traditional law and governance of course. The limitations to the projection of state power during colonialism and the subsequent need recognise existing local forms of law and governance have had direct consequences or indigenous constitutionalism.

5. CONCLUSION

In this first chapter to the thesis, we wanted to give a general picture of what the thesis seeks to do. Section 1 gave an overview of the main scholarly components of the thesis, including the background to the study, its scope, a note on the various strands of scholarly literature which forms its foundations, and the theory and methodology guiding the research. We looked at the way the coming chapters are organised and provided summaries of what the three case-studies tell us.

As a thesis on comparative constitutions and constitutionalism which rests on the investigation of the *longue durée* history of the politics of law, it was imperative that we looked at some of the big questions before proceeding further. We took a quick tour of the history of constitutions and

[40] Benton, Lauren (2010) *A Search for Sovereignty: Law and Geography in European Empires 1400–1900*. Cambridge: Cambridge University Press, p. 2 and pp. 276-7.

[41] Scott, James C. (2017), *Against the Grain: A Deep History of the Earliest States*, New Haven: Yale University Press. Most of Scott's refences are to the early agrarian states of Mesopotamia and Southeast Asia on which he has written extensively. But his observations also reverberate in the African context. Some of the ideas in *Against the Grain* were developed earlier in his 2009 book *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, New Haven: Yale University Press.

constitutionalism. This was followed by an overview of indigenous constitutionalism in Africa and the indigenous barriers to absolutism contained within. The history of the continent also necessitated an overview of colonial constitutionalism. With this background established, we can now proceed to the literature review chapter; which will then be followed by the chapter 3 on theory and methodology.

We will then lay out, examine, and evaluate the three different paths to empowering African constitutionalism as epitomised by the fate of Tswana, Xhosa, and Oromo systems of indigenous law and governance through the course of their long histories. Details of the relationship between the traditional and the modern are covered in the case-study chapters. While the political, legal, historical, and social context make each three case-study unique in their own right, there are also generalisable patterns which emerge from the investigation. The final chapter looks back and takes stock of the bigger lessons, insights, and observations from the comparison across the three case-studies as well as the comparison across the history of the different constitutional phases.

Chapter 2:
The Relationship between Indigenous Traditional Law and Received Modern Law in Literature

---

1. INTRODUCTION

The previous introductory chapter laid out the research question and framed the general scholarly approach guiding the thesis. We also discussed how the three case-studies epitomise three different paths to empowering indigenous constitutionalism and what this means for both the scholarly literature and the practice of constitutionalism. The successive phases of constitutionalism reflecting the various historical and geopolitical ebbs-and-flows of the continent provided the backdrop to the introductory chapter. In this chapter we are not yet getting into the details of the three case-studies and the three paths they epitomise. Before that we cover the scholarly literature and accompanying the various comparative constitutional ideas practices. Framing African indigenous law and governance in terms of non-Western constitutionalism is indeed quite uncommon in the scholarly literature, but it is not our aim to carve out and claim a brand-new research agenda disconnected from other strands of scholarly literature. While the scholarly literature on looking at indigenous law and governance through the lens of constitutionalism might be quite thin, there is a great deal of past scholarship to learn from. We build on other strands of scholarly literature across disciplinary divides, theoretical approaches, applied concerns, and time. The aim of this chapter is to bring these various strands of scholarly literature together in a way that prepares us for the building the theoretical framework guiding the investigation.

The next Chapter 3 is specifically on the theoretical framework of the thesis, and the research methodology employed in order to address it. Together, Chapters 1, 2, and 3 form the scholarly background needed for the investigation of the case-studies. It is only after this do we delve deep into the details of the three case-studies and discuss why they represent ideal-models. The thesis

concludes with Chapter 13 which distils in detail the comparative lessons, insights, and observations which the three case-studies reach.

The present chapter expands on some of the general leads introduced in Chapter 1 earlier. It is a more detailed treatment of traditional law and governance in terms of reviewing the scholarly literatures on the subject and discussing the various paths to recognition we see in Sub-Saharan Africa. The reason why we employ the plural form here is because the very scholarly literature(s) on traditional law and governance is divided along disciplinary demarcations. Legal Anthropology is the one which contains the most extensive coverage of indigenous traditional law in all its facets. Ethnography is another related literature. In more general terms, Legal History has also given some interest to traditional systems of law and governance – but mostly covering the final historical phase of colonial retrenchment, transition to self-rule, and post-independence constitutional reforms. Another relevant scholarly literature comes from within the ranks of Legal Pluralism – broadly defined. We will incorporate material from this sizeable but somewhat uneven literature whenever the constitutional angle is prominent.

As the coming review reveals, at various times in history, in different parts of the world, various theoretical approaches in legal studies have shown interest in non-Western law and governance, while others without such explicit interest have also produced work with potential indirect relevance. We aim to bring a sense of order to a very diverse collection of scholarly output by bringing them together under one roof in a way that prioritises the macro constitutional angle and indigeneity. However, what becomes clear during the course of the review is that the scholarly literature specifically from Constitutional Law itself on non-Western constitutionalism is in short supply. Indigenous constitutionalism and traditional law and governance have so far remained a marginalised and almost invisible part of comparative constitutional studies. When studied, works containing non-Western constitutionalism tend to come from the more recent study of indigenous politics and law in the Western world – especially Canada, Australia, and New Zealand. The Constitutional Law literature from Latin America and the Indian Sub-Continent occasionally covers the status of traditional institutions and law in their constitutions, but these studies tend to be delimited by national jurisdictions. That is, beyond the country in question there is little that is comparative reflection in the framing of these discussions, and subsequently, little applicability to cases in other parts of the world. What the chapter seeks to do is to pull the relevant bits of scholarly literature closer precisely in order to frame things in comparative terms. In the course of bringing together separate of scholarly literatures – some of which had never been studied together, the aim is to construct a more integrated framework that would not only help steer the coming case-studies of the thesis, but also hopefully to help set the framework for others in the future who might be interested in studying non-Western constitutionalism.

At this point in the chapter it is also imperative to highlight that, like every attempt to classify and categorise intellectual constructs, the coming subsections below and their labels are not set in stone. Some subsections use the self-designation the authors themselves devised for their approaches, in other instances we place authors in certain subsections we have devised and labelled for this very literature review. Some of the subsections are defined by the descriptive content, some represent theoretical approaches, others are sub-fields of legal studies. What is common is their relevance to the comparative study of indigenous law and governance. As it is the case with all literature reviews

of scholarly work, the chapter seeks to bring a sense of order to a very diverse collection of output covering different continents, historical periods, and disciplinary demarcations. This means that separation between the strands of literature we have labelled is not going to be always watertight, but the subsections will help set the benchmarks of scholarship and provide us with a bird's-eye-view of what is relevant and potentially relevant.

While the strands tend to cluster around certain time-periods in history, not all do. Throughout the two centuries of scholarship we cover (i.e. from early 1800s up to the present), various strands of literature postulating similar intellectual positions have flourished and then disappeared, and then were then reincarnated under different labels. What is more, at different points in their academic careers some of the reviewed authors pursued different scholarly goals – or they have consciously adopted different priorities when writing in different languages. Scholarship across linguistic divides rarely lends itself to a standardised set of common labels. Concepts, terms, theories, methods, and applied policy concerns are likely to differ, or similar things are labelled differently. And lastly, some of the labels used for different strands of scholarly literature imposed *post-hoc* by some scholars were contested yet by others.

Despite all these wide-ranging challenges, we have tried to exhaustively, comprehensively, and even-handedly cover every relevant strand of scholarly literature. In addition to content, the organisation of the literature review and the sequence of the subsections follow the broad course of history starting with 19th century works by colonial bureaucrats and missionaries and ending the decolonising the curriculum debates marking our current times. With these caveats in mind, let us now turn to the literature review:

2. LITERATURE REVIEW

2.1. Surveys by Colonial Bureaucracy and Missionaries

The first comprehensive and well-known scholarly treatment of non-Western law and governance in indigenous traditional societies is by Bronislaw Malinowski, but his work was preceded by a sizeable oeuvre undertaken by colonial bureaucracies and missionaries on local laws and governance – not all of it reliable but still helpful in providing a glimpse into the policy priorities of the time as well as documenting some of the now extinct indigenous laws and structures.[1]

During the expansion of colonialism in the 19th century as Western powers expanded from their existing coastal holdings and extended their control inland across wide swathes of territory, concerns for stable long-term governance replaced the earlier practice of running coastal trading outposts, relying on private chartered companies and affiliates, establishing treaties with inland local kingdoms and paramount chieftaincies, limiting military presence to the occasional expedition into the continent only for specific purposes. The 19th century expansion of colonialism came with the goal to establish permanent presence. This necessitated colonial bureaucrats knowledgeable in the ways of the local subjects. There were thus a number of surveys of indigenous law and governance undertaken by

[1] Malinowski, Bronislaw (1932) [1926], *Crime and Custom in Savage Society,* New York: Harcourt, Brace and Court. Some examples of such studies by colonial bureaucracies and missionaries are on the next page.

colonial authorities across sub-Saharan Africa, with the explicit policy agenda of providing stability to colonial governance by training colonial bureaucrats, soldiers, and magistrates stationed in the locality.

The quality of colonial surveys often depends on the leading author. Some were fairly detailed ethnographic studies reporting on the indigenous political system, the composition of tribes, religious structures and so on, yet others were patchy and sometimes even misleading. One of the more scholarly-inclined examples of this oeuvre is Colonel Rattray's work on the Ashanti laws and constitution. The Ashanti of the Gold Coast (present-day Ghana) was one of the more sophisticated and complex systems of law and governance on the continent. Ostensibly written as a document to help colonial officials, Rattray contains many interesting observations and reflections on the nature of traditional authority and law.[2] Not all colonial surveys were this detailed and learned however. Colonel Rattray's observations on the Ashanti constitution is more scholarly in tone and content than most such bureaucratic surveys at the time. The same uneven quality defines works by Christian missionaries often working in tandem with national interest. In the Congo, policies of the Catholic Church were inseparable from the interests of first King Leopold II and later the Belgian state. And similarly, the London Missionary Society and the Wesleyans were closely aligned with British colonial interests on the continent. We will review their work in southern Africa in more detail in our South Africa and Botswana case-studies.[3]

Chapter 8 on South Africa and Chapter 5 on Botswana contain a number of 19th century and early 20th century examples of such colonial surveys of indigenous law and governance – both by bureaucrats and missionaries. Such colonial surveys continued well into the 20th century, but due to the wide-ranging, multifaceted, and complex nature of what was under investigation, these surveys almost always ended up incomplete and inconclusive.[4] For the purposes of this more comparative literature review, what is noteworthy is that as time went by surveys by British colonial bureaucracy started moving in the direction of recommending more official recognition of indigenous laws and governance. Lord Hailey's *African Survey* is perhaps by far the best-known example:

> "There are few problems which demand more careful study than that of an effective adjustment of existing judicial methods to meet the needs of the African Native. It is regrettable that the subject has not been brought under any comprehensive inquiry by the Governments concerned. In the Union [of South Africa], Commissions such as the Cape Native Laws and Customs Commission of 1883 dealt at some length with the general legal position in regard to Natives, but no specific inquiry has been made on the administration of justice".[5]

[2] One incisive point Colonel Rattray highlighted was the way different components of indigenous structures were all weaved together constituting an integrated and interrelated whole: "Ashanti Law and Ashanti Religion were intimately associated" as he put it, Rattray, R. S. (1929), *Ashanti Law and Custom*, preface.

[3] There is no similar oeuvre for Ethiopia, or more precisely the Abyssinian Empire, which had successfully fought off Italian colonialist incursion. What we have is a handful of Western travellers and patchy and unreliable accounts of local laws and customs.

[4] An interesting parallel to colonial surveys of African law falling short of their comprehensive ambitions is the fate of the post- World War II Restatement of African Law Project (RALP). The coming Subsection 2.6. is on RALP.

[5] Lord Hailey (1938), *An African Survey: A Study of Problems arising in Africa South of the Sahara*, Oxford University Press, p. 300.

We will cover the Cape Commission Lord Hailey refers to in detail in South Africa case-study, but in this chapter our aim is to take a bird's-eye-view and situate all the relevant literature in the historical context in which they took root. Changes in the tone of bureaucratic surveys is inseparable from the changes in British Imperial policy favoring a more local involvement in colonial governance, often referred to as 'indirect rule'.[6] Lord Hailey's *African Survey* thus did not itself cause a more open British colonial policy towards indigenous law and governance, but it signaled the way official policy and scholarship on the matter was evolving.

2.2. Malinowski and the Birth of Legal Anthropology

Even if it were not driven by scholarly goals, many of those colonial bureaucrats who investigated, compiled, and recorded local laws did end up serving scholarship. However, it was Bronislaw Malinowski who deliberately and explicitly took things in a different direction with his 1926 book *Crime and Custom in Savage Society*. His lasting contributions to the disciplines of Anthropology and Ethnography starting with this rather short book are, arguably, unmatched by any other. Malinowski is often credited with the establishment of the new fields of Social and Legal Anthropology, but rarely, if ever, is his work referenced by those who work on comparative constitutions and constitutionalism. Yet *Crime and Custom in Savage Society* contains important insights into the dynamics of non-Western constitutions and constitutionalism – especially the way he put function above form,

What was ground-breaking in Malinowski's work was the systematic and comprehensive investigation of indigenous law and governance (without a policy agenda to guide the inquiry), lengthy time devoted to open-ended field-research on the spot (not combined with a policy responsibility for colonial authorities), and an elevation of non-Western systems of law and governance to the same level as their Western counterparts. In this sense, arguably Bronislaw Malinowski's work has redefined the field of scholarship and set the course for a number of related scholarly literatures that have followed his wake. But all of this in fact came as an accident.

Malinowski had just arrived in Australia for ethnographic field-research when World War I broke out. As a citizen of the Austro-Hungarian Empire and thus an enemy state, he was interned in Trobriand Islands off the north coast of the country during the war, and thus ended up spending a lot more time on the field than he had originally planned. He learned the local language and for two years observed the indigenous system of law and governance on the island. What was particularly of interest to him was how Trobriand Islanders had come to maintain an orderly society without coercive institutions and formal law. The lengthy field work amongst a small indigenous community in a remote and isolated region in fact served the purpose of this rather macro and timeless research question.[7]

[6] Nowadays some writers link the idea of British imperialism and so-called 'indirect rule' with Michael Crowder's work. When he coined that phrase, Crowder was describing what had historically existed in various British colonies, especially Lord Lugard's Nigeria; Crowder, Michael (1964), "Indirect Rule: French and British Style", *Africa: Journal of the International African Institute*, Vol. 34, No.3, pp.197-205. Despite being a prolific scholar and writing about many different things, Crowder did not invent the concept of 'indirect rule' himself. He did however christen the policy with a more memorable and quotable label.

[7] Malinowski's unplanned and unwanted lengthy internment also gave birth to modern ethnographic scholarship. According to Conley and O'Barr, it was Malinowski who invented the "inseparability of fact and theory, subject and object, and observation and interpretation that anthropology now takes for granted",

Malinowski's work came to define a new way of looking at law and society: it was not the outside appearance of law and formal institutions, it was the function they performed in society that mattered; thereby, opening the way for comparisons across Western and non-Western societies. A society is not lawless because it lacks "codes, courts, and constables" as he put it.[8] "In such primitive communities I personally believe that law ought to be defined by function and not form, that is we ought to see what are the arrangements, the sociological realities, the cultural mechanisms which act for the enforcement of law".[9] While Malinowski did elevate the legal systems of small-scale preliterate traditional to the same level of Western law, this did not mean that the two systems were similar of course: "In the study of communities where law is neither codified nor administered before courts, nor yet enforced by a constabulary, certain problems arise which can be easily overlooked in a jurisprudence based on our own formal and crystallised systems".[10] What was particularly worth reflecting on was why most rules were obeyed without enforcement while other rules were questioned. His main comparative insight that social order (in a traditional society) rests on various modes of social control rather than formal institutions and enforcement remains relevant to this day.

Later in his career, Malinowski joined the London School of Economics (LSE). Here, through his research, teaching and supervision, he played a key role in establishing what came to be known as British Social Anthropology. While Malinowski himself seems to have had little interest in Sub-Saharan Africa, quite a few of his doctoral students developed interests in the indigenous societies of Africa, consolidating the school of British Social Anthropology. One characteristic of this school was the 'participatory observation' method Malinowski had honed while being interned on the Trobriand islands. Instead of desktop research from afar, the researcher would get immersed in the everyday life of the community and absorb the indigenous social culture in all its facets in order to observe and understand rules and laws in their broader context. As we mentioned a few paragraphs earlier, the guiding perspective in all this was to look for the function of law in a society rather than the form. And this would be done by incorporating into the analysis all the attending 'sociological realities' and 'cultural mechanisms'.

Malinowski's disciples within the British Social Anthropology School used the method of participatory observation in their field-research throughout the world, contributing to a growing scholarly literature on small-scale preliterate traditional societies. Their research relied on spending extensive periods of time ensconced within traditional societies, observing and absorbing the customs and laws of these societies and their mechanisms for dispute settlement. Not all of such research of British Social Anthropology was on Sub-Saharan Africa of course; Malinowski's enduring influence extended to those outside this scholarly tradition in Anthropology.

Conley, John M. and William M. O'Barr (2002), "Back to the Trobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society", *Law and Social Inquiry*, Vol. 27, No. 4, pp. 853.

[8] Malinowski, Bronislaw (1942), "A New Instrument for the Interpretation of Law – especially primitive", *Yale Law Journal*, Vol. 51, No. 8, p. 1248).

[9] Malinowski, Bronislaw (1934), "Introduction", H. I. Hogbin, *Law and Order in Polynesia*, NY: Harcourt and Brace, p. lxiii.

[10] Malinowski, Bronislaw (1942), "A New Instrument for the Interpretation of Law – especially primitive", *Yale Law Journal*, Vol. 51, No. 8, p. 1237.

Yet before we cover others who followed Malinowski's wake, it is imperative to address quite a sensitive issue here. One thing we have seen on a few occasions until now, and will continue seeing more in the coming chapters, is how some of the past terms used at certain periods in history can sound uncomfortable and offensive to present ears. Malinowski's ground-breaking 1926 book is entitled *Crime and Custom in Savage Society*. When it comes to literature from the 19th century and early 20th century, it is certainly not uncommon to see terms and labels like 'savage' for indigenous peoples that are deemed inappropriate nowadays; but there is a need exercise caution before lumping Malinowski with the rest scholars of the time who dismissed non-Western societies as backward. In fact, here we might be a little mistaken if we consider the word 'savage' in the title as a similarly patronising choice of words. By showing the similarities between the function performed by the uncodified but complex laws of the illiterate, pre-industrial Trobriand Islanders and Western 'codes, courts, and constables' – despite the differences in form – Malinowski was subversively placing the two legal systems on an equal footing. Besides, nothing that happened on the islands would come close to matching the savagery of World War I which was taking place among the civilised European states during his internment. The label 'savage society' was thus very likely chosen to force the readers to confront their Eurocentrism. It is thus no surprise that David Bederman calls *Crime and Custom in Savage Society* a "slim, provocative, and utterly subversive 1926 volume".[11] And the volume did indeed inspire a research agenda combining Anthropology and Law which we will shortly examine under subsection 2.5. Before that however we should incorporate into this review two related strands of scholarly literature, which historically had little to do with non-Western constitutionalism. Yet both have laid down the scholarly foundations for cross-disciplinary approaches to the study of Law which indigenous law and governance necessitates.

2.3. Historical Jurisprudence in Britain / Sociology of Law (*Rechtsoziologie*) in Europe

While there seems to be no direct intellectual link between Bronislaw Malinowski's work and the 19th century British jurist, legal comparativist and historian Sir Henry Maine, one of the benefits of a bird's-eye-view of looking at numerous scholarly literatures is to spot the intellectual links between them. The 19th century British jurist and legal historian Sir Henry Maine has neither written on constitutions and constitutionalism in Africa, nor has his work been references by those who work on these topics, but his legal history work (on India and the early modern period), arguably, contains potential theoretical insights that could help put the more recent African experience in a different light. While his work seems to lack the international impact Bronislaw Malinowski's work has had on the scholarly literature, Maine was a celebrated and very influential jurist at the time and was the recipient of various accolades. More importantly for us, his historical work contains arguments directly relevant to the current study of uncodified indigenous constitutionalism in Africa; in particular, the need for a broader conceptualisation of the law and the importance of the unofficial and uncodified variants. It seems the questions Malinowski and Maine asked, despite the different contexts, show remarkable similarities. Historically, both have established the main parameters for future scholarly work.

Sir Henry was mostly interested in how ancient societies in the West, which ran on traditional laws governing collective categories subjects, gradually moved towards a more individual-based legal

[11] Bederman, David J. (2010), *Custom as a Source of Law*, Cambridge: Cambridge University Press, p. 6.

system.[12] It is perhaps not surprising that Sir Henry had served in India as a colonial legal counsellor where the relationship between Western laws managing the individual and the various traditional laws of India managing the affairs of collective groups was a part of his responsibility. Despite his tenure in India, most of Maine's work was published not while there but afterwards once he had been appointed to the aptly named Oxford Chair of Historical and Comparative Jurisprudence. Partly based on this position, his rather expansive conceptualisation of what law means, covering both formal laws and social obligations, the past and the present came to be known as Historical Jurisprudence.

Nothing in Sir Henry Maine's writing indicates knowledge of Africa nor an interest, but the relevance of his ideas to the traditional systems of law and governance across Africa is self-evident – in particular the enduring pull of traditional forms of legitimacy we continue to see on the continent and the need to conceptualise the law beyond written codes and formal institutions. In this context, it makes perfect sense that Sir Henry Maine had also lent his name to legal debates of the time and had defended common law against advocates of codification in British political discussions.

While Sir Maine himself, and those influenced by his oeuvre, would probably not label his Historical Jurisprudence approach as Sociology of Law. But the holistic conceptualisation of law (containing uncodified rules, unwritten norms, and societal underpinnings), carefully placed within the historical context, would place him close to scholars across the channel on the continent who adopted this very term for their approach. Seemingly unconcerned with non-Western constitutionalism, this scholarly literature was particularly vibrant in German-speaking Europe. Carl Friedrich von Savigny is the best-known scholar representing this continental European approach to law and governance.[13] His historical work on the sources of Roman Law is now remembered not for the historical details but for the big argument that law cannot be imposed from the outside without due attention to the political, historical, social context.[14] Similar to Sir Henry Maine, von Savigny held a historically and culturally-grounded understanding of the law beyond formal rules: "however far back one goes in the past of a people one will always find some law governing them".[15] The label for this scholarly approach in German was not the translation of Historical Jurisprudence however. It was *Rechtsoziologie*, i.e. the Sociology of Law.

Others credit, not Savigny but the Russian-Polish legal scholar Potgorecki as the founder of the Sociology of Law.[16] Regardless of the assigned label given to their respective approaches, on both sides of the Channel there were those who questioned the usefulness of a narrow and rigid conceptualisation of the law where only written laws matter. After Savigny's work in the early/mid-19th century, what is labelled as the Sociology of Law took a more diverse path incorporating almost any perspective which conceptualises the law beyond formal laws. It is now a diverse literature with

[12] Amongst his oeuvre, the one with closest relevance to what we are studying is Maine, Henry James Sumner (1861) *Ancient Law, Its Connection with the Early History of Society and its Relation to Modern Ideas*, London: John Murray.

[13] Zimmermann, Reinhard (1996), "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science", *Law Quarterly Review*, Vol. 112, p. 576.

[14] Savigny von, Carl Friedrich (1814), *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.*

[15] Quoted in T Olawale Elias (1956), *The Nature of African Customary Law*, Manchester: Manchester University Press, p. 43.

[16] Van Niekerk, Gardiol Jeanne (1995), *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective*, Pretoria: University of South Africa, p. 147.

various different research agendas but remains true to its historic *raison d'être* : Sociology of Law had emerged as an opposition to a more positivist understanding of the law; that is, one that deemed codified laws as the only thing that mattered. And that society-centred approach to the law remains the defining characteristic of the approach (albeit the historical element seems to have moved to the margins of the field in more recent times). While Historical Jurisprudence, as a distinct subfield of Legal Studies, seems to have gone into a more dormant state. And it is not the only scholarly approach in Law which enjoyed a high-profile past but then went into decline. Legal Realism has had a very similar fate:

2.4. Legal Realism in the United States

In the Introductory Chapter (and also earlier in the subsection on Malinowski and Legal Anthropology above), we had touched upon how some of the historical terminology used would be inappropriate nowadays. 'Primitive law' is the label what US-based scholars used for indigenous law and governance. E. Adamson Hoebel's *The Law of the Primitive Man*; Karl N. Llewellyn and E. Adamson Hoebel's *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* were part of a scholarly approach known as Legal Realism.[17]

Karl Llewellyn was the Betts Professor of Jurisprudence at Columbia Law School. As Ajay Mehrotra reports "antiformalist rule scepticism that had been at the heart of his legal theory and scholarship throughout his career".[18] In other words, his approach questioned the teachings of Legal Positivism. For him, law was part of the broader legal, political, social, and historical context. According to Connolly, Pschirrer and Whitman, Karl Llewellyn was adamant that "theories should not be lifted from their supporting factual contexts".[19] However, for most of his academic tenure, his scholarship was mostly neglected by the American legal establishment. This was perhaps because Llewellyn had been an outsider, an *emigré* scholar from Europe; or perhaps because the cross-disciplinary approach did not easily lend itself the training of students to practice law in specifics jurisdictions. In the closing years of his career Karl Llewellyn found an intellectual companion in the form of a junior member of academia.

Llewellyn's holistic conceptualisation of law and preference for a cross-disciplinary approach was shared by E. Adamson Hoebel who worked a few metro-stops away at New York University Law School. Hoebel shared the same cross-disciplinary view which held the law to be inseparable from politics, society, culture, and history. He believed that "we must have a look at society and culture at large in order to find the place of law within the total structure"[20]. Together Llewellyn and Hoebel turned their attention to the indigenous laws of the Cheyenne Indians of the American Great Plains and put it under their holistic framework of analysis. What is more, due to its conceptualisation of law that went

[17] Hoebel, E. Adamson (1954), *The Law of the Primitive Man*, Cambridge MA: Harvard University Press.; Llewellyn, K. N. and E. Adamson Hoebel (1941), *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman: University of Oklahoma Press.

[18] Mehrotra, Ajay K. (2001), "Law and the 'Other': Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way", *Law and Social Inquiry*, Vol. 26, p. 748.

[19] Connolly, James, Peggy Pschirrer, and Robert Whitman (1998), "Alcoholism and Angst I the Life and Work of Karl Llewellyn", *Ohio Northern University Law Review*, vol. 24, pp. 47-8.

[20] Quoted in Moore, Sally Falk (1973), "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law and Society Review*, Vol.7, No.4, p 719.

beyond formal legal rules, Legal Realism was also able to transcend national legal contexts more easily and lend itself amenable to comparative perspectives. Llewellyn and Hoebel's work was highly regarded by fellow scholars across a number of disciplines, but their approach was more deemed scholarly rather applied. Legal Realism seemed to have little direct applicability to training legal professionals who were to practice law in the US jurisdictions. But this was not the end of Legal Realism. While failing to flourish across American law faculties, the approach had managed to establish a foothold outside New York (at least for a while).

During the 1940s to mid-1950s, Yale Law School became the hub for Legal Realism and the attending holistic conceptualisation of the law. As Conley and O'Barr explain, the prevailing scholarly approach was to "demystify law and appreciate it in its political and cultural context".[21] In the following years Yale's explicitly cross-disciplinary approach lost control of the last remaining scholarly outpost among the American legal establishment as Legal Positivism re-established its dominance in the training of legal professionals.[22] However, across the ocean, and with some time-lag, ideas guiding Legal Realism were to engender a strand of scholarly approach which came to be known as 'Law and Society' or 'Law in Context'[23], eventually becoming part of the broader field of 'Socio-Legal Studies'. Subsection 2.7 will unpack this literature in more detail, but let's now turn to a strand of scholarly literature which directly turned its gaze to indigenous law and governance.

2.5. Applied Legal Anthropology in British Africa and Its Critics in the North

Bronislaw Malinowski's cross-disciplinary ethnographic research was not driven by applied concerns, but it did eventually give birth to a more applied version of his mix of Law and Anthropology. Malinowski's novel take on indigenous law and governance was soon embraced by colonial powers – in particular, the British. The 'embrace' we refer to here is not an explicit agenda of enlisting academics to serve applied policy goals, but more indirectly in terms of recognising crossdisciplinarity as the most appropriate approach to the issue, creating or increasing funding for such research, and creating new academic departments and institutes devoted to Legal Anthropology.

A prime example of this literature is the work of South African Anthropologist Isaac Schapera (whose research we will cover in more detail later in the Botswana case-study). What is perhaps worth noting is that after his tenure at the University of Cape Town, Schapera took up the chair created for Malinowski at the University of London. Amongst the dozens of books and reports he wrote, perhaps Schapera's best-known work is the 1938 *Handbook of Tswana Law*. Schapera's compilation of various different tribal branches of Tswana customary law was not only a study of Legal Anthropology, but it also helped the day-to-day administration of justice in the Bechuanaland Protectorate (and to a large extent, the application of traditional customary law later in independent Botswana as well). What is

[21] Conley, John M. and William M. O'Barr (2002), "Back to the Trobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society", *Law and Social Inquiry*, Vol. 27, No. 4, p. 854.

[22] Not only in the United States, but throughout the world, Legal Positivism (and its narrow conceptualisation where the narrow and rigid reading of the letter of the law is prioritised) has an enduring appeal to Law School curricula designed to train legal professionals to practice law in a given national jurisdiction. Positivism's reliance on formal 'black letter' laws is criticised by scholars – especially by those who have comparative knowledge, but at the same time it is also presents a straightforward and convenient way to teach law – hence its enduring presence.

[23] Twinning, William (1985), "Talk about Realism", *New York University Law Review*, Vol. 60, No. 3, p. 329.

more, Schapera was not interned against his wish in Bechuanaland during war. He was able to secure funding for lengthy field-research trips to the Protectorate, hire research assistants and local help, and take extended leave from his teaching position in Cape Town in order to study indigenous law and governance in the Bechuanaland Protectorate. Compared to the unique circumstances which led to Malinowski extended field-research on the Trobriand Islands, Schapera's research was explicitly designed in a way to serve both applied policy goals as well as ethnographic scholarship. It is this indirect 'embrace' by legal, political, and scholarly establishment that defines the birth of Applied Legal Anthropology.

The leading intellectual hub for Applied Legal Anthropology was the Rhodes-Livingstone Institute in Lusaka, Northern Rhodesia (present-day Zambia). Northern Rhodesia was the Central African link between of British presence in Central/East Africa (Nyasaland, Tanganyika, Zanzibar, Kenya, Uganda) and in Southern Africa (South Africa, South West Africa, Basutoland, Bechuanaland, Swaziland, Southern Rhodesia). Placed at the geographic centre of British Africa, the research at Lusaka's Rhodes-Livingstone Institute was decidedly pan-African and comparative.

Under the directorship of Max Gluckman and his successors, the Institute undertook a number of detailed anthropological case-studies into traditional structures of law and governance. In the very first strand of literature we covered earlier we had remarked on how British Imperial policy had moved in the direction of favoring a more local involvement and self-rule in colonial governance. It is within this broader geopolitical context of impending colonial retrenchment that the pan-African work of the Rhodes-Livingstone Institute should be placed and evaluated. Through various in-depth studies, the aim was to observe, analyse, and record the different legal systems of the various ethnic communities in the region.[24] This was not for scholarly goals only. The Institute had quite an ambitious research agenda of mapping out the indigenous African structures with an eye to paving the path to recognition and application which was assumed to increase with more self-rule in the colonies.

The more senior names amongst the staff of the Rhodes-Livingstone Institute in Lusaka, Max Gluckman, Leo Kuper, Hilda Kuper, all continued Schapera's approach of mixing applied policy concerns with high scholarly standards for cross-disciplinary ethnographic research. In fact they were all former students of Isaac Schapera from the University of Cape Town.[25] Institute staff and affiliated scholars (almost all Anthropologists) rejected a minimalist understanding of the law and conceptualised it in more macro cross-disciplinary terms comprising all social obligations in a traditional society. As Gluckman put it: "Custom thus has an obligatory character of legal sanction, even though it is unenacted and not necessarily court enforced… Law is a body of binding rules and includes custom".[26] According to Hilda and Leo Kuper, for the study of indigenous law and governance

[24] See for example, AL Epstein (1953), *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, Lusaka: The Rhodes-Livingstone Institute; AL Fallers (1969), *Law without Precedent: Legal Ideas in Action in the Courts Colonial Busoga*, The University of Chicago Press; Gluckman, Max (1963), *Order and Rebellion in Tribal Africa: Collected Essays with an Autobiographical Introduction*, Cohen and West; PH Gulliver (1969), "Dispute Settlements without Courts: The Ndendeuli of Southern Tanzania", in L Nader, Laura (ed.) *Law in Culture and Society*, Aldine; VW Turner (1957) *Schism and Continuity in An African Society: A Study of Ndembu Village Life*, Lusaka: University of Zambia.

[25] Described in more detail in Comaroff, John L., Jean Comaroff and Deborah James (eds) (2007), *The African Photographs of Isaac Schapera*, Chicago: University of Chicago Press.

[26] Gluckman, Max (1965), *Politics, Law and Ritual in Tribal Society*, pp. 201-2.

"a flexible and eclectic approach, rather than a firm semantic commitment seems necessary.[27] Some of the work associated with the Rhodes-Livingstone Institute was more ethnographic in tone; that is, the authors had immersed themselves in their chosen ethno-linguistic community and sought to compile and record the local indigenous laws. Others, especially Gluckman, sought to identify broader comparative patterns and distil lessons and insights that would help indigenous traditional laws and received modern ones to co-exist.

With the benefit of historical hindsight, it appears that amongst those affiliated with the Rhodes-Livingstone Institute, it is Gluckman's work which had most long-term scholarly impact.[28] Despite his rather expansive conceptualisation of what the law means, compared to his colleagues at the Institute, the Legal Anthropology practised by Max Gluckman was still more visibly more legal than anthropological.[29] He is best known for his work on the laws of the Barotse of Northern Rhodesia (present-day Zambia).[30] In fact, his work on Barotse jurisprudence remains one of timeless classics of the field – mostly because Gluckman formulated his inquiry in a way that addressed some of the broader foundational questions about politics, society, and the law.[31] His writings on Barotse law addressed bigger questions of indigenous constitutionalism, local forms of checks-and-balances, and the division of power between indigenous forms of *Trias Politica* (i.e., legislative, executive and judicial powers in modern polities). After Barotse constitutionalism, Gluckman then employed his framework in comparative terms to customary law in other African countries.[32]

While the background might be set by geopolitical context of colonial retrenchment, Applied Legal Anthropology literature was marked by its high scholarly calibre. In fact, looking back at the various output of the Rhodes-Livingstone Institute during its relatively short existence one gets the impression that the main concern for the Legal Anthropology scholars affiliated with the Lusaka Institute was not the identification and application of the law specifically, but a quest to decode the broader workings of traditional societies in general – including indigenous forms of constitutionalism. Throughout this review chapter we have been careful to provide the geopolitical backdrop to the various backdrops of scholarly literature. Sometimes the impact of this has been diffused and indirect, in other instances such backdrop is inseparable from the very literature itself. In this strand of literature we have a clear indication that the establishment of the Institute and its subsequent research output cannot be separated from the political context of the British Empire retrenching in the direction of a looser British Commonwealth where former colonies were being granted home-rule akin to what existed in the Antipodean Dominions and Canada.

---

[27] Hilda Kuper and Leo Kuper (1965), "Introduction", in Hilda Kuper and Leo Kuper (eds) (1965), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press, p. 5.

[28] The Legal Realist, E. Adamson Hoebel was partly responsible for ensuring that Gluckman's work on, what Hoebel called, 'ethnological jurisprudence' found a receptive audience in the United States: Hoebel. E. Adamson (1956), Review of Max Gluckman (1955) 'The Judicial Process among the Barotse of Northern Rhodesia', *The University of Chicago Law Review*, Vol. 23, pp. 546-49.

[29] See for example, Gluckman, Max (ed.) (1969), *Ideas and Procedures in African Customary Law*, OUP.

[30] Different local dialects substitute the consonant 'l' for 'r' and 'z' for 'ts' sound, so transliterations into English are not standardized. The Barotse are sometimes transcribed as the Balozi. Since 'Ba' is the plural prefix in Bantu languages, one also sees references to the Lozi or Rotse.

[31] Gluckman, Max (1965), *The Ideas in Barotse Jurisprudence*, New York and London: Yale University Press.

[32] Gluckman, Max (ed.) (1969), *Ideas and Procedures in African Customary Law*, Oxford University Press.

Instead of precise policy goals immediately available to colonial and local administration, it was the more macro constitutional element that defined most of the applied angle in this strand of scholarly literature. This means that the oeuvre of the Rhodes-Livingstone Institute did not always automatically serve the needs of courts, magistrates, and colonial bureaucrats. Besides, the Britain's hold over its remaining colonies and influence over the former colonies was fast fading in a new world order increasingly defined by the new Cold War dynamics between the United States and the Soviet Union and their allies and subjects. Despite its ambitious start, the Institute's profile quickly dimmed as changes started to take hold on the continent. Its staff subsequently took their work elsewhere. Max Gluckman, for example, moved to the University of Manchester where he continued his work on Legal Anthropology and followed the comparative direction with more African case-studies. Some have labelled the more legal-inclined anthropological research Gluckman and his colleagues collectively did in the United Kingdom as the 'Manchester School'.[33] It has to be said that this is not the most accurate and appropriate label because the cross-disciplinary applied Legal Anthropology approach has a scholarly pedigree which precedes Gluckman's arrival Manchester.

What had started with Isaac Schapera and had culminated with the Rhodes-Livingstone Institute in Lusaka was where the Applied Legal Anthropology approach was developed and honed. Long before the emergence of the Manchester School, Applied Legal Anthropology had already brought in a radical change to the study of traditional structures in Africa. This oeuvre showed the richness of indigenous legal cultures, thereby aiming to undo the scholarly ignorance and misrepresentation of previous episodes of Western ethnographic surveys of the continent. By elevating the traditional structures into alternative equals to the West in the social, political and legal organisation of societies, their work effectively put breaks on the assumption of Western cultural superiority that used to be dominant during colonial times. The Applied Legal Anthropology work into non-western notions of law challenged the widely held belief in the West that non-Western constitutionalism and indigenous legal cultures were either primitive or non-existent. This literature (epitomised by the oeuvre of scholars affiliated with the Rhodes-Livingstone Institute before the Manchester School came into being) had deliberately sought to make traditional systems of law accessible to the rest the world. To this end, Max Gluckman and his colleagues had used the Western notions of law as comparative benchmarks to show that, while the form differed, traditional legal systems provided the same functions to those found in Western systems of law. But what many considered to be novel, fruitful, and useful – and indeed the defining characteristic of this approach – was deemed a liability by yet by others.

The use of cross-disciplinary perspectives, and a concern for both the scholarly and applied, exposed Applied Legal Anthropology to criticism from purists from two different quarters: some within Anthropology found the approach too legalistic, others from the legal profession found it too academic. The strongest criticism came from fellow academic Anthropologists across the ocean who were themselves also studying indigenous law and governance. Not only within the British Empire but also in the United States the post-World War II years had seen a growing interest in non-Western societies. Britain had a longer history as a global power, it had various colonial territories with different constitutional status and jurisdictions, its military and bureaucracy had long periods of service in

[33] One outstanding example of the Manchester oeuvre is Elias, T Olawale (1956), *The Nature of African Customary Law*, Manchester: Manchester University Press. It remains a relevant, learned, and readable piece of scholarship.

overseas territories, and there were settler communities inhabiting the different corners of the Empire. This meant that there was a long history of engagement with the non-Western world. The study of small-scale preliterate traditional societies was part of this multifaceted complex picture. Things were different in the United States. Americans were just assuming their role as a new global power (in competition with the other new post World War II arrival to global geopolitics, the Soviet Union). Without a history of engagement in Africa, knowledge of faraway lands was often within the monopoly of academic anthropologists. In tandem with America's new engagement with the world, American Anthropological scholarship benefitted from a newfound vibrancy. However, this followed a more purist path of immersion in small scale societies with little interest in seeking comparative lessons, insights, and observations. It is in this context that Applied Legal Anthropology's efforts to frame things in comparative terms came under attack from more *pure sang* academic Anthropologists – including a handful of those who had started off their careers as junior members of the Applied Legal Anthropology school.[34]

Max Gluckman and his colleagues were accused of imposing western conceptions onto different social and cultural settings. For the critics what was especially problematic was the assumption that the form of the law could differ, but that the function was universal. This assumed that western notions of justice, rights, harm, and retribution were universal. The critics pointed out that in most traditional societies concerns for social harmony and communal consensus override abstract notions of what is legally right and wrong. Accordingly, the very function of law could also differ across different cultures. Instead of a comparative framework looking at rules or indigenous constitutions, purists believed that one had to get immersed in the totality of single individual cases from small locations and observe the meaning and process of how the society worked for that select society only. One of the most prominent critics, Paul Bohannan, insisted that one could not use rule-centred Western concepts of law to study non-Western societies, and that each case-study had to be contextualised and studied on its own. [35]

This was not a good-natured academic debate among fellow scholars studying non-Western forms of law and governance – it was bitter and divisive. Applied Legal Anthropologists were accused of deliberately presenting indigenous systems of law in juridical terms that are common to western notions of the law. For them, it was the process that mattered. Bohannan and others argued that, Gluckman and his colleagues had stretched the African cases to fit in rule-centred concepts from the West. The polemical debate between Gluckman and Bohanann in an edited collection that aimed to bring two sides together symbolises the deepest point of this rift.[36]

The debate defined and encompassed the entire literature of Legal Anthropology. Comaroff and Roberts report that scholarship at the time was deeply divided into 'rule-centred' and 'processual' approaches.[37] But instead of fine-tuning, improving, and nuancing the research agenda, the debate ended up polarising Legal Anthropology. By the end of the 1960s, instead of adding more non-Western case-studies to the literature, undertaking more local field-research, cross-referencing comparative

[34] Gulliver, PH (1978) *Cross Examinations: Essays in Memory of Max Gluckman*, Leiden: Brill.
[35] Bohannan, P. (1957), *Justice and Justice Amongst the Tiv*, Oxford University Press.
[36] Nader, Laura (ed.) (1969) *Law in Culture and Society*, Aldine.
[37] Comaroff, John L. and Roberts, Simon (1981), *Rules and Processes: The Cultural Logic of Dispute in an African Context*, University of Chicago Press, p. 4.

observations, and finetuning theoretical lessons, the attention of Legal Anthropology had turned inwards as the conflict consumed all scholarly energy. The scholarly debate between rule-centred and processual approaches continued, but it increasingly took scholastic tones as concerns for applied relevance declined. Parallel to the debilitating internal scholastic dispute taking over the subfield, Applied Legal Anthropology declined in visibility. Other than a few scholars who have ventured to try to reconcile the concerns of the two sides of the debate,[38] Legal Anthropology was soon after relegated to the margins of academic Anthropology and never regained the prominence it once enjoyed.

One explanation for the decline of Applied Legal Anthropology is that the self-destructive internal conflict ended up weakening the entire field of Legal Anthropology. The other explanation is that Legal Anthropology rested on unsteady cross-disciplinary foundations from its inception. Most academic anthropologists were consumed with the ontological and epistemological aspects concerning the scholarly quest to identify generalisable and comparative patterns applicable across case-studies. Many academic anthropologists viewed the rule-centred way of looking at indigenous law and governance as an inappropriate starting-point for the field.[39] Most legal scholars, on the contrary, were concerned with extracting rule-centred applied lessons for the specific jurisdiction in question.

A little earlier we had seen how Legal Realism was deemed too anthropological for the legal establishment. Looking back at the fate of Applied Legal Anthropology we can see the opposite happening within the anthropology scholarly establishment. This time Legal Anthropology was deemed too legal for anthropological purists who objected to the use of a common framework for analysis of indigenous law and governance in Africa. For them, non-Western constitutionalism could not be studied in comparative terms and each case had to be studied separately and in-depth without common benchmarks and without seeking generalisable observations. This purist rejection of comparative patterns, generalisability, and applied relevance goes against the very *raison d'être* of Applied Legal Anthropology and its origins in Isaac Schapera's work and the Rhodes-Livingstone Institute. But what is worth noting however is that the cross-disciplinary tensions also been present during the field's inception in Southern Africa. But there the geopolitical context had kept a lid on scholarly tensions and prioritised applied relevance. We had seen how Applied Legal Anthropology was embraced by the legal, political, and scholarly establishment at the time. With such support, the underlying tensions could be managed, and scholarship would thus continue. Once the support is switched off however, Applied Legal Anthropology failed to survive on its own.

[38] Martin Chanock is one of these rare voices. While sharing the criticism of Western ethnocentrism in research on indigenous law and governance, as vocalised by Bohannan, Chanock remained committed to seeking comparative patterns in the workings of non-Western law along the Rhodes-Livingston Institute tradition. Chanock, Martin (1985), *Law, Custom and Social Order: The Colonial Experience in Malawi and Tanzania* (Cambridge University Press); Chanock, Martin (1985), "A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Africa", *Journal of African History* Vol. 32, No. 1, p. 65; Chanock, Martin (983) "Signposts or Tombstones? Reflections on recent works on the Anthropology of Law", 1 *Law in Context*, Vol.1, p. 107.

[39] The scholarly credentials of Applied Legal Anthropology were eventually restored. Looking back at the conflict and reflecting on the competing claims, John Comaroff and Roberts write that p.7-8: "It would be wrong, however, to portray writers working within the rule-centred paradigm as invariably seeking to do no more than fit non-Western systems of social control into a conceptual framework provided by Western legal theory". Comaroff, John L. and Roberts, (1981), *Rules and Processes: The Cultural Logic of Dispute in an African Context*, University of Chicago Press, pp. 7-8. See also Roberts, SA (1979), *An Introduction to Legal Anthropology*, Penguin.

2.6. The Restatement of African Law Project (RALP)

In the preceding subsections, as well as in the coming ones, we review the various strands of scholarly literature in terms of their relevance to the study of indigenous law and governance. Some of these, such as Historical Jurisprudence for instance, have never devoted any direct attention to non-Western constitutionalism. It is the potential theoretical relevance and inferred intellectual links which justifies their inclusion in the literature review. There is yet one strand of literature which directly addresses the relationship between uncodified indigenous traditional law and received modern law.

The Restatement of Law Project, generally know through its acronym RALP, was the most comprehensive attempt at mapping out the relationship between the traditional and the modern along multiple fronts. Various questions like recognition, codification, application, and feasibility were all pursued in comparative terms. What is more, participants of the project met on various occasions with the aim of seeking to learn from each other and reach a common framework for the entire continent. It was a grand undertaking, but things did not end on the same high note defining its inception. RALP eventually ran out of steam leaving almost all of its investigation it had invested in half-finished. Let us now paint the scholarly, and indeed political, context behind this big but inconclusive initiative:

The geopolitical context of post-World War II decolonisation provides the vital backdrop to the Restatement of Law Project. By late 1950s, the former British colonies Sudan and Ghana had blazed the trail for self-rule for the continent. It was clear that decolonisation was around the corner for the rest of the continent. At the same time, no one at that point anticipated the large-scale political violence that would accompany the changing geopolitics of the continent and the arrival of Cold War dynamics. The post-colonial civil wars sparked by Biafra and Katanga secessions were only a few years away. The general mood marking the beginnings of RALP was one of cautious optimism. Almost all observers expected gradual change towards giving more voice to local laws and governance but with the major colonial powers still exerting political influence.[40] Britain, France, Belgium, and Portugal did not foresee how quickly their hold over their colonies would erode.

To this backdrop, in combination with extensive political and financial support from these colonial powers, the Restatement of African Law Project was formally launched at the end of 1959. Its beginnings precede Sudanese and Ghanaian self-rule by a few years, however. Britain and France (and to a lesser extent Portugal and Belgium) anticipated the process of decolonisation to follow a gradual path and they assumed that they would supervise the reforms brining self-rule and remain politically influential. It is in this context that the British Secretary of the State for Colonies had convened a so-called Judicial Advisers Conference between 1953 and 1956 which prepared the foundations of what was to become RALP.

The first meeting of the project was the London Conference on the Future of Law in Africa (December 1959 - January 1960). The initiative started off with the motiviation to compile all forms of African indigenous law. Both theoretical and applied angles were explored, the different legal systems

[40] See for example, Moffat, R. L. (1952), "Native Authorities and the Law" in HCF Cox (ed.) *Justice and the Law*, Oxford University Press, pp. 22-32.

bequeathed by the colonial powers were dissected, from family law to land law various branches of the law were examined. By all accounts, it was a very ambitious project with pan-African goals.[41] The bigger political agenda was combined with a nuanced and learned approach to indigenous law and governance. The choice of the term 'restatement' is not an accident and reflects the thoughtful scholarly concerns of its participants. RALP was supposed to record the uncodified laws that existed, but not immediately codify them into directly applicable and enforceable new formal laws.

Experiences from Tanganyika (the mainland part of future Tanzania) provided certain benchmarks guiding the project. One big challenge, as Tanganyika demonstrated, was to identify and agree what was deemed indigenous law. Tribal sub-branches of ethnic communities would often have differences in their customary laws. Draft declarations of customary laws were submitted to a panel of experts from district councils. L.C.B. Gower reports that this was the biggest initiative towards codifying and unifying customary law until then.[42] It was a procedure that was to also become the basis of the Restatement of African Law Project. At the London Conference it was decided to replicate this approach. There would be so-called 'law panels' of 15 participants to collect and compile the indigenous law of different ethnic communities, use all the written material for a first draft, then continue field-research until panel members would agree that the eventual revised report was the most accurate 'restatement' of the laws in place. The reports would then form contribute to the administration of justice as guidelines – that is, they were not code books in the formal sense but a collection of general principles and priorities. This was mostly to ensure that customary law was not 'frozen' and was let free to evolve with changing circumstances – arguably one of the core reasons for the timeless resilience of customary law around the world. At the same time, it is easy to see how any such attempt to write down the law – that is, assuming that the experts on the law panels were able to agree on a common text – would inevitably lead to reification and ossification. Across a variety of cases, judges and magistrates seeking an authoritative source on local indigenous laws would naturally rely on these reports – especially if they happen to have no first-hand knowledge of the ethno-linguistic community in question and its laws. The unintended consequence is that such 'restatement reports', even if not directly applicable an enforceable, would end up unintentionally freezing indigenous customary law in time.[43]

The 1959/60 London Conference was soon followed by three other conferences in Africa. The reach of the initiative was now truly pan-African. London's School of Oriental and African Studies (SOAS) became the hub for the project and A.N. Allott its main scholarly coordinator. The meeting of the conference of the project was in Nigeria in 1964.[44] By that time, the geopolitical landscape on the continent had changed. The cautious optimism marking the early days of decolonisation was replaced by worries about the retrenchment of former colonial powers, and the arrival of Cold War dynamics. Concerns about how to recognise, integrate, and apply indigenous law and governance during the transition from colonialism to self-rule was now secondary to concerns about establishing and

[41] For more, see Allott A.N. (ed.) (1960), *The Future of Law in Africa*, London: Butterworth.
[42] Gower, L.C.B. (1967), *Independent Africa: The Challenge to the Legal Profession*, Cambridge, MA: Harvard University Press, p. 92.
[43] In the Botswana case-study we will see how Isaac Schapera's 1938 *Handbook of Tswana Law*, contrary to the author's intentions, ended up being used by legal professionals as a directly applicable and authoritative statement of what the law is.
[44] Allott, A. N. (1971) (ed.), *Integration of Customary and Modern Legal Systems in Africa: A Conference held in Ibadan on 24-29th August 1964*, Ile-Ife: University of Ife Press.

projecting state power. Besides, its ambitions for pan-African comprehensiveness, RALP had spread itself too thin. Combined with declining interest and support from national governments, while scholars based at SOAS continued to work on related themes, the grand ambitions of the project gradually fizzled out.

2.7. Law and Society / Law in Context / Socio-Legal Studies

In the beginning of this literature review, we had highlighted how the intellectual exercise of classifying and categorising various strands of scholarly literature into subsections, and the designated labels used for this exercise, are by definition, not set in stone. An example of this is a collection of scholarly oeuvre we will group under here. Not only do the three labels for the subsection cover wide and diverse scholarly literatures, but some of the authors we review here have also seen their work placed under different categories and labels. Depending on who is doing the literature review, the labels 'Law and Society', 'Law in Context', and 'Socio-Legal Studies' can overlap or mean different things. However, what is common to all three is an expansive conceptualisation of law set within the broader social context. The said social context potentially covers any uncodified societal factor. From indigenous customs to the social class structure, from unwritten cultural norms to the social-constructed historical memories, the scope of what falls under this category is very diverse. We cannot exhaustively cover it all so our focus is delimited to works that have, or potentially have, an intellectual link to the study of indigenous systems of law and governance. With this little caveat, let us now turn to reviewing relevant parts of this scholarly literature.

We had ended the subsection on Legal Realism with a note on how it had failed to establish a large following and had faded a distinct theoretical school by the 1960s. We had also mentioned how the holistic ideas underpinning Legal Realism had found their way into the foundations of what came to be known as the 'Law and Society' or the 'Law in Context' approach.[45] One of the founders of this approach was Sally Falk Moore whose work had been influenced by the Legal Realism, especially the ideas of E. Adamson Hoebel. She warned legal scholars and practitioners "against sterile citing of rules" which came with positivism's rigid and narrow view of what the law is.[46] Law and Society's broad conceptualisation of the law beyond formal legal rules rendered it appropriate for comparative analyses which could transcend the idiosyncrasies of different national jurisdictions.[47] The Law and Society approach ended up having more longevity than American Legal Realism.[48]

Others following a similarly cross-disciplinary perspective mixing legal and societal perspective preferred a different label for their approach. For them, 'Law in Context' was a more accurate designation for their approach.[49] The proponents of this distinction see Law in Context a bigger and

[45] Moore, Sally Falk (1973), "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" *Law and Society Review*, Vol. 7, No. 4, p. 79.

[46] Moore, Sally Falk (1969), "Introduction" [to the Comparative Studies Section], in Laura Nader (ed.), *Law in Culture and Society*, Chicago: Aldine, pp. 337-348.

[47] Nader, Laura and Harry F. Todd (eds) (1978), *The Disputing Process. Law in Ten Societies*, Columbia University Press.

[48] Moore, Sally Falk (1973), "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law and Society Review*, Vol.7, No.4, pp. 719-46.

[49] Benda-Beckmann, F. von (1984), "Law out of Context: A comment on the Creation of Traditional Law Discussion", *Journal of African Law*, 28 (1-2), PP. 28-33.

more inclusive field of study than what Law and Society covers. One such prominent name, William Twinning, believes 'Law in Context' is not only a more appropriate label for an approach which includes more than the social context and contains political and historical elements, but that this is also a potential path forward for 'enlarging the discipline'. [50]

As the above discussion reveals, the strand of scholarly literature we have placed under the three alternative/overlapping labels 'Law and Society', 'Law in Context', and 'Socio-Legal Studies' is indeed a one of the most diverse categories we are reviewing in this chapter.[51] While the first and second labels are broad and inclusive they also have somewhat more identifiable research agendas, but Socio-Legal Studies is in contrast is a big broad church. In fact, the term has recently become an umbrella term for various different approaches all of which, in different ways, contest the narrow and rigid conceptualisation of the law associated with Positivism.[52]

The reason we devote attention to this strand of literature is precisely because of its rejection of Legal Positivism, and by extension, the more expansive conceptualisation of the law they all share as lowest common denominator. The scope of what potentially could fall under this subsection is vast, so for us it is the extent this literature helps us with the study of non-Western constitutionalism. We do not cover the vast and varied 'Law and Society / Law in Context / Socio-Legal Studies' literature beyond this.

There is very little one can discover about the working of indigenous law and governance – especially uncodified customary laws – if one's framework of analysis and explanation only registers formal black letter laws. One cannot understand and explain indigenous constitutionalism without an accompanying broad conceptualisation of the law which incorporates social factors into the analysis. When uncodified, unrecognised and unofficial, the only way to identify the workings of indigenous law and governance is through such society-based cross-disciplinary perspectives. But these are less useful when traditional law and governance is granted a degree of official recognition and things are framed in terms of indigenous constitutionalism. There is one strand of literature that directly addresses the status of indigenous law and governance under official recognition. It comes from *apartheid* South Africa.

2.8. Bantu Studies in South Africa (*Bantureg*)

In all the preceding subsections we sought to situate the particular strand of literature within its proper legal, political, social, and historical context. In some instances, such as the surveys by colonial bureaucracy and missionaries, the broader context, and its importance, is self-evident. In others, such as Legal Realism, the broader context has only indirect relevance to the formation of this approach. In this subsection we look at a strand of scholarly literature explicitly and inextricably linked to the political context.

[50] Twining, William (1947), *Law in Context: Enlarging a Discipline*, Oxford: Clarendon.

[51] An attempt to bring a sense of order to the diverse strand of literature is: Twinning, William (2000), *Globalisation and Legal Theory*, Butterworths.

[52] Harris, D.R. (1983) "The Development of Socio-Legal Studies in the United Kingdom", *Legal Studies* , Vol. 3, No.3, at pp. 315-33; Thomas, Philip A. (1997), "Socio-Legal Studies: The Case of Disappearing Fleas and Bustards" in P.A. Thomas (ed.), *Socio-Legal Studies*, London: Taylor and Francis, pp. 2-3.

Throughout most of its history, South Africa produced an inordinate amount of contribution to the scholarly literature on indigenous law and governance. Some of these have come from the left, some from the right, and some have been more even-handed. Our coming detailed case-study covers this literature in detail and shows the remarkable breadth of output. The variation is due to the various historical episodes when the borders, laws, and very nature of the political system changed. In parallel, subsequent political systems of South Africa approached the recognition, application, and indeed, the teaching of indigenous African law differently. Many of the 19th surveys by colonial bureaucracy and missionaries we discussed earlier were indeed from South Africa. We also saw how South African scholars were overrepresented among Applied Legal Anthropology. There is however one strand of the literature which is uniquely and exclusively South African: Bantu Studies.

One thing that sets South Africa apart from other African countries is that a 'domesticated' version of indigenous law had gained recognition very early in the mid-19th century.[53] Parallel to the various political phases of the country with the two British colonies of the Cape and Natal, two Boer Republics, (the Orange Free and Transvaal), and three British Protectorates (Swaziland, Basutoland, and Bechuanaland); followed by the Union of South Africa; and then followed by the apartheid regime, indigenous law and governance had started to enter university curriculum. What came to be known as *Bantureg* (Bantu Law in Afrikaans) had its roots in the Applied Legal Anthropology which had flourished during Britain's imperial retrenchment from Africa. So, of course, such studies had a lineage preceding apartheid, but under the label Bantu Law a more distinct field of study emerged: it had very clear applied goals and little interest in comparative analysis and theorising.

Despite the political agenda behind the creation of Bantu Studies departments, those hired to work in Bantu Studies programmes were scholars trained in the oeuvre of the previous generation of Legal Anthropologists. This was thus not a simple story of training state bureaucrats for administrative and legal duties. The scholarly roots of the field lay outside apartheid policies. What is more, during different political episodes, many amongst the ranks of Bantu Studies scholarship would openly object to more heavy-handed and arbitrary national policies in, what were eventually to be known colloquially as, the Bantustans. But it was also very likely that those very heavy-handed policies were devised and implemented by some of their former students.

Individual students in Bantu Studies programmes could have their own reasons for choosing this field of course, but most of these programmes were designed with state interest, *raison d'État*, in mind. Robert Gordon calls Bantu Studies 'establishment anthropology'.[54] According to Gordon, the origins of the field of study, and the subsequent use to which Bantu Law has been put, had rendered Bantu Studies a state instrument of internal control. While Gordon's verdict on Bantu Studies as a field of study serving the apartheid state is beyond contestation, we should also remind ourselves that during apartheid most fields of study, ranging from cartography to medicine, were managed with an eye to *raison d'État*. It would therefore be unfair to paint all the scholars and students associated with Bantu

[53] Early recognition was followed by almost-constant institutional redesign and policy changes superimposed on each other with each new political phase in the country. As the coming South Africa case-study shows, recognition does not always equal empowerment.

[54] Gordon, Robert (1989), The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa", *Journal of Historical Sociology*, Vol. 2, No. 1, pp. 41-65.

Studies with the same broad brush.[55] In any case, *Bantureg* never became a high-profile part of university research or curriculum.[56] It was framed as more of an applied study rather than an academic one.

What is noteworthy in this literature is that theoretical element was downplayed, and the more applied legal angle was prioritised – hence the more common label *Bantureg*. What is noteworthy is that, either despite the applied agenda or because of it, Bantu Law incorporated cross-disciplinary perspectives into its repertoire. A.C. Myburgh identifies four distinct disciplines which join forces in the study of indigenous African law. Naturally, Law is the first such discipline followed by Anthropology, Linguistics, and Government.[57] Field-research was often also part of Bantureg studies.[58] Not surprisingly, given the political context, quite a few of studies of Bantu Law were published in the form of government reports and surveys, covering the traditional laws of different indigenous communities of South Africa (and Namibia). [59] From the laws of the Venda to those of the Zulu, there was wide-ranging coverage of the system of law and governance in the country's so-called Native Reserves (which were later to become nominally autonomous and independent ethnic Homelands, i.e. the Bantustans). [60] The amaXhosa were thus among the various communities of South Africa whose laws were studied under Bantureg.

Even when co-opted into the *raison d'État*, the country's venerable Legal Anthropology heritage ensured a firm scholarly foundation for Bantu Studies. In addition, a tone of benevolent paternalism prevented Bantu Studies from becoming an explicit tool of state control in the early years of apartheid.[61] However, by the 1980s when the apartheid regime found itself internationally isolated and fighting on many fronts, Bantu Studies did come to be seen as training for bureaucrats responsible for overseeing the increasingly restless Homelands. During this time, many scholars of Bantu Studies buried themselves in the more-escapist cultural, technical, and theoretical aspects of indigenous law, thereby trying to avoid serving the prescribed policy goals of the apartheid regime. Especially during

[55] Shaun Johnson's 2006 novel *The Native Commissioner* is a (somewhat fictionalised) account of the author's father who had started as an official in the pre-apartheid Department of Native Affairs. As a Native Commissioner, he learns a number of local languages and devotes himself to study of indigenous culture and history. As the apartheid regime takes over the South African state in 1948, the author's father finds himself as an administrator working for the new Bantu Homelands administration. The novel takes us through the personally traumatic consequences that follow.

[56] As TW Bennett puts it "[African] Customary Law has seldom attracted much attention in South Africa: unknown and, apart from a small group of academic devotees, seldom studied, it is a Cinderella subject." Bennett, T W (1991), "The Compatibility of African Customary Law and Human Rights". *Acta Juridica*, p. 18.

[57] Myburgh, A.C. (1985), *Papers on Indigenous Law in Southern Africa*, Pretoria: J. L. van Shaik, Chp. 1, pp. 1-12.

[58] Van Niekerk, GJ and LP Vorster (1991), *Field Research in Indigenous Law*, Pretoria: University of South Africa.

[59] Namibia, then officially called South West Africa, was former German colony which had been absorbed into the British Empire as a League of Nations Mandate territory after World War I. It was in effect governed by South Africa. After the end of World War II, its status had changed to a United Nations Trust territory – again governed by the Union of South Africa. The country was governed as the fifth province of the Union until the mid-1980s when it was given self-rule.

[60] See for example, Van Warmelo, N.J. (1948), *Venda Law*, Pretoria: Department of Native Affairs.

[61] Jeff B. Peires contrasts the romantic narrative which distinguishes between the last generation of colourful, courageous, and benevolent imperial Native Commissioners and apartheid's faceless Bantustan bureaucrats. Peires believes that the "congenial self-image of Native Commissioners as a special breed of uniquely gifted administrators possessed of extraordinary tact and insight" was not borne out by reality on the ground Peires, Jeff B. (2009), "Nostalgia and the Native Commissioners: A Hundred Years in the Old Transkei", *Kronos*, Vol.35, No.1, p.244.

the last decade of apartheid, the Bantu Studies literature tried insulated itself from day-to-day politics and became more comparative and academic.[62] During apartheid's last chaotic decade, the label Bantu Law was changed to Indigenous Law.

We had started this subsection by saying how Bantureg was explicitly and inextricably linked to the South African political context. Scholarship on indigenous law and governance did not end with the end of apartheid of course. Once the remnants of *raison d'État* finally excised from their field of study, former scholars Bantureg continued to contribute to the comparative literature on indigenous law and governance. One interesting angle they have explored is to frame the relationship between modern written laws and the variety of traditional indigenous laws in the terms of 'Conflict of Laws'.

2.9. Conflict of Laws / Legal Pluralism

We ended the previous subsection on how some scholars with roots in Bantu Law studies in South Africa (which as a field of study itself had roots in South Africa's Legal Anthropology scholarship in pre-apartheid years) had framed their subject matter in the terms of 'Conflict of Laws' – a branch of legal studies more often associated with Private International Law. In this instance, in an innovative twist, the framework was employed to determine applicability in a national system of legal pluralism.[63] During the first decade of post-apartheid South Africa, this approach became a very vibrant part of South African legal scholarship.[64] Others also put the Conflict of Law framework to use in studying indigenous law and governance elsewhere in Africa. After all, as Arthur Schiller has observed: "almost every country on the African continent has a plurality of legal systems within the bounds of the individual state".[65]

Framing the study of the relationship between various indigenous traditional laws and modern laws in terms of Conflict of Laws is, by definition, predicated upon some form of underlying Legal Pluralism of course. Similar to 'Law and Society / Law in Context / Socio-Legal Studies', Legal Pluralism is a broad and diverse scholarly literature. It also has a venerable long history. The British legal scholar A.C. Dicey's 1896 *Conflict of Laws* has had numerous editions since its first publication, it is remains in print, and is still used as a textbook on the topic.[66] In this broad and diverse literature, the study of indigenous systems of law and governance occupies a tiny spot on the margins of the field. [67] Works which frame indigenous law and governance in constitutionalist terms are even rarer in Legal Pluralism.[68]

---

[62] See for example, Bennett, T W and T Vermeulen (1980), "Codification of Customary Law", Vol. 24, No. 2, *Journal of African Law*, pp. 206-19.

[63] in A.J.G.M. Sanders (1980) (ed.), *The Internal Conflicts of Laws in South Africa*, Durban: Butterworths, pp.1-12

[64] Van Niekerk, Gardiol Jeanne (1995), *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective*, Pretoria: University of South Africa.

[65] Arthur Schiller (1968), "Introduction" in Thomas Hutchison (ed), *Africa and Law: Developing Legal Systems in African Commonwealth Nations*, The University of Wisconsin Press, p. vii.

[66] Dicey, AC (1896), *Conflict of Laws*, First Edition, London: Self-published.

[67] See, Van Binsbergen, W. (1987) "Chiefs and the State in Independent Zambia", *Journal of Legal Pluralism* , Vol. 25 & 26, p. 139; Benda-Beckmann, F. von (2000), "Who's Afraid of Legal Pluralism?", *The Journal of Legal Pluralism and Unofficial Law*, Vol. 34, No 47, pp. 37-82; Merry, S.E. (1988), "Legal Pluralism", *Law and Society Review*, Vol. 22, No. 5, pp. 869-96.

[68] For an exception, see Fuller, Chris (1994), "Legal Anthropology, Legal Pluralism and Legal Thought", *Anthropology Today*. Vol. 10, No. 3, pp. 9-12.

There is however room to incorporate the 'Conflict of Laws / Legal Pluralism' perspective into the study of indigenous law and governance; and there are scholarly benefits from framing things in such comparative terms. But Private International Law is not going to be of much use here. Instead of individuals and corporate entities, what we need is a focus on Public Law issues like orders of government, territorial vs. non-territorial jurisdiction, exclusive vs shared jurisdiction, hierarchy between legal orders vs. national supremacy. In other words, there is room to frame indigenous law and governance in Conflict of Laws terms as long the emphasis is on constitutionalism, checks-and-balances, and division of power. And we can import from two other fields of study: Comparative Federalism (where the constitution grants orders of government both autonomous and shared jurisdiction) and Legal History (studying imperial constitutionalism and jurisdictions).[69] Both fields can help frame the relationship between indigenous systems of traditional law and governance on the one hand, and the modern national system on the other, in such macro jurisdictional terms while still remaining within the spirit of Conflict of Laws. As the next chapter on the theoretical framework and the subsequent three case-studies show, this is indeed a big part of the comparative constitutionalist path we seek to follow in this thesis. Framing things in terms of orders of government and jurisdiction, also happens to the defining characteristic of the literature we review in the last subsection.

2.10. Comparative Indigenous Law and Governance Elsewhere

Under this last subsection we examine a more recent strand of scholarly literature mostly originating from Canada. The country's decentralised federal system with strong provinces which enjoy exclusive jurisdiction in many policy areas, a relatively small population spread over an immense geographical space spanning from the Arctic to the United States border on the one end and from the Atlantic Ocean to the Pacific on the other, and history of two colonial powers (Britain and France) with the different legal systems they have bequeathed, had all historically worked in favour of legal pluralism. The ensuing local diversity in laws was compounded the British imperial system (akin to the one in South Africa) where settlers and natives were subject to different systems of law. What is more, because of a past with two colonial powers, some provinces had Common Law systems, other Civil Law systems, yet others where elements from both were mixed, while Native Reserves were under federal jurisdiction were varieties of indigenous law were combined. What is more, the country's (indigenous) First Nations were composed of the Mètis (a mixed-race community in habiting the continental Prairies), the arctic Inuit, and the so-called 'Indians' spread over the entire land who themselves were composed of a variety of indigenous ethno-linguistic communities with their own systems of law and governance. To add to the complex system of legal pluralism, indigenous peoples who did not live on federal Reserves were subject to different provincial laws. In addition to the ten self-governing Provinces of the country, there are also three autonomous indigenous so-called Territories where the federal government has more direct role than in the Provinces. Add to this Canada's constitutional tradition of recognising collective group rights in the form of multinationalism and multiculturalism. Federal division of power, various orders of government, and multiple jurisdictions has made constitutionalism a core part of Canada's politics.

[69] The Applied Legal Anthropologist, Max Gluckman, has also covered the matter from the historical angle, see Gluckman, M. (1974), *African Traditional Law in Historical Perspective*, Oxford University Press.

Altogether, this complex legal, political, historical context combined with demographic and geographical factors had worked in favour of indigenous law and governance – even when managed by the Office of Native Affairs under the political supervision of the Federal Government. There is thus a history of oeuvre on indigenous law which could be placed under the first subsection of the literature review Surveys by Colonial Bureaucracy and Missionaries and (the Canadian equivalent of) Bantureg subsection. The details of the various and varied output taking stock of the laws of various different Indian First Nations tribes, the Mètis, and the Inuit are not immediately and directly relevant to the subject of the thesis. What is relevant however is when Canadian scholars of Indigenous Studies adopt a macro constitutional perspective looking at the jurisdictional distribution of prerogatives across the various governmental orders and different legal systems constituting Canada.[70] Since this also happens to be the path the LLD thesis pursues, even when such a literature exists that ostensibly is about Canada, we will incorporate the country's experiences with non-Western constitutionalism in a legal and political system based on multinational and multicultural diversity and subsequent legal pluralism .

There is also a more recent, more politically engaged, more activist branch of Canadian writing on such issues. Instead of theoretical and methodological discussions on how to conceptualise and analyse indigenous law and governance, what unites this branch is an *engagé* call to 'decolonise the curriculum'; that is, the call to tone down the Western emphasis in university education and introduce more indigenous voices, topics, and approaches. In this thesis we do not directly address such concerns about social change and curriculum development. Indirectly, however, what is covered in the thesis (and the subsequent lessons, insights, and observations) will inevitably have relevance to such debates. In the concluding Postscript of the thesis, we will reflect on how the thesis might come to play a role in incorporating non-Western approaches to constitutionalism, local forms of checks-and-balances, and the division of power between indigenous forms of *Trias Politica*.

3. CONCLUSION

The preceding sections show us that various strands of scholarly literature are relevant to this research. These will form the foundations of the theoretical framework we build in the next chapter. Our aim in this literature review was not to exhaustively list each and every publication as part of a stock-taking exercise. Instead, the aim was to get a bird's-eye-view of what is relevant (and potentially relevant), to set the benchmarks for inquiry, and to provide us with a repertoire of ideas and approaches to guide the investigation. The next chapter builds on what past scholarship from various different academic disciplines has contributed to the macro constitutional study of indigenous law and governance. All that we covered here provides the foundations for this.

[70] Borrows, John (2016) "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61/4 *McGill Law Journal* Vol. 61, No. 4, p. 795; Borrows, John, "Indigenous Legal Traditions in Canada" 19/1 *Washington University Journal of Law and Policy* Vol. 19, No. 1, p. 166; Borrows, John (2002) *Recovering Canada: The Resurgence of Indigenous Law*, University of Toronto Press; Napoleon, V. and H Friedland (2016), "And Inside Job: Engaging with Indigenous Legal Traditions through Stories", *McGill Law Journal* Vol. 6, No. 4, p. 725; Napoleon, V. and H Friedland H. (2014), "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law*, Oxford University Press, p. 225; Grammond, S (2013), *Terms of Coexistence: Indigenous Peoples and Canadian Law*, Carslwell.

Chapter 3:
Theory and Methodology

[H]istory, in illuminating the past, illuminates the present,
and in illuminating the present, illuminates the future.
Benjamin N. Cardozo (1921)[1]

1.INTRODUCTION

1.1. Core Ideas from the Literature Review

As we now enter the last chapter before the three case-studies (and the attending theoretical and methodological details of the investigation) let us quickly revisit some of the relevant ideas we had identified in the previous chapter on the scholarly literature, highlight how the teachings of different strands of scholarship could be combined into a more integrated theoretical framework geared to our research, and describe how this would help steer the investigation into the case-studies.

[1] Cardozo, Benjamin N. (2009) [1921], T*he Nature of the Judicial Process*, New York: Cosimo Classics Reprint, p. 53.

What we had done in the literature review was to take a bird's-eye-view of relevant (and potentially relevant) strands of scholarship. While doing so, we covered a remarkably diverse oeuvre of scholarship spanning across centuries and continents. But this was not just a mere stock-taking exercise of listing one strand of such literature after another. Instead, the aim was to see how one might establish a new research agenda on the foundations of past scholarship and the repertoire of ideas and approaches they have bequeathed. The hurdle is to build something coherent, comprehensive, and internally consistent from a vast and varied literature cut across by disciplinary divides, theoretical approaches, methodological preferences, applied concerns, geography, and time. And that is what we will be doing in this chapter.

Indigenous law – whatever the label used in a national jurisdiction at a given point of time (be it Native law, African Law, Tribal Law, Traditional Law, Customary Law, or Bantu Law) – can be studied through various perspectives employing different research questions. Throughout the thesis, we will seek consistency whenever possible and use 'traditional law and governance structures indigenous to the land'. Some research questions are comparative and generalisable, others pursue very specific micro interests delimited to a particular jurisdiction or sub-jurisdiction. Ours is decidedly on the more macro side as we seek to frame indigenous law and governance in the terms of constitutionalism, the relationship between legal systems, local forms of check-and-balances, conflict regulation and arbitration, the jurisdictional distribution of prerogatives across the various governmental orders, and the division of power between indigenous forms of *Trias Politica* (i.e., legislative, executive and judicial powers in modern polities). The following section on the theoretical framework fleshes this out in more detail. In addition to framing indigenous law and governance in comparative macro terms, we will also acknowledge what sets them apart from Western forms of constitutionalism. That is, we will expose what is unique to indigenous law and governance in Africa. This is followed by the section where the research methodology employed is unpacked and explained.

There is a combination of a few core ideas from the literature review we carry forward into this chapter. The expansive conceptualisation of the law covering both the formal and the uncodified, situated within the historical, social, and political context, is one. The search for comparative and generalisable patterns is another. And the combination of theoretical and applied concerns is yet another. While doing so, the discussion of indigenous law and governance will be couched within terms of constitutionalism and its non-Western variants, and the various forms of relationship between the indigenous traditional and received modern legal orders. While the intended target audience is the scholarly community of (comparative) Constitutional Law, the lessons, insights, and observations represent the results of cross-disciplinary investigation along multiple avenues where the legal is accompanied by the historical, political, and social. This means that findings will accessible to those beyond any one subfield of legal scholarship.

Before we proceed to the comparative theoretical framework, it is imperative to establish one important element in using historically grounded research for making broader theoretical points about comparative non-Western constitutionalism. In the course of presenting the various strands of scholarly literature in the previous chapter we were careful to provide the geopolitical backdrop to the times. In addition to the theoretical preference for setting case-studies within in the broader context, another important justification for this is the desire to avoid projecting what might be *presentist* assumptions and interpretations onto the past.

1.2. *Presentism* and Historically Grounded Research

One of the side-benefits of historically grounded research is immersion in the time-period painted by contemporary sources and archival evidence, and the chance to capture some of the nuances and complexities which have been forgotten or ironed out since. Research which tends to project debates from today onto yesterday and frame things without due attention to the proper historical, political, social context of the time will, by definition, fail to spot relevant factors outside their *presentist* blinkers. The details emerging from our case-studies reveal a few such *presentist* assumptions and interpretations in need of finetuning or correction:

The first one to note is that colonialism was not a one-size-fits-all policy of Western powers. The constitutional status and jurisdictional prerogatives of various imperial territories differed from one another. In addition to the varied constitutional status of the various imperial holdings in British Sub-Saharan Africa, there were also political and economic disagreements between settlers in the colonies, the imperial bureaucracy, various missionary societies, and corporate economic interests. What is more, in London itself cycles of competition and cooperation defined the relationship between the Dominion and Colonies Secretariat. Contrary to what most of our students nowadays seem to think, the Imperial Government was often reluctant to extend formal colonial control and intervene, fearing the economic costs of involvement. It was the settlers who were the leading voices for more colonial presence. Contrary to some of the presently held views about Africa's past, direct imperial intervention was in fact often demanded by the progressive-leaning parts of European establishment as a way to hold in-check the greed and brutality of European settlers widely reported across newspapers at the time. In this forgotten detail about colonialism, direct involvement to 'help' Africa was promoted, not by British conservatives, but liberals on the left of the political spectrum.

Another side-benefit which historically grounded research provides is the need for nuance in juxtaposing a dichotomy between colonial authorities and the indigenous. Country-specific details of this appear in each of the case-studies, but it is also imperative to highlight this here before we get to the theoretical framework steering the research and the methodology put to use for this. Just as the colonials were divided between imperial bureaucracy, corporate interests, missionaries, and settlers, so did the locals have their tribal allies, enemies, competitors, and different and varying agendas. Following the ubiquitous logic of inter- and intra-tribal conflict, many traditional leaders saw colonial authorities through the lens of my 'enemy's enemy is my friend' and served as the outsourced arm of imperial power and saw this as an opportunity to defeat their local competitors and enemies, while other locals welcomed what was deemed as the arrival of modern economic development and social progress.

Colonialism's extractive exploitation is now universally acknowledged, but this was not the case for most of the 19th century and early 20th century. Colonial expansionism was justified on the grounds of bringing modernity, development, progress, and stability to what was seen as a backward continent in need of help. We had seen how, in a twist of history, 19th century British liberals were the ones who favoured direct involvement for promoting the progressive goals of social and economic development, while conservatives were suspicious of running imperial policy on such an agenda and favoured to

leave things in the hands of locals.[2] That is, the politics in the imperial capital was not a timeless constant. This means that whoever was in power in Westminster came to influence the priorities of colonial policy.

Historically grounded research highlights the need to treat colonialism as a complex phenomenon where the role of national politics has to be factored in. While acknowledging this, we should also be careful not to reduce colonial policy to intra-imperial partisan competition in London of course. From 'indirect rule' of establishing treaties with local traditional rulers to self-governing Dominions, from chartered companies to leased harbours, the British Empire was a heterogenous amalgamation of exclusive and cross-cutting jurisdictions and privileges. With varying degrees, remote parts of the empire cut off from the ins-and-outs of Westminster partisan politics could function autonomously. We should also remind ourselves the long overseas distances when it comes to communication between the metropolitan capital and various imperial holdings across the globe. Imperial authorities on the ground often had to make their own decisions, leading to policy discretion at the hands of colonial governors. Combined with a rather thin bureaucratic and military presence short of the reach and range needed to implement imperial policies directly underscores the 'nuance and complexity' we referred to earlier. What we mean by this will become clearer within the context of the case-studies of South Africa and Botswana in particular. How much recognition traditional laws were granted, and the subsequent relationship between the indigenous and received laws, are closely related to the intra-imperial dynamics of British colonialism in Africa.[3]

The reason why we address this here in the Theory and Method chapter before the case-studies is to underscore how historically grounded research helps prevent the decontextualized projection of *presentist* assumptions and interpretations onto the past, and hopefully, how this ensures the findings will remain relevant and accessible beyond the specific concerns defining various jurisdictions today.

1.3. Delimiting the Scope of Generalisability

The previous sub-section established our primary scholarly goal of learning from the past in order to understand the consequences of the different legal paths to empowering indigenous constitutionalism. But we are not only using history to understand the present, we are also setting the case-studies holistically in their broader context in the course of the investigation. All three case-studies are put through this theoretical framework; and subsequently offer generalisable and comparative lessons, insights, and observations. But there is one shared background enabling factor behind all three which delimits to what extent the these are transportable and applicable to other case-studies: a combination of demographic strength, territorial attachment, and geographic concentration. Let us unpack what this means a little more:

[2] For the French colonies on the continent, partisan political cycles at home had little impact on the nature of colonialism. The representation of colonialism as a force for progress and development remained constant in the form of France's self-appointed *mission civilisatrice* for the continent.

[3] During the same time-period Ethiopia was free of Western colonialism, but it was also a time when Oromo lands in the south of the county were in the process of being absorbed into the Abyssinian Empire in a type of internal colonialism akin to Russia's expansion into central Asia around the same time. That being said, despite this important difference, some of the dynamics characterising Abyssinian imperial expansion and subsequent intra-Oromo tribal politics have close parallels to history of British colonialism in southern Africa. Ethiopia's unique history will be discussed in full detail in Chapter 7.

One of the benefits of employing a holistic, cross-disciplinary, and historically grounded perspective is that it reveals something in the background that would have been left out of investigations investigating current legal and political factors only. While three case-studies present different historical trajectories in terms of the relationship between the traditional and the modern, and represent three different paths to empowering indigenous constitutionalism, they all have one thing in common. And what they share has made Tswana, Xhosa, and Oromo law and governance more resilient than some of the other indigenous ethnic communities of Africa.

Compared to the smaller, more dispersed, and nomadic/pastoralist ethnic communities, the Batswana, the amaXhosa, and the Oromo all enjoy a certain degree of demographic strength, territorial attachment, and geographic concentration. The dispersed and mobile nomadic/pastoralist societies without the demographic strength of sizeable populations have not had the same degree of success in ensuring the survival of their indigenous systems of law and governance. In addition, our three ethnic communities under examination all have a strong rural component. This means that they are less likely to be subject to individualisation, deracination, and cultural assimilation which often characterise social dynamics in large urban centres. Put simply, traditional structures have a better record of resilience in more rural areas where they do not have to compete with other more modern political loyalties, be it partisan, economic, or class based. This has been a long-standing pattern across Africa for indigenous law.[4]

Geographic and demographic concentration gives traditional structures more of a strength to withstand the pressures of modernisation, political manipulation, and economics – something that nomadic/pastoralist ethnic groups and territorially more dispersed indigenous communities lack. What is more, other than some of the border areas surrounding of the Oromia region of Ethiopia, there is no contestation with other ethnic communities over their ancestral lands in the way Francophones and Flemings fight over Brussels or Israelis and Palestinians over Jerusalem and the West Bank.[5] Compared to indigenous communities which are territorially dispersed, cut off from one another, and demographically vulnerable, the Batswana, the amaXhosa, and Oromo are the majority in their ancestral lands and have a demographic strength that allows their traditional culture to survive. Although our investigation is interested in macro constitutional questions, we have to take note of this enabling background factor which ensured the resilience of indigenous forms of law and governance. In comparative terms, it is thus necessary to note that, geographic and ethnographic concentration, together with societal and cultural homogeneity, ensures the legitimacy and resilience of traditional structures.

1.4. Note on Terms and Terminology

[4] Epstein, A. L. (1953), *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, Lusaka: The Rhodes-Livingstone Institute, p. 23.

[5] To be precise, some of the borderlands of Oromia are indeed contested, especially the surrounding region around the capital Addis Ababa (Finfinne in Afaan Oromo) and the outskirts of Dire Dawa in the north. But the ancestral heartlands of Oromia, especially the Guji-Borana district that is the subject of our investigation, are not areas where different ethnic communities lay claim to the same territory. Details are in Chapter 7.

In a research project that covers various scholarly literatures, the overriding concern is accessibility and readability across scholarly disciplines. What is clear in one scholarly literature might not be understood in another one, or similar terms might refer to different things. What was also concern was accessibility and readability across time. For these reasons we tried to stay clear of terminology that has more scholastic overtones and kept to English-language terms that have proven more timeless. Descriptive accuracy is but one aspect of terminology issues, but the more sensitive one has been the changing connotations of terms over history, particularly what has come to be perceived as offensive.

The main text sought to standardise the term for the subject matter of the thesis as 'traditional law and governance structures indigenous to the land'. It is not perfect, but at the same time the choice provides the lowest common denominator of descriptive accuracy, accessibility across scholarly disciplines, and a potential to withstand shorter terms fluctuations in academic fads and their preferred terms.

Changes in terminology is not only a matter of the natural recourse of language changing over time. Official policy also has a policy of changing the label of what it does. Throughout the course of the coming chapters, the reader will encounter these different terms in quotations from both official and scholarly works during different time-period and different jurisdictions. Some of these terms have become either taboo words or with negative connotations. But one cannot rewrite history in the form of changing the wording of original documents. The author hopes readers acknowledge this challenge and understand the reasons why controversial terms appear in quotations of titles of official documents, books, and articles from previous centuries.

2. THEORY

2.1. The Building Blocks of the Theoretical Framework

In the introductory section to Chapter Two we had stated that constructing an integrated framework from various different strands of scholarly literature was not only to steer the investigation here, but also to help set the theoretical framework for others in the future who might be interested in studying non-Western constitutionalism comparatively. Many of these building blocks have been part of the preceding discussions in this chapter as well as the previous one but let us quickly highlight and list them here before we get deeper into looking at African indigenous law and governance under a comparative lens.

2.1.1. Holistic

In addition to its limitations in other various branches of Legal Studies, the narrow and rigid conceptualisation of the law which defines Legal Positivism is particularly unsuited for the comparative study of indigenous law and governance. Uncodified rules, unwritten norms, unofficial customary laws, unrecognised governance structures are indeed defining characteristics of our subject matter. It is for this reason that in Chapter 2 we tried to pull together various different strands of scholarly literature where the law is conceptualised beyond written codes and formal institutions in a more

holistic way. This is one of the key building blocks of the theoretical framework steering our investigation.

2.1.2. Historically Grounded

The fate of indigenous law and governance has fluctuated within our three case-studies over time. What is more, in terms of the relationship between received modern laws and indigenous ones, there is often a time lag between official policy decisions on these matters and subsequent outcomes. All our case-studies have gone through different historical trajectories. Surefooted historical knowledge is imperative in the quest to distil lessons, insights, and observations which have comparative generalisability.

2.1.3. Cross-disciplinary

Although the aim of Chapter 2's literature review was to cover various strands of scholarly literature which are relevant (or potentially relevant) to the study of comparative indigenous law and governance, we also ended up citing a number of 19th century foundational classics of Law Scholarship in general. Had two of these luminaries, Sir Henry Maine and Carl Friedrich von Savigny, been writing today instead of the 19th century, their approach would have been labelled cross-disciplinary.[6] While their main concern was the law, their approach contained politics, history, and society in order to help them reach comparative and generalisable conclusions. Since Sir Henry and von Savigny, academia has divided itself into multiple disciplines, and then further divided into sub-disciplines. In today's specialist world their macro approach would be deemed to crosscut through the academic disciplines of Law, Political Science, History, Sociology, and Philosophy; and potentially fall under various newer sub-disciplines like Development Studies and Indigenous Studies. Ours is a cross-disciplinary approach to law in the same scholarly spirit of Sir Henry and von Savigny.

2.1.4. Mix of Theoretical and Applied

There is one building block of our theoretical framework which is not purely theoretical. And that is our concern about applied consequences. Our effort to build a theoretical framework to study African indigenous constitutionalism is not for scholastic ends targeting the limited audience of fellow academics in a select sub-discipline. In the previous chapter we had seen how Max Gluckman and others in Applied Legal Anthropology had come under fire from anthropological purists for their efforts to put their applied concerns about how to recognise and apply indigenous law comparatively across Sub-Saharan Africa.[7] By now it should be evident that, in terms of its foundations, our approach is closer to Gluckman and his colleagues'. What is different from most Applied Legal Anthropology is that ours does not target specific branches of indigenous law delimited to a particular jurisdiction or sub-jurisdiction – say family law or land law – but instead pursues macro constitutional questions.

2.1.5. Comparative Constitutionalism

So, what does a holistic theoretical framework, where theoretical and the applied are combined, in a historically grounded way, across disciplinary divides, tell us about Africa's indigenous forms of

[6] Maine, Henry James Sumner (1861) *Ancient Law, Its Connection with the Early History of Society and its Relation to Modern Ideas*, London: John Murray; Savigny von, Carl Friedrich (1814), *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.*

[7] Views from both sides can be found in, Gulliver, PH (1978) *Cross Examinations: Essays in Memory of Max Gluckman*, Leiden: Brill.

constitutionalism? Well, it shows how indigenous law and governance can indeed be framed in comparative terms and contribute to the literature on Comparative Constitutionalism. That is what we will be examining in the next Section 2.2. We will also look at how there are indeed unique characteristics to African constitutionalism which sets it apart from Western forms. And that part of the picture is covered in Section 2.3. afterwards.

2.2. Non-Western Constitutionalism in Comparative Focus

In Chapter 2's literature review, the first strand of literature we covered was the historical surveys carried out by colonial bureaucrats and missionaries. Some, like Colonel Rattray's report on the Asante Kingdom, remain accessible, reliable, and insightful to this day, but such imperial surveys of a high scholarly calibre are in fact quite rare. Other imperial surveys have not aged that well. This is either because their authors had either wilfully prioritised an imperial political agenda over even-handed scholarly investigation, or because the Eurocentric prejudices they held prevented them from seeing and reporting things accurately, or because they were too gullible and believed whatever their small number of informants decided to tell them without further verification, or because there was a desire to overplay the despotic elements in indigenous governance and the superstitious in indigenous law in order to fortify colonialism's claims of brining development and progress to a backward continent. It is mostly for these reasons that, until Max Gluckman explicitly did it with the Lozi (Barotse), indigenous constitutionalism was rarely put to comparative use on par with those of the West.

This political dynamic has especially been pronounced in the French, Portuguese, and Belgian colonies where more urbane segments of the local population had been linguistically, culturally, religiously 'assimilated' and co-opted into colonial governance structures as soldiers and bureaucrats. The negative portrayal of the pre-colonial was thus part of legitimising this social structure. It was especially lawyers trained within the received Western laws who came to view indigenous law as backward.[8] As a result, regardless of who the colonial powers were, what was traditional and home-grown was either ignored or negatively misrepresented. Africa was often painted as a continent of brutal absolutism of local chiefs and kings, a continent of witchcraft and superstition. According to a doyen of African studies, Michael Crowder: "colonial writers, whose interest as to deny the ability of Africans to govern themselves, had ignored or belittled the earlier state-systems of the region and had presented the acephalous type of society as the norm".[9] In terms of the colonial policies of Western powers, the lack of scholarly interest was coupled with an official neglect towards the nature of local legal systems, traditional culture and social structures.

Once deemed inferior to Western forms of law and governance, traditional structures did not appear to qualify for comparative constitutionalist analysis. This means that, instead of legal scholars, political scientists, and historians interested in constitutionalism, Africa's indigenous peoples were studied by

[8] This tendency would continue into the post-colonial era as well. Writing in 1966, in the context of the Restatement of African Law Project (RALP) we discussed in the previous chapter, Eugene Cotran expressed his reservations about entrusting national high courts with the authority to interpret, decide, and apply indigenous law: "I am afraid that the superiority of English law attitude still persists strongly amongst the judiciary and especially the judges of superior courts". Cotran, Eugene (1966), "The Place and Future of Customary Law in East Africa", *International and Comparative Law Quarterly*, Vol. 72, pp. 75.

[9] Crowder, Michael (1968), *West Africa under Colonial Rule,* London, p. 13.

anthropologists and ethnographers, who by definition, had little interest in constitutionalism *per se* (reflecting the scholarly priorities of their academic disciplines). While some within Legal Anthropology school, such as Schapera, Roberts and Comaroffs' work on the Batswana, devoted a lot of attention to indigenous forms of law and governance, other anthropologists and ethnographers had more interest in capturing the unique social and cultural characteristics of select small-scale preliterate traditional societies. It is perhaps for this reason that Anthropology literature on Africa's indigenous people highlighted the more exotic elements like magic, rainmaking, secret societies and ceremonies.

In addition to colonial inaccuracies in reporting existing forms of indigenous law and governance, there are also many instances when colonial authorities directly interfered to change or replace what existed on the ground. This, of course, has to be discussed within the context of the British colonial policy of indirect rule we had discussed in Chapter 2. While the practice came with a recognition of indigenous law and governance, this was not out of principled legal reasons but for more pragmatic political ones. In many instances, the policy rarely went beyond outsourcing colonial control to co-opted local allies. Throughout Africa, traditional leaders became partners to the British or they were loosely co-opted into colonial administrations.[10] Traditional structures were mostly used as a quick way to establish control over wide swathes if territory with a small contingent of soldiers and officials. As Sandra Joireman Fulllerton points out, it was a system based on necessity not one that was a principled policy "[The British] needed traditional leaders in order to make their policy of indirect rule work".[11] Save for a few colonial governors like Nigeria's Lord Lugard who had genuine interest in local forms of law and governance, there does not appear to be attempt to understand and integrate the indigenous law and governance in a comprehensive manner. Concerns were more about outsourcing colonial local governance to those who can impose their rule. Internal diversity, power-sharing, division of power, indigenous forms of check-and-balances did not serve this agenda – centralised absolutist indigenous governance did. We will see many instances of this especially in the history of our South Africa case-study, but we here we should briefly note a remarkable instance of this colonial practice from British East Africa:

During the late 19th, early 20th century British colonial bureaucracy completely rewrote the nature and rank of the indigenous leadership of the Kipsigis of Kenya. Like many other nomadic/pastoralist ethnic communities of Africa, Kipsigi leadership was not centralised in the office of a paramount chief or king but instead indigenous elites were an amalgamation of hereditary sorcerers, full-time judges, part-time military leaders, rainmakers, and so on.[12] A very interesting turn of events took place when the British wanted to deal with 'the chiefs' of the tribe. Suspicious of the intentions, the Kipsigis ended up selecting low-ranked members of the tribe and sent them to the British. Bernardi reports that:

> "In effect, these lesser men were chosen by the Kipsigis themselves, for they made it a policy in those earliest days to steer the British away from their most competent people. Since they could not be sure of what would happen to the men whom the

[10] Some observers believe this history of co-optation explains some of the current political dynamics. See for example, Nkrumah, S.A. (2000), "Decentralisation for Good Governance and Development: The Ghanaian Experience", *Regional Development Dialogue*, Vol. 21, no. 1, pp. 53–67.

[11] Fullerton Joireman, Sandra (2001), "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy", *Journal of Modern African Studies*, Vol. 39, No. 4, pp. 571–596.

[12] Manners, Robert a. (1967), "The Kipsigis of Kenya: Culture Change in a 'Model' East Africa Tribe", in Julian H. Steward (ed.), *Contemporary Change in Traditional Societies, Vol I: Introduction and African Tribes,* Urbana, Chicago and London: University of Illinois Press, p. 249.

> British were appointing, they decided to offer them not their most desirable leaders but lesser people".[13]

Since Bernardi's study of the Kipsigis in 1952, some of these low-ranked 'chiefs' have ended up consolidating their power into absolutist hereditary positions while indigenous forms distribution of political, executive, and judicial power between various leadership offices have gone largely extinct. Historical experiences like this perhaps also account for the widely held view across much of the critical post-colonial academic literature which tends to associate traditional leadership with despotic patriarchy. The prime example is Mahmood Mamdani's oft quoted and influential views equating traditional leadership with despotism.[14] Mamdani's views could very well be influenced by his native Uganda. His country's traditional leaders were known to oppose modernist progressive reforms. What we should note, however, is that their absolutist claim to power had been forged during British colonialism – at the expense indigenous forms of accountability and distribution of political, economic, and judicial power.

Earlier in subsection 1.2. we had referred to one of the benefits of historically grounded research on contemporary sources and archival evidence, that is, the chance to capture some of the nuances and complexities which have since been forgotten. One such important historical detail we have to establish is that traditional leaders were historically not as politically powerful in pre-colonial times. There might be element of modernity here playing a part too. Without standing armies, professional bureaucrats, tax extraction powers, governance infrastructure, developments in communication and transportation, (and the might of their colonial allies), it would have been impossible for pre-modern political leaders to project uncontested authority through their territories. Pre-colonial kings and paramount chiefs had little option but govern through consensus, share power, and rely on intermediaries. All three of our case-studies contains examples of these dynamics.

Despite the opprobrium heaped upon them by purist academic Anthropologists for using Western concepts in their comparative analysis, Applied Legal Anthropologists in fact did more to raise the profile of indigenous law and governance than any anthropologically detailed immersion in the ceremonies and magic of a select small scale pre-modern community. Max Gluckman and his colleagues exposed the richness of indigenous legal cultures, thereby aiming to undo the ignorance and misrepresentation of previous eras. By elevating the traditional structures into alternative equals to the West in the social, political and legal organisation of societies, their work effectively put breaks on the assumption of Western cultural superiority. With the benefit of a historical bird's-eye-view, we see that especially Applied Legal Anthropologists at Rhodes-Livingstone Institute were purposefully trying to emphasise comparability between African law and Western. Once such scholar, A. L. Epstein wrote that behind "the apparent simplicity and lack of formality in Bantu judicial proceedings",[15] a great deal of similarity with the legal systems of the West existed. As he put it, "fundamentally, African

[13] Bernardi, B. (1952), "The Age System of Nilo-Hamitic Peoples", *Africa: Journal of the International African Institute,* Vol. 22, p. 321.

[14] Mamdani, Mahmood (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton: Princeton University Press, p. 23.

[15] 'Bantu' law Epstein refers to is one of many different labels for indigenous law that have been used in different jurisdictions during different time-periods. Epstein, A. L. (1953), *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, Lusaka: The Rhodes-Livingstone Institute, p.1.

courts are faced with problems essentially similar to those which confront our own courts, and handle them in terms readily comprehensible to the trained European jurist". [16]

We had seen how it was only Gluckman who himself had interest in macro constitutional questions while others in Applied Legal Philosophy investigated more specific branches of indigenous law delimited to a particular jurisdiction or sub-jurisdiction, but at the end of the day, they all followed Malinowski's teachings on putting function above form. They used Western notions as comparative benchmarks to show that, while the form differed, indigenous legal systems provided the same functions to those found in Western systems of law. The parallels with our theoretical approach are self-evident.

One challenge with comparative exploration we have to address is that there rarely has been a pristine form of African indigenous law and governance which has managed to survive untouched so that one can clearly separate and juxtapose Western and non-Western constitutionalisms. Our Ethiopian case-study will show that the Oromo are amongst a handful of ethnic communities whose laws have remained relatively insulated from modern state laws until recently. But South Africa, and to a more limited degree Botswana, have a long history of interaction between received and indigenous legal traditions. The way to deal with the challenge is to ensure we acknowledge, incorporate and address the complexities, nuances, and indeed contradictions, marking the long historical relationship between the different legal systems and traditions.

To wrap up this section: Notwithstanding the historical reasons which led to misrepresenting or underplaying indigenous forms of law and governance, and notwithstanding the pervasive colonial manipulation of indigenous structures, African constitutionalism can indeed be put through the lens of Comparative Constitutionalism. And this is where Malinowski's teachings prioritising function over form is particularly useful. Instead of projecting the Western form of separation of powers between the three legislative, executive and judicial powers in modern polities, we way to pursue comparative analysis is to look at indigenous forms of *Trias Politica*, local forms of checks-and-balances, and power-sharing. All three of our case-studies show a variety of such structures designed to hold the centre to account, and to divide the various responsibilities of governance, representation, and justice. At the same time, there are important characteristics which sets African constitutionalism apart from its Western counterparts, and that is where we turn to now.

2.3. Unique Characteristics of African Constitutionalism

There is no one-size-fits-all model of African constitutionalism. There are differences across various indigenous systems of law and governance across Sub-Sahara Africa. What is more, even within a single ethnic community the tribal sub-branches of customary law can, and in fact often do, differ. While some indigenous cultures are based on patrilineal lineage, others are matrilineal, and yet others have more mixed methods for determining descent. When it comes to specific branches of law like family law and inheritance, these differences lead to very different dynamics of customary law in different jurisdictions or sub-jurisdictions. Some ethnic communities have had martial pasts; which to

[16] Epstein, A. L. (1953), *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, Lusaka: The Rhodes-Livingstone Institute, p.36.

this day continues to have an impact on how disputes are settled; while others have had histories defined by low incidences of violence. Some ethnic communities are sedentary; others nomadic/pastoralist. Yet, despite the many differences, they all happen to share a set of defining characteristics:

2.3.1. Society over the Individual

What had been an important factual insight, and subsequently a contribution to the scholarship on indigenous systems of law and governance, was Malinowski's observations that it, in the absence of courts, magistrates and police, it was the Trobriand Islanders' society that acted to enforce the law.[17] Origins of most indigenous systems of law derive from small-scale preliterate traditional societies where disputes were between individuals who possibly knew each other, and their extended families who were certainly aware of each other, and who were thus destined to come into interaction in the future again.[18] This means that intra-community harmony and social peace were thus often the overriding concerns when disputes arose between individuals or groups. As a result, the people and the law were inseparable from the collection of all types of social relationships which constitutes the community as whole.

Contrary to Western legal systems, indigenous law does not always come in a neat separation between the legal and the political, the official and the lay. Social norms, practices, customs – and even religion and culture – are not separate spheres from that of law. John Comaroff and Simon Roberts use Tswana law to make this point: "The stated rules found in Tswana communities, known collectively as *mekgwa le melao ya Setswana*, constitute an undifferentiated repertoire, ranging from standards of polite behaviour to rules whose breach is taken extremely seriously".[19] The Nguni Bantu saying *umntu ngumtu ngabantu* emphasising how an individual becomes one only through his/her membership in the society epitomises this paramountcy of community.

Indigenous law across Africa shows remarkable similarity in terms of valuing collective consensus over individual rights. This does not mean that traditional customary laws are identical everywhere of course, but across various indigenous communities a defining characteristic of traditional law is that concerns for social harmony and communal consensus often takes precedence over the letter of the law and abstract legal principles even as their respective systems of traditional customary law range from the less legalistic to more.[20] As George Ayittey puts it:

> "Great care, therefore, was exercised in traditional African societies to contain individual conflicts and prevent them from becoming an all-out group confrontation. This practice was much evident in legal jurisprudence where heavy emphasis was laid on restoring harmonious social relationships rather than the pursuit of an abstract notion of justice".[21]

[17] Malinowski, Bronislaw (1934), "Introduction", H. I. Hogbin, *Law and Order in Polynesia*, NY: Harcourt and Brace, p. lxiii.
[18] Nader, Laura and Harry F. Todd (eds) (1978), *The Disputing Process. Law in Ten Societies*, New York: Columbia University Press, p. ix.
[19] Comaroff, John L. and Simon Roberts (1981), *Rules and processes: The Cultural Logic of Dispute in An African Context*, Chicago and London: University of Chicago, p.9.
[20] Fallers, Lloyd A. (1969), *Law without Precedent: Legal Ideas in Action in the Courts Colonial Busoga*, Chicago and London: The University of Chicago Press, pp. 326-32.
[21] Ayittey, George B. N. (1991), *Indigenous African Institutions*, New York: Transnational Publishers, p.8.

What this suggests is that there is a clear preference for settlement and social peace between over litigation and confrontation between individuals. P.H. Gulliver's work on Ndendeuli conflict resolution in Tanzania concludes with a few general observations which in fact apply to almost all forms of indigenous law in Africa:

> "1. It is typically some kind of negotiated compromise between conflicting claims… 2. It is dependent not only on ideas of norms, rights, and expectations and on the respective bargaining strengths of both principals and their supporters, but also on considerations of its effects on other men's interests and the continuance of neighbourly cooperation and concord. 3. It is and must be, an agreed settlement, accepted by both principals as the best that can be obtained in the circumstances… 4. It is put into effect immediately if at all possible. The compensation or debt is paid, the apology made, the claim renounced, all in the moot. Although not invariably so, a settlement that is not acted upon straight away may be no settlement at all, for the whole dispute may have to be renegotiated at a later date, when the claim is exerted again… Further, by the immediate completion of a settlement it is hoped to remove the dispute altogether and thus allow for the re-establishment of working neighbourly relations".[22]

2.3.2. Conflict Prevention before Conflict Resolution

In light of the paramountcy of society we discuss above, it is evident that an incision aiming to isolate the legal and political from the social and cultural will fail to capture other unique characteristics of African law and governance. The holistic and cross-disciplinary building blocks of our theoretical framework help us see things that analyses influenced by the teachings of Legal Positivism would miss. One such observation is how concerns for intra-community harmony bring in a dynamic of conflict prevention which is largely absent in Western forms of law and governance where conflict is dealt with, after it takes place, according to a set of written laws and precedent.

Conflict resolution or arbitration between the collective entities – be it constituent states, provinces, regions, communities, cantons, devolved territorial governments, churches, traditional authorities, or kingdoms – is generally not enshrined in Western constitutions. It is Constitutional Courts/Tribunals, Supreme Courts, or High Administrative Courts who are often responsible for hearing cases of conflicts between collective entities recognised by constitutions, or between these collective entities and the central government. But such cases are decided on the basis of the wording in the constitution and precedents, and once decided, the judgement creates a winner and a loser. Conflict resolution and arbitration on the other hand, are different from deciding cases on the basis of written laws. As an intra-community matter – one which potentially could upset social peace – the conflict is not decided according to formal laws or abstract notions of justice. Instead, everyone is involved, and deliberations go on until both sides agree to the settlement. The small-scale social settings common to the practice of indigenous customary law also means that the details of the issues that are deliberated and the cases that are discussed are widely known, as well as the arguments and concerns of the different involved parties. This allows for the discussions and deliberations to centre on finding a solution rather

[22] Gulliver, P.H. (1969), "Dispute Settlements without Courts: The Ndendeuli of Southern Tanzania", in L Nader (ed.) *Law in Culture and Society*, Aldine, p. 67-8.

than presenting and pleading competing cases. Each and every case is decided in a way that balances different principles and norms, but also by prioritising harmony and consensus over individual entitlements. Instead of a verdict creating winners and losers, social peace is sought.

In quite a few ethnic communities across Africa such deliberations would historically take place under the shade of a (holy) tree. Depending on the geography, this could be a sycamore, palm, acacia, or baobab. The tree thus often symbolises justice and peace. The flag of Ethiopia's Oromia Regional State is in fact a sycamore tree. Instead of the deciding on merits of the case, conflict resolution and arbitration seeks to reach a position acceptable to both sides as well as the community at-large. Intracommunity arbitration and conflict resolution between groups is thus also a future societal investment in conflict prevention. But what makes most indigenous forms of constitutionalism in Africa different from their Western counterparts is that, because of the search for consensus and harmony on a case-by-case basis, there is an inherent element of inevitable indeterminacy of legal norms and expectations.[23]

2.3.3. Evolving Laws and Flexibility

With the exception of Britain, Israel and New Zealand, constitutions modelled on Western forms of law and governance are codified following the Roman/Napoleonic tradition of written law originating from continental Europe. While ensuring a degree of timeless certainty and providing formal recognition and protection to minorities and under-privileged groups, this tradition also comes with the risk of ossifying the letter of the law while circumstances and issues evolve and change. In contrast, one defining characteristic of traditional customary law is its inherently evolving and flexible nature. As part of the Rhodes-Livingstone Institute oeuvre of the 1950s, Victor W. Turner was reminding outsiders that African customary law was neither timeless nor static.[24] Turner's in-depth and detailed study of the way customary law functioned (even in a single remote village of Zambia yet untouched by modernisation) reflected the complexity of countervailing forces evolving with changing circumstances – while retaining the "structural regularities that interpenetrate them", the application of the law reflected unique contrasting and countervailing pressures of individual cases.[25] The label 'traditional law' sometimes obscures how indigenous customary law has always evolved with internal social and cultural changes as well as external factors like economic development, modernity, and indeed, political intrusion. What is deemed traditional often deals with what is modern. Our three case-studies all contain instances of how indigenous law has evolved even before coming into contact with received modern laws.[26]

This not only applies to indigenous customary law. The component parts and functions of indigenous governance structures have also evolved with time. One is unlikely to unearth unspoiled versions of

[23] Gulliver, P. H. (1969), "Dispute Settlements without Courts: The Ndendeuli of Southern Tanzania", in Laura Nader (ed.), *Law in Culture and Society*, Chicago: Aldine Publishing Company, p. 67.

[24] Turner, Victor W. (1957), *Schism and Continuity in An African Society: A Study of Ndembu Village Life*, Lusaka: University of Zambia and Manchester: Manchester University Press.

[25] Turner, Victor W. (1957), *Schism and Continuity in An African Society: A Study of Ndembu Village Life*, Lusaka: University of Zambia and Manchester: Manchester University Press, p. 330.

[26] One of the important challenges in terms of empowering indigenous constitutionalism in modern political systems is the risk of 'freezing' indigenous customary law through formal recognition and codification. All our case-studies address this challenge; and the Postscript chapter juxtaposes the pluses and minuses of formalising the application of indigenous law.

traditional structures untouched by social and cultural change carefully preserved since time immemorial. Almost all traditional forms of social stratification and political order in Africa have changed; sometimes evolving with times, sometimes fragmenting and dissipating.[27] As we proceed to the case-studies, the reason for selecting these three will become clearer: they represent three different paths to empowering indigenous constitutionalism, and show how these paths come with different dynamics of change.

2.3.4. Differentiated Individual Rights and Obligations based on Group Membership

Reflecting the same historical pattern as it was the case in most of the West before the post-Second World War, historically individuals did not hold identical rights and obligations.[28] Group membership and status determined which sets of laws were applicable. Almost all ethnic communities of Africa – with the exception of small and isolated hunter-gatherers like the San of the Kalahari and Namib deserts and the Pygmies of central African tropical forests – were based on indigenous forms of social stratification. In its most common form, stratification would separate individuals into 1) 'founder' groups akin to indigenous nobility, 2) 'commoner' members, 3) 'strangers' or 'immigrants' who have come to permanently reside within, 4) and servants or the servile (who were often historically the slaves).[29] Different rights and obligations often would apply to these four groups. With modernity, democracy, and received laws, things have evolved in the direction of formal legal equality between individuals; yet in an unofficial way, these distinctions remain influential in the appointment to non-hereditary indigenous leadership offices as sub-chiefs, elders, and judges. Hereditary leadership positions in the form of chiefs, paramount chiefs, and kings are, by definition, within exclusively reserved for members of the founder groups.

But not all ethnic communities of Africa have this system of social stratification and the attending rights and obligations based on membership in these groups. The Nandi, Masai, and Kipsigis of Kenya and the Karamojong of Uganda – and indeed the Oromo under examination in this LLD project – are examples of indigenous communities of East Africa where social order, stratification, and functional division rest on a somewhat loose and more flexible form of age-groups.[30] These five ethnic communities also happen to be, or historically were, nomadic/pastoralist and have had fairly decentralised governance structures in the past, not unlike a form of confederacy.[31] In fact, the

[27] This has been very pronounced for pastoralist communities; see Spencer, Paul (1998), *The Pastoral Continuum: The Marginalization of Tradition in East Africa*, Clarendon Press: Oxford. Yet sedentary communities have also faced similar difficulties, including 'cultural extinction'; Diamond Stanley (1967), "The Anaguta of Nigeria: Suburban Primitives", in Julian H. Steward (ed.), *Contemporary Change in Traditional Societies, Vol. I, Introduction and African Tribes*, Urbana, Chicago, and London: University of Illinois Press, pp. 361-505.

[28] What is often forgotten in *presentist* perspectives is that the legal history of the West is also based on different laws that apply to groups based on religion, profession, social class, ethnicity, and gender. Even in early liberal democracies, voting was historically based on multiple franchise as the number of votes individuals (mostly men, except widows as family breadwinners) could cast went up with education and property. The South Africa case-study includes some instances of different legal rights and obligations based on group membership. Both Dutch laws in the Cape until the end of18th century, and English laws after that, differentiated between soldiers, sailors, settlers, locals, and slaves.

[29] Ayittey, George B. N. (1991), *Indigenous African Institutions*, New York: Transnational Publishers, p. 8.

[30] Prins, A. H. J. (1953), *East Africa Age Class Systems: An Inquiry into the Social Order of Galla, Kipsigis, and Kikuyu*, J. B. Wolters: Groningen.

[31] The influential political classification system proposed by the Anthropologists Fortes and Evans-Pritchard have left out the more decentralised versions of indigenous governance, lumping them all together under the

division of the society into age-groups, who hold different collective responsibilities and rights, used to exist throughout most traditional societies of Sub-Saharan Africa in pre-colonial times but have since been replaced by other forms of collective group identities.[32] Remnants of this system exist in the form of initiation ceremonies of the amaXhosa and the Batswana covered in detail in Chapters 5 and 11. While no longer formally part of social stratification, the attending socialisation into age-groups through these ceremonies establish lifelong loyalties and commitment among the age-cohorts, with social and political consequences.

Although they are now almost exclusively sedentary, the Oromo of Ethiopia are an example of an ethnic community where the system of age-groups known as the *Gadaa* still provides a social, political, and legal role. The *Gadaa* is a mixed system of self-government, social-stratification, traditional institutions, and indigenous customary law.[33] Self-government is based on five permanent constituent units of age-groups, eight-year cycles that determine shifts in rights and responsibilities. The holistic building-block of our theoretical framework ensues that we do not leave out a key aspect of indigenous law and governance in our case-study on the Oromo of Ethiopia.

3. METHOD

The main scholarly goal of the thesis is to expose the different ways non-western constitutionalism is recognised and integrated into modern state structures – with lessons, insights, and observations into both the theory and practice of constitutionalism. The three case-studies from Africa represent three different paths to recognising indigenous traditional systems of law and governance. The three are what are known as scholarly 'ideal types' or 'ideal models' in English language (the origin of the term in German is *Idealtypus*). These are heuristic devices for scholarly inquiry rather than describing individual case-studies without concerns for comparative theoretical applicability elsewhere. The word *Gedakenbilder*, i.e. 'mental images', in the original formulation by the German Sociologist Max Weber might better convey the heuristic element in constructing and using such benchmarks for inquiry.[34] Using potentially generalisable 'ideal type' case-studies is thus the defining characteristic of the methodology driving the LLD research project. Our case-studies indeed epitomise three unique paths to empowering indigenous constitutionalism; and as such, they have comparative relevance for scholarship and practice beyond their more unique individual details.

The research methodology employed rests on the theoretical foundations developed earlier in this chapter. All three case-studies are put through a three-step analysis. They start with an overview chapter of the respective legal and political history of the countries within which the communities under investigation are situated. This is followed by a chapter devoted to the indigenous systems of law and governance in these communities. The final third chapter of each case-study puts the spotlight

misleading label 'stateless societies'. Fortes, M. and E. E. Evans-Pritchard (1940), "Introduction", in Fortes and Evans-Pritchard (eds), *African Political Systems*, London: International African Institute, pp. 1-24.

[32] Smith, Michael G. (1966), "Pre-Industrial Stratification Systems", in Neil J. Smelser and Seymour Martin Lipset (eds) (1966), *Social Structure and Mobility in Economic Development*, Berkeley: University of California Berkeley, pp. 141-64.

[33] Hassen, Mohammed (1990), *The Oromo of Ethiopia: A History 1570-1860*, Cambridge University Press.

[34] Weber, Max (1949) [1904], "Objectivity in Social Science and Social Policy" in E. A. Shils and H. A. Finch (ed. and trans.), *The Methodology of the Social Sciences*, New York: Free Press, p.90.

on the relationship between the indigenous systems of traditional law and governance and modern received constitutions. The case-studies all examine how the traditional indigenous systems of law and governance fared under different constitutional arrangements – ranging from parallel co-existence with modern law to incorporation into a single national hierarchy, from non-recognition partial recognition subsumed under the supremacy of modern national laws.

Research is mostly based primary sources in archives in the form of various official documents and secondary sources in the form of scholarly works. The previous literature review chapter had shown how a number of holistic theoretical approaches, despite the different labels attributed to them, provided the most appropriate theoretical approach to guide the research methodology for our subject of study. William Twinning groups the scholarly literatures Law and Society, Law in Context, Legal Realism, Socio-Legal Studies, and Sociology of Law all together and sums up the common message they share: "… the advice is to open things up, to broaden the focus, to make connections with nonlegal materials, factors, or ideas, and to relate legal doctrine to actual circumstances and events."[35] While Twinning himself seems to believe the label 'Law in Context' to be general enough to potentially cover all such holistic approaches, it is the teachings of Legal Realism that is of most use in helping us devise and fine-tune our research methodology:

> "Rules are an important, indeed central, feature of law, but for almost any purpose – for understanding, for practice, and for reform – the study of rules alone is not enough; law must be studied in the context of social processes generally".[36]

Regardless of what the chosen label for the theoretical approach, the employed research methodology in all such holistic approaches is remarkably similar:

> "One should set any rule, case, text, decision, or other phenomenon that one is considering in the context of some broad picture that provides a basis for mapping its relationship to other phenomena, and for assessing how typical or untypical it may be".[37]

Following the insights of Twinning, research on primary and secondary sources is complemented with open-ended field-research in the three jurisdictions under examination. The very need to document the workings of indigenous law and governance, especially when officially unrecognised by modern laws and constitutions, necessitates the use of a methodology that can capture things beyond formal laws and institutions – particularly what can sometimes be the somewhat opaque workings of traditional customary law. The informal recognition and application of indigenous law is often a lot more widespread than what official documents suggest. There is a visible distance between the *pro forma* letter of the law and the practice on the ground. Especially in more peripheral regions beyond the reach of much of modern infrastructure, officials often informally consult with traditional chiefs and incorporate customary practices of conflict prevention and resolution. This necessitates the need to incorporate the open-ended field-research methodology.

[35] Twinning, William (1985), "Talk about Realism", *New York University Law Review*, Vol. 60, No. 3, p. 375.
[36] Twinning, William **(**1997), *Law in Context: Enlarging a Discipline*, Oxford: Clarendon, p. 33.
[37] Twinning, William (1985), "Talk about Realism", *New York University Law Review*, Vol. 60, No. 3, p. 377.

The fact that almost all traditional *Gadaa* laws in Ethiopia's Oromia region are unwritten and uncodified, and that Xhosa and Tswana traditional laws contain sizeable segments not yet recorded in written form, necessitates this methodological combination. In Botswana, for example, parallel to official customary courts there are also "unofficial, informal, and unrecognised customary courts".[38] This means that research on primary and secondary sources has to be complemented with open-ended interviews with informants from the indigenous communities under investigation, participant observation within traditional structures, and informal interviews with local legal professionals.

In order to gain access to the working of local indigenous law and governance, and to display goodwill to traditional leaders and the local community, the author has also invested in language-training in Setswana, isiXhosa and Afaan Oromo. One of the prominent *Bantureg* scholars, A.C. Myburgh, had argued that "a sound knowledge of one or more African languages is essential to good field-work, indigenous law is also closely connected with linguistics".[39] The author cannot claim he has acquired 'sound' knowledge of the three languages, but he has acquired basic proficiency to ensure the field-research delivered insights (particularly versions of oral history that differ from official accounts) which do not exist in written documents. He has also had the chance to observe some of the traditional legal proceedings in person. In light of the theoretical approach and research methodology devised and finetuned in this chapter, it is time we turn to the next chapters and start revealing what all this means in the context of the case-studies.

[38] Fombad, Charles M. (2004), "Customary courts and traditional justice in Botswana: Present Challenges and Future Perspectives", *Stellenbosch Law Review* Vol. 15, p. 174.
[39] Myburgh, A.C. (1985), *Papers on Indigenous Law in Southern Africa*, Pretoria: J. L. van Shaik, p.1.

Chapter 4:
Introduction to the History of the Politics of Law in Botswana

---

1. INTRODUCTION

In the recently designated Central Business District (CBD) of Botswana's capital, Gaborone, surrounded by government ministries and office buildings – some still under construction, stands an imposing sculpture of the three tribal paramount chiefs (*dikgosi*) of Botswana who had joined forces and travelled to London in 1895 to seek Queen Victoria's help in fending off the plans of both Sir Cecil Rhodes' British South Africa Company (BSAC) as well as the Transvaal South African Republic of Afrikaner Boers to expand into their land. The monument is surrounded by set of smaller ones marking the different episodes of Tswana history. During the first phase of construction in the Central Business District, The Three Dikgosi monument sat lonely in the middle of the dusty flatness away from any human activity, let alone visitors. Now the monument and its lovingly tended garden are surrounded by shiny new buildings as pupils of all ages disembark from their school buses in excitement to see the founding fathers of the Tswana nation. It is a place for young people from nearby offices to visit in their lunch breaks as they sit and chat away under the shades of the trees. Is the monument just a recent, and perhaps even artificial, attempt to create a national founding myth? Or did the visit of the three chiefs really set Botswana on the path to eventual independence?

As we will do the coming case-studies on South Africa and Ethiopia, we start with an historical overview aiming to set the scene for a more detailed investigation of the relationship between indigenous and received laws in Botswana. Following the teachings of Legal Realism, this is done in order to situate the law within the broader political, social, and historical context. Understanding Tswana politics, history, and culture is the key to understanding Tswana law. It is imperative to reiterate, however, that this macro analysis on *longue durée* patterns is done with an eye to comparative experiences elsewhere. That is, the discussion of the indigenous Tswana system of law and governance will not only be informed by insights from other countries, but the lessons Botswana provides will then in turn help identify broader patterns in the recognition, application, and constitutionalisation of indigenous customary law. But before all that, let us address the question raised in the opening paragraph above: yes, 1895 was indeed a critical moment in history paving the

way for an independent Botswana; and as we will see, it was also a critical moment in terms of setting the course for the long-term survival of its indigenous system of law and governance.

2. THE HISTORY OF THE POLITICS OF LAW

2.1. Precolonial History

Most historians trace the origins of the Sotho-Tswana people of southern Africa (mostly residing in present-day Botswana and South Africa) to west/central Africa, although accounts differ in terms of the time of their settlement.[1] By the 17th century, communities who were to eventually form the Tswana tribes (and their Sotho-speaking cousins) had settled across a wide swathe of territory in southern Africa covering Lesotho in the south-east to Botswana in the north-west. Unlike their Zulus neighbours to the east or their Balozi (alternatively transliterated as *Barotse*) neighbours to the north, they did not form kingdoms defined by political centralisation and hierarchy. Instead, theirs was a remarkably decentralised political system with strong tribes and a very loose form of a common political framework which only under exceptional circumstances brought the constituent tribes together. What probably underpinned this system of decentralisation was that the nature of the Tswana economy which was overly reliant cattle-herding, combined with small scale seasonal farming. This meant that tribes could move in search of better pastures or away from conflict, rendering any centralised political system difficult to attain and maintain. Within the tribe, however, there was more political centralisation – more than what we will see among the amaXhosa of Transkei and the Oromo of Guji-Borana. As time went on and the population of the region increased, stronger tribes started to lay claim to territory and an understanding of inter-tribal borders started to appear. These stronger and bigger tribes, in due course, ended up with more internal hierarchy with the tribe's paramount chief ruling over local chiefs and sub-chiefs, with village headmen at the grassroots level. The next chapter goes into further into the details of Tswana tribal constitutionalism, but a brief introduction to the Tswana system of law and governance here should proceed the history of the politics of law in Botswana.

The tribe (*morafe*) led by a hereditary chief (*kgosi*) remains the main indigenous form of political organisation to this day. In comparative terms, Botswana is somewhat unique in Africa since its indigenous system of law and governance was officially recognised by both the colonial authorities and later by the country's post-independent constitution. During their transition to independence, Zambia, Ghana and Uganda had also recognised the powers of indigenous traditional institutions, but these countries have since gone through political upheavals with the attending large scale constitutional changes which scaled back the political powers of the chiefs. Botswana however is marked by an unbroken line of continuity in terms of its traditional political and legal institutions – notwithstanding the minor tweaks, finetuning, disagreements, and controversies along the way. In the Postscript to the Botswana case-study we turn our attention to identifying and distilling these comparative lessons, insights, and observations. The continuity defining Botswana legal history means that there is a lot it can teach those working on legal pluralism, comparative constitutionalism, and indigenous law in comparative terms. In addition to imperial constitutionalism defining the colonial

[1] Some like Thomas Tlou and Alec Campbell trace the population movement back to as early as 1,200 AD; Tlou, Thomas and Alec Campbell (1984), *History of Botswana*, London: Macmillan, pp. 92-96.

era and post-independence constitutionalism that followed, in order to strengthen the reliability of our comparative inferences, we will also examine indigenous Tswana tribal constitutionalism.

The *trias politica* of the executive, legislative, and judiciary might very well have its roots in western notions of constitutional politics, but these benchmarks help set the discussion of indigenous constitutionalism in comparative terms. These reference points, even when they fall short of capturing some of the more unique aspects of non-Western cases, allow lessons and insights to travel across countries and continents. Related to executive, legislative and judiciary functions, another helpful comparative benchmark is the notion of checks-and-balances. One frequently hears about the despotic powers of the chiefs in contemporary debates – more often than not, such opinions are accompanied by a dismissive view of traditional forms of law and governance. Yet one rarely hears about indigenous *trias politica* and indigenous forms of checks-and-balances. This could also explain why, in some places across Sub-Saharan Africa, since the advent of colonialism chiefs have indeed become more despotic at the expense of traditional mechanisms which used to historically hold them to account. The negative reputation of traditional structure might be because of the dearth of academic knowledge or simply a lack of interest. We might be swimming against the tide here, but an even-handed and nuanced treatment calls for a more comprehensive, and indeed, comparative look at the entirety of indigenous law and governance while withholding any normative judgement on its desirability.

Like all Bantu languages, in Setswana words are formed by adding prefixes to roots. The common prefix *Ba-* we see in tribe names is the plural noun form in Setswana (that is, the Tswana-language). When added to the root '*tswana*', the same prefix *Ba-* forms the word *Batswana*, i.e. the Tswana people (*Motswana* in singular). Ethnic Batswana make up more than 85 % of Botswana citizens. *Bo-* is in fact the ordinary locative prefix, thus Botswana literally means the place of the Tswana. In comparative terms, the demographic make-up of Botswana sets the country apart from most Sub-Saharan Africa. Such (relative) ethno-linguistic homogeneity is indeed quite rare in Africa where most states are defined by high levels of ethnic diversity (as demonstrated by our other case-studies South Africa and Ethiopia).[2] But before we proceed, there are important caveats to the notion of a one-nation, one-state Botswana. The first one is the presence of various smaller ethnic groups who have not been able to find a recognised role for themselves in the official Tswana discourse on national identity. Their presence in Botswana is partly due to the geopolitics of imperial history and demarcation between various British colonial holdings. Once the borders were drawn, some ethnic groups found themselves in Botswana despite having ethnic kin on other sides of colonial demarcations. And secondly, more ethnic Batswana live in next door South Africa than in Botswana proper. These two caveats originate from a combination of two separate but interrelated factors: the decentralised form of political existence which defined Tswana history and the complex and convoluted constitutional politics of British imperialism in southern Africa.

The decentralised existence of tribes was further underpinned by the frequency of tribal secessions. Tribes would often split, move away, and new sub-tribes would form under their own kgosi. Some of

[2] The other Sub-Saharan African state with (relative) ethno-linguistic homogeneity is Somalia. For a rare comparison, see Samatar, A. (1997), "Leadership and Ethnicity in the Making of African State Models: Botswana and Somalia", *Thirds World Quarterly*, 18, 4, pp. 687-707.

the tribes would accept becoming tributary vassal states of either the ones they had split from or new ones whose territories they have settled in. Sometimes, if strong and sizeable enough to maintain protect themselves, the new tribes would declare their independence. And sometimes the roles would reverse as the former vassal tribe would in time grow in power and establish dominance over others, as the history of the Bamangwato (sometimes written as Bangwato) demonstrates. Historically under the Bakwena paramount chieftaincy, the Bamangwato are now the most populous and politically dominant tribe of Botswana. The founding president of the country, Sir Seretse Khama, hails from this tribe.

It is important to note that the Tswana tribes were not always ethnically homogenous. Sometimes the hunter-gatherer Khoisan people – called *Basarwa* in Setswana – would become slaves of these tribes[3], sometimes other ethnic groups would be absorbed into tribes either as subjects with subordinate social status as it is the case with the *Bayei* in the north in the Okavango delta under, or they would cohabit the same territory but retain their distinctiveness as it is the case with the *Bakalanga* in the northeast along the present-day border with Zimbabwe.[4] Smaller ethnic groups on the other hand have in time assimilated into Tswana culture and society.[5]

The second factor which accounts for the caveat regarding Botswana as a one nation, one state country is imperial geopolitics. As we will see a little later in more detail, it is the geopolitics of late 19th century which resulted in the separation of Batswana into two states; with long term consequences for the indigenous Tswana law and governance. It is during this time that the subject of our in-depth investigation in the following chapter, the Bakgatla tribe, ended up on the Botswana side of the border.

2.2. The Imperial Geopolitics of Southern Africa

Our review of Botswana history inevitably covers some of the same grounds Chapter 7 on South Africa. The imperial constitutional history of southern Africa, from the changes in the jurisdiction of the British High Commissioner in Cape Town to the establishment of the Union of South Africa, have had direct consequences on both of our cases – the Transkei amaXhosa of Eastern Cape and the Bakgatla of southeast Botswana. But our angle is different here. Our overview of the history of the politics of law in South Africa covers some of the British imperial history of southern Africa with an aim to track down

[3] For more on this, see Mazonde, Isaac (2004), "Equality and Ethnicity: How Equal are the San in Botswana?", in Robert Hitchcock ad Diana Vinding (eds), *Indigenous Peoples' Rights in Southern Africa*, Copenhagen: International Work Group for Indigenous Affairs, pp. 134-51.

[4] In his autobiography, the pan-Africanist opposition politician Motsamai Mpho describes his childhood and the servile status of the Bayei people under the Batawana, who derogatively called them *koba koba* as a reference to the sound they made as they trotted on foot carrying things behind the Batawana mounted on horses. During these earlier times, the Bayei were not allowed to speak at the kgotla although they did participate in other Tswana customs like the *bogwera* initiation ceremony. Edge, A. Wayne (1996), *Autobiography of Motsamai Mpho*, Gaborone: Lebopo publishers, p.5 and 14. In time however such blatant displays of differences in social status of ethnic minorities were eliminated.

[5] In recent years, ethnic tensions have periodically emerged, such as the one between the Bamangwato and Bakalanga in the central district; but such tensions do not come close to ethnic unrest and violence we see in other parts of the continent. Fr more, see Nyati-Ramahobo, Lydia (1998), "Ethnic Identity and Nationhood in Botswana", in. W. A. Edge and M. H. Lekorwe (eds), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, pp. 17-27.

the historical path Xhosa law and governance followed. This chapter traverses some of the same grounds in imperial history but this time with a quest to chart the historical trajectory of Tswana law and governance. The history of the Eastern Cape is one of the Cape Colony versus the local Xhosa kingdoms and paramount chieftaincies; there weren't many other major players. This means that we did not have to get into the complexities of intra-imperial geopolitics of the time. The history Botswana on the other hand is part of the frontier fluidity of mid to late 19th century where various political actors with competing interests fought, collaborated, and switched sides. The country's strategic location on the north-south road connecting Cape Town to central Africa and its proximity to the gold and diamond reserves, make it necessary to widen the analysis to the complexities of southern African imperial history.

What would eventually play a big role for the future of indigenous Tswana law and traditional institutions was indeed the declaration of the Bechuanaland Protectorate.[6] As we see a little later, little of this had to do with local Tswana politics; it was in fact regional geopolitics and intra-imperial politics which created the historical context that led to the establishment of the Protectorate. Here is thus a seemingly obvious but still underappreciated point which matters to the study of indigenous law and governance in general. Accidents of geopolitics can put different territories on different historical trajectories in terms of the long-term survival and resilience of indigenous forms of law and governance. Something which had little to do with Botswana itself was to have immense consequences for the country, its political system, and its laws. So, let us now turn to those fateful decades of late 19th century.

In the years before the outbreak of the Boer wars which would pitch the mighty British Empire against the Boer citizen militia, regional politics was constantly evolving, and geopolitical tensions were steadily escalating. The key political actors of this era operating in Tswana lands were 1) Sir Cecil Rhodes' British South Africa Company (BSAC) chartered and based in Cape Town but with ambitions reaching up to central Africa in the Rhodesian lands he named after himself; 2) the Government of the Cape Colony mostly representing white settlers and a smaller section of mixed race and native African on their electoral roll; 3) military and administrative representatives of the Imperial Government in London with the Governor and High Commissioner in Cape Town at the top; 3) the two independent Boer Republics of Transvaal and Orange Free State; and 4) various Tswana tribes. In addition, there were smaller actors who lacked the might of the four above. The Griquas were an Afrikaans-speaking mixed-race community who had adopted European ways and moved up north from the Cape. They lived side-by-side southern Tswana tribes and European settlers. The region also had indigenous Khoisan communities spread throughout. The Khoisan were divided into the two branches of subsistence farming and more sedentary communities of the Khoi and the nomadic hunter-gather bands of the San.

Transvaal was an independent settler republic formed by Afrikaner Boers who had left the Cape Colony after it had passed on to the British and had trekked up north as pioneers; hence the terms *Trekboers* and *Voortrekkers*. There were also Boers who had accepted the new status of the colony

[6] The 'ch' sound in Bechuanaland was an attempt to approximate the spelling of the sound 'ts' sound in Tswana-language. After independence, the desire for a more accurate transliteration into English led to adoption of the new spelling, Botswana.

1809 and continued to live in the Cape. (It was with the ones who had refused to accept British rule and had trekked up north that the Anglo-Boer wars were to be fought in the late 19th century). Between 1834 and 1854 thousands left what became a British colony and joined what came to be known as the Great Trek. They found themselves in the midst of wars unleashed by the expansion of the Zulus under King Shaka. At one point the Boers, the Griqua, and Tswana joined forces to defeat the Ndebele who had defected from the Zulus and had been moving westward in search of new lands. The alliance was short-lived and soon after in 1852 the first of many Batswana-Boer wars started. [7]

The Orange Free State was one of the republics the voortrekker Boers had formed. Its sovereignty was recognised by the British with the Orange River convention in 1854. Transvaal (officially the Transvaal South African Republic, i.e. *Suid-Afrikaanse Republiek*) was the other one. With the Sand River Convention of 1852, the British had recognised Boer sovereignty in the lands beyond the Vaal river which flows west from its source in the Drakensberg mountains and then curves northwards towards the southeast corner of present-day Botswana – hence the name Transvaal. The local African tribes within the territories of the Boer Republics were either subjugated, chased away, or their lands were ostensibly bought through legal contracts. Others became allies and contributed to the supply of much-needed labour. During the early phases of their existence, the territories of these two settler republics were composed of sparsely inhabited farming communities.

During 1866/67, at a time when the interstate borders had still not been finalised, large diamond reserves were discovered in Kimberley, on the Orange Free State side of the Orange and Vaal rivers. This was on a plot where the mixed-race Griquas had first settled. The area was subsequently claimed by Transvaal, Orange Free State, the Cape Colony, and the Griquas. A mediation under the good offices of the Governor of British Colony of Natal placed Kimberley under Griqua jurisdiction. The Griquas then sought British protection; and soon after the new territory Griqualand West was proclaimed in October 1871 and became a Protectorate of the Cape Colony.[8]

Diamonds were followed by the discovery of gold. Throughout the Transvaal smaller gold mining operations had existed, but the discovery of the massive reserves of the Witwatersrand basin 1884 changed everything. The result was an international gold rush at a scale unprecedented for southern Africa. There was an influx of what the Boers called *uitlanders*, i.e. foreigners, mostly arriving from either the British colony of Natal along the Indian coast, or from the Cape Colony to the south. Some of the uitlanders were residents of these two British colonies others were new overseas arrivals in the wake of the gold rush. The formerly isolated, insulated, and underpopulated Boer – literally *farmer* – republics would now be home to the rip-roaring gold rush.

The region Griqualand West bordering Transvaal had already been incorporated into the Cape Colony and British semi-formal presence existed beyond official demarcations. These were fluid times; borders were changing, countries were forming, alliances shifting, formal territorial claims were made without practical enforcement, control on the ground existed without legal basis. Britain had in fact annexed Transvaal and had appointed Sir Theophilus Shepstone from the nearby Colony of Natal as

[7] Ramsay, Jeff, B. Morton, and T. Mgadla (1996), *Building a Nation: A History of Botswana from 1800 to 1910*, Gaborone: Longman Botswana.
[8] Griqualand East was directly annexed into the Cape Colony in 1874.

the Governor in 1877.[9] This arrangement was not to remain for long. Sr Theophilus was away from his power base in Natal and did not have a large contingent of British soldiers, police, and officers accompanying him. The declaration of formal annexation did not equal political control. Based on the historical records of the exchanges between official figures of the period he has examined, Andrew Manson believes that there was a desire to incorporate Transvaal into the British Empire as part of a new South African Confederation.[10] British plans for a South African Confederation are also mentioned in the historic exchanges cited by Anthony J. Dachs – especially in the correspondence between Cape Governor Sir Henry Bartle Frere and the Colonial Office in Whitehall.[11] From the antipodes to British North America, (con)federal ideas were prominent within the British Empire. There was in fact an influential Imperial Federation League campaigning for such policies. But in terms of Transvaal's fate, the idea did not remain in place long.[12] The Government changed in London and the British handed the territory back to the Boers in 1881 (before the discovery of gold in the Witwatersrand basin in 1884). What is known as retrocession meant that that Transvaal was given back Boer rule - not necessarily because of an inability to enforce British rule, but also because of the calculations of the military and economic costs to the Imperial government this would entail.

What is a little-known historical detail is that, in addition to Transvaal and the Orange Free State, there were two other Boer Republics situated between Transvaal on the east, the Cape Colony in the west and south, and the territory that was to become Bechuanaland Protectorate in the north. The Republic of Goshen with its capital Rooigrond and the Republic of Stellaland with its capital Vryburg were both strategically located on the main road connecting Cape Town to Salisbury in the north, Rhodesia's capital. In this underpopulated region, where various African natives and European settlers traded, fought, collaborated, and switched sides, everything was in flux. For readers unfamiliar with the history of the region, the picture which might have close parallels is that of the Wild West 'Frontier' of America around the same time-period. In the south-east corner, just outside present borders of Botswana, the two republics had been formed right in the midst of these tumultuous years.[13] In 1884,

[9] In addition to the part he played in the annexation of Transvaal, Sir Theophilus Shepstone is someone who has played a very important role in the recognition of indigenous customary law in South Africa. We will encounter him again in Chapter 8 on South Africa, Section 3.1. in South Africa, on an overview of how he had granted full legal recognition to Zulu law in Natal.

[10] Manson, Andrew (1998), "Christopher Bethell and the Securing of the Bechuanaland Frontier, 1878-1884", *Journal of Southern African Studies*, Vol. 24, No. pp. 491.

[11] Dachs, Anthony J. (1972), "Missionary Imperialism – The Case of Bechuanaland", *Journal of African History*, Vol. XIII, No. 4, pp. 653.

[12] A prominent voice in favour of a South African Confederation, was the Secretary of the Colonies in Whitehall, Lord Carnarvon, who envisioned something similar to the British North African, i.e. Canadian Federation. The coming wars with the Boers and Zulus, and the ongoing ones with the amaXhosa, exposed the difficulties in attaining and keeping a political union similar to the one in Canada. One might say that the federal idea was just postponed until the creation of the Union of South Africa in 1910. Similar ideas also guided the post-WWI establishment of the British Central African Federation between Southern Rhodesia (present-day Zimbabwe), northern Rhodesia (present-day Zambia), and Nyasaland (present-day Malawi).

[13] Although both were Boer Republics, their composition was somewhat different; Sanders, A.J.G.M. (1992), *Bechuanaland and the Law in Politicians' Hands*, Gaborone: The Botswana Society, p.5. Stellaland – named after a passing comet – under the administration of its founder J. G. van Nierkerk was more a more cosmopolitan and economically thriving place. Goshen on the other hand had more of a combative republican character and more freebooters among its population; Sillery, Antony (1965), *Founding a Protectorate: History of Bechuanaland 1885-1895*, London and The Hague: Mouton and Co, p. 85. The leader of the Goshenites was Gey van Pittius Manson, Andrew (1998), "Christopher Bethell and the Securing of the Bechuanaland Frontier, 1878-1884", *Journal of Southern African Studies*, Vol. 24, No. pp. 499.

the President of Transvaal, Paul Kruger, declared both republics Transvaal protected states. A clash seemed imminent. We should mention these republics were much smaller than Transvaal in terms of size and population, but they happened to sit on the borderlands where the Imperial Government, the Government of the Cape Colony, the British South Africa Company (BSAC), the Transvaal Republic of South Africa, and various Tswana tribes all had competing claims and interests.

The terms used by the British at the time for the people making up Goshen and Stellaland was 'freebooters' and 'filibusters'. These are terms with pejorative overtones which at the time were used for unauthorised individual irregulars fighting for a foreign cause – instead of companies of mercenaries with military training enlisted through legal means. Among the citizens of Goshen and Stellaland one found not only those of Trekboer stock but also ethnic Tswana allies, English-speaking whites, deserters from the Imperial army, and other European farmers, adventurers, hunters, miners, mercenaries, cattle-thieves, and outlaws.[14]

It is imperative to highlight that the British South Africa Company (BSAC) and the bureaucratic and military representatives of the Imperial Government did not always share the same political and economic vision for southern Africa.[15] Sir Cecil Rhodes and the Company had their eyes on the Boer Republics, or more precisely, on the untapped gold and diamond reserves which were assumed to be situated in their territory. Tensions between the Company and Imperial Government would fluctuate depending on who was appointed as Governor of the Cape and the British High Commissioner for southern Africa. The position of the Government of Cape Colony, on the other hand, remained in tandem with Company priorities in most policy areas. The close alignment of Company and Cape Government interests was partly a reflection in the changes the Colony's status within the Empire. Since 1854, there had been a multi-racial Cape Parliament elected on a qualified franchise based on property, but the parliament had little direct influence over the Colony's executive. Cape Government Ministers reported to the Whitehall-appointed Governor of the Cape Colony (who simultaneously held the position of the British High Commissioner). In 1872, the Cape Colony was granted Responsible Government, thereby giving more voice to local political and economic concerns, hence the close alignment with Rhodes' British South Africa Company.

Although considered an inhospitable, mostly-desert, underpopulated region, present-day Botswana lay on a very strategic position. The main road, and what was eventually to become the railway, connecting Cape Town to British territories in the north, Southern Rhodesia (present-day Zimbabwe), Northern Rhodesia (present-day Zambia), and Nyasaland (present-day Malawi) passed through what was then called Bechuanaland. 'The Road to the North' was in fact a common phrase used by advocates of northbound British imperial expansion at the time.[16] What is more, Bechuanaland sat right in-between the Boer Republics and the German Colony of South West Africa (present-day Namibia) on the Atlantic coast. While the BSAC entertained geo-economic interests, the Imperial

[14] One notable resident was the notorious outlaw, the professional criminal, George Gordon Lennox 'Scotty' Smith; Sillery, Antony (1965), *Founding a Protectorate: History of Bechuanaland 1885-1895*, London and The Hague: Mouton and Co. p. 84

[15] For more on this, see Maylam, Paul (1980), *Rhodes, the Tswana, and the British: Colonialism, Collaboration, and Conflict in the Bechuanaland Protectorate 1885-1899*, Westport, Connecticut: Greenwood Press.

[16] Dachs, Anthony J. (1972), "Missionary Imperialism – The Case of Bechuanaland", *Journal of African History*, Vol. XIII, No. 4, p. 669.

Government policy was guided by geopolitics. Put simply, London was worried that the Boers and Germans might link up.

One of the prominent advocates of establishing imperial control of 'The Road to the North' was the Scottish missionary John Mackenzie of the London Missionary Society stationed in Bechuanaland. Mackenzie had established strong links with his Tswana hosts and had already been lobbying the imperial government for the establishment of a Protectorate in Bechuanaland territory in order prevent Boer incursions from Transvaal.[17] Mackenzie was known to be a supporter of the Batswana and an opponent of Sir Cecil Rhodes and the British South Africa Company. Although there was little imperial presence across Bechuanaland territory, Mackenzie had managed to get himself appointed Deputy Commissioner of Bechuanaland in 1884 and continued advocating increased British imperial involvement in the region.[18] But the views of the British High Commissioner at that time, Sir Hercules Robinson, were closer to Rhodes' vision for southern Africa. Sir Hercules in fact appointed Rhodes to the position he had fired Mackenzie from. Robinson seems to have favoured friendlier relations with Transvaal and outsourcing imperial expansion to the British South Africa Company in a way that combined the geo-economic interests of both English-speaking and Afrikaans-speaking communities of the Cape. Rhodes was sympathetic to land claims of Stellalanders and sought to sort this within the Cape Colony, while Goshenites and their land claims were left under the Transvaal sphere of influence. The future seemed to be a system of friendly relations between the Company and Transvaal over Bechuanaland with no room for a Tswana state separate from both.

But the grand vision shared by Sir Hercules and Rhodes for southern Africa was punctured in London. The preference of Whitehall was for the punishment of the Goshenites and Stellalandes who were sending in raiding parties into the outer reaches of the Cape Colony, to Griqualand West, parts of British Bechuanaland south of the Molopo river, and into Bechualand beyond that. The imperial response to Boer incursions into territories under formal British rule (and also where formal British claims and semi-formal presence existed) was to send a high-profile large expeditionary force to subdue the European filibusters and freebooters active in the region. This was an important step towards establishing uncontested imperial control in the yet uncharted border areas between the Cape Province, Transvaal, and Tswana tribal territories.

It was Major General Sir Charles Warren who was chosen by Whitehall to lead a sizeable contingent of 4,000 men for this purpose.[19] The expedition started in December 1884 and lasted a few months

[17] See his memoirs, Mackenzie, John (1887), *Austral Africa Losing It or Ruling It. Incidents and Experiences in Bechuanaland, Cape Colony and England*, London: Sampson Low, Marston, Searle and Rivington; especially Book II "The Bechuanaland Protectorate – Incidents and Adventures among the Freebooters".

[18] Mackenzie's role in Bechuanaland becoming a Protectorate is also mentioned in P.T. Mgandla's Introduction to Main, Elisabeth (1996), *Man of Mafeking: The Bechuanaland Years of Sir Hamilton Gould-Adams 1884-1901*, Gaborone: The Botswana Society, p.iv.

[19] An interesting side-note predating the Warren expedition is the fate of Christopher Bethell and how this helped galvanise British public opinion in favour of the expedition. Bethell was a young English aristocrat, and a relative of Sir Charles Warren, who had been shipped off to the Cape Colony after getting into debt from gambling and a carefree life. He was seconded to the Bechuanaland Mounted Police and was stationed in Barolong tribal territory. Shillington describes him as "a tall, blonde Englishman… considered somewhat eccentric and unreliable", Shillington, Kevin (1985), *The Colonisation of Southern Tswana 1870-1900*, Braamfontein: Raven Press, p.132. While in Barolong territory he had married a local Tswana girl – according to some accounts, the niece of chief Montshiwa (alternatively transliterated *Montshioa*), while other account name

into 1885. Unable to resist such a force, the republics of Stellaland and Goshen melted away and quietly disappeared from history. Stellaland territory ended up on the British side of the demarcations and was absorbed into the Cape Colony; Goshen joined Transvaal. The expedition also led to establishing a permanent imperial presence in the form of the new Bechuanaland Border Police. An equally important geopolitical gain was to block off the potential for long-term German expansion from their South West Africa Colony (present-day Namibia) eastward towards Transvaal and the Orange Free State.

For our purposes, however, what came to be soon known as the 'Warren Expedition' was also the beginning of future Botswana. In 1885, Sir Charles declared the north of Molopo River, i.e. territories which would eventually become Botswana, the Bechuanaland Protectorate. The southern part of Bechuanaland was to remain formally within the borders of the Cape Colony as British Bechuanaland. Mafikeng (alternatively transliterated *Mahikeng* or *Mafeking*), now on the British Bechuanaland side, would continue to act as the headquarters of British imperial administration and military. All this was done while the expedition was still on-going and away from the direct input of Whitehall. Naturally, most of details of the new arrangement had neither been finalised nor formalised.

2.3. The Bechuanaland Protectorate

Regardless of the incompleteness of the arrangement, Sir Charles Warren's unilateral declaration of the creation of the Bechuanaland Protectorate in 1885 was a frustration to both Boers and the Company. Sir Charles' announcement did not put an end to Boer incursions however. Until the Protectorate was to gain *de jure* existence within the Empire with its Statutory Provision, the declaration had little *de facto* enforceability. The constitutional details of the powers the Protectorate would have within the empire, the role and obligations of the Imperial Government, and the precise location of the borders were not yet enumerated. Plus, there was no British military and bureaucratic presence in the Protectorate to deter Boer incursions. What is more, the British South Africa Company still had its eyes on this strategic territory linking southern Africa to central Africa. Though outmanoeuvred on this occasion, Rhodes' had not yet given up on his plans. This time it was the southern Tswana tribes who had ended up on the British Bechuanaland side who were to be courted by the Company.

The northern Tswana tribes in the lands declared a Protectorate by Sir Charles in turn wanted to hold back the ambitions of the Company by seeking direct Imperial protection and commitment. There were fears that once Warren left and London got distracted by other matters elsewhere in the Empire, the British South Africa Company (BSAC) would renew its efforts to control 'The Road to the North'. Lacking the formal imperial seal of approval, Warren's declaration could easily be watered down, revoked, or not enforced. The concerns of the northern Tswana tribes aligned with the concerns of certain circles in London – especially those who were suspicious of Rhodes' ambitions. Brokered by Mackenzie and others sympathetic to the Tswana cause, a momentous trip to London was organised.

her as a daughter of commoners. Manson, Andrew (1998), "Christopher Bethell and the Securing of the Bechuanaland Frontier, 1878-1884", *Journal of Southern African Studies*, Vol. 24, No. p. 500. While trying to save chief Montshiwa's nephew from the filibusters, the 28-year old Bethell was shot in the face, taken prisoner, and then executed. Sanders reports that his dead body was kicked by passers-by before being buried. Sanders, A.J.G.M. (1992), *Bechuanaland and the Law in Politicians' Hands*, Gaborone: The Botswana Society, p.5.

Reviving the Tswana confederal tradition, the perception of external threat had brought the paramount chiefs (*dikgosi*) of the three big tribes together. In 1895 Khama III of the Bamangwato, Sebele I of the Bakwena, Bathoen I of the Bangwaketse made their historic trip to London. They found the Secretary of State for the Colonies Joseph Chamberlain receptive to their concerns. They also met Queen Victoria and directly asked for her protection against both the Boers and the Company. Their efforts were successful, and the Bechuanaland Protectorate was formally granted its Statutory Provision in May 1895. In the meantime, the Tswana tribes of the Barolong and Bagamalate whose lands were in the south continued to flirt with the British South Africa Company.[20] With the Proclamation of October 1895 these territories in British Bechuanaland were put under Company jurisdiction. This critical moment in history separated the fates of two Bechuanalands and set the north on the path to eventual independence.

The Three Dikgosi monument opening up this chapter therefore does mark a fateful moment in Tswana history, although what *de jure* establishment of the Protectorate in 1895 owes more to the intra-imperial geopolitical calculations in London rather than the efforts and activism of the three paramount chiefs. This convoluted and complicated history explains why some ethnic Batswana ended up as residents of the Bechuanaland Protectorate in the north, and eventually, citizens of the independent state of Botswana. In contrast, 1895 also explains why some ethnic Batswana in the south first ended up as residents of British Bechuanaland; soon after that, subjects of the British South Africa Company (BSAC); then inhabitants of the Cape Colony; followed by their status as 'Native' subjects of the Union of South Africa; then nominal citizens of the apartheid Bantu Homeland of Bophuthatswana, and only in 1994 did the Batswana of southern Bechuanaland eventually become free citizens democratic South Africa.

1885 was an eventful year, and more things were in the making. Three Dikgosi's trip to London and the subsequent formalisation of the status of Bechuanaland Protectorate in the Empire in May, and the Proclamation placing British Bechuanaland under the jurisdiction of the British South Africa Company (BSAC), had led to a new phase of geopolitical intrigue. The various actors involved were now playing new parts in changed set of circumstances. The British South Africa Company (BSAC) still had wide-ranging geo-economic interests and the imperial government retained its long-term geopolitical vision for southern Africa. In the meantime, the new metropolis Johannesburg was emerging from the gold boom in Transvaal's Witwatersrand basin. Right at that time, the three paramount chiefs were on their way back home with a big political victory they snatched in the corridors of power Whitehall. Their arrival was to coincide with one of the most-studied and least-understood events of South African History, the Jameson Raid on Johannesburg.

In 1889 Sir Henry Loch had become the new British Governor of the Cape Colony and High Commissioner for Southern Africa. Unlike Sir Hercules Robinson he had replaced, Sir Henry was known to be unhappy about the police doing BSAC work and wanted to preserve the Imperial Government from getting embroiled in local adventures.[21] Right after the return of the three paramount chiefs,

[20] For more on this, see Shillington, Kevin (1985), *The Colonisation of Southern Tswana 1870-1900*, Braamfontein: Raven Press.

[21] Sillery, Antony (1965), *Founding a Protectorate: History of Bechuanaland 1885-1895*, London and The Hague: Mouton and Co, p.175.

what seemed to be a plot to get the imperial government embroiled in Transvaal politics was set in motion. Company agents wanted to start an uprising of non-Afrikaner foreigners (*uitlanders*) in Johannesburg, which would result in an armed response by Transvaal authorities, and the ensuing violence and anarchy would eventually drag Britain in. None of that happened.

The ill-advised, badly planned, and poorly executed Jameson Raid on Johannesburg (named after the colonial politician Leander Starr Jameson who led it) failed to spark a revolt of foreigners. During the 29th and 30th of December 1895, a small armed group composed mostly of BSAC agents and the Bechuanaland Border Police – quite a few of them recruited from Company-held Rhodesia –tried to ignite an uprising of the *uitlanders* in Johannesburg. The historical records give contradictory accounts concerning the extent of British imperial government involvement - not necessarily involvement in a supporting role that is, but in a tactical way to ensure the raid's failure and the subsequent weakening of the Company's wider geopolitical ambitions.[22] The unauthorised raid led the British to confiscate the weapons they had given to the Company. The fiasco tilted the geopolitical balance in favour of the Imperial authorities at the expense of the Company and the Cape Colony Government in Cape Town which had its interests closely aligned with the BSAC.

Plans of the BSAC to establish a bridgehead not only failed, but imperial authorities took advantage of the Jameson debacle to insulate Bechuanaland from further Company intrusion. Intra-imperial geopolitical intrigue had worked in the favour of what was to become Botswana. This was not only about establishment of an imperial Protectorate with direct links to London without any formal involvement of the Cape Colony government and the British South Africa Company, but it was also about preventing outsiders from purchasing Tswana land. Based on the arrangement the Three Dikgosi had reached in London, and reflecting the strategic interests of the imperial government, only a tiny fraction of the Bechuanaland Protectorate was declared freehold land, i.e. open to be bought and sold, which effectively meant open to European settlers. This put a hold on the possibility of Boers from legally purchasing land and expanding westward into Bechuanaland; it was also a check on Company ambitions over Bechuanaland territory.

Due to the fluidity of demarcations and political status of lands preceding the 1895 Bechuanaland Protectorate Statutory Provision, some outsiders had legally purchased land within the new borders of the Protectorate. The status of these small holdings along the borders were recognised as freehold land. These pockets along the borders where white farms existed were known as 'Blocks'.[23] Pockets designated as 'freehold', i.e. non-tribal lands that can be bought and sold, was limited to less than 5 % of Bechuanaland Protectorate's territory. In addition to these small holdings of freehold lands in the east and south, large tracts of desert in the east bordering the German colony of South West Africa (present-day Namibia) where the hunter-gatherer Basarwa (i.e. San) traditionally lived were declared Crown Lands.[24] Compared to its neighbours at the time, i.e. South West Africa, Transvaal, the Cape,

[22] Shillington, Kevin (1985), *The Colonisation of Southern Tswana 1870-1900*, Braamfontein: Raven Press.
[23] Louis Picard reports that there were five such 'blocks' in Ghanzi, Tuli, Gaborone, Lobatse, and Molapo. Picard, Louis A. (1985), "From Bechuanaland to Botswana: An Overview", in Louis A. Picard (ed) *The Evolution of Modern Botswana*, Lincoln: University of Nebraska Press, pp. 3-25.
[24] 70 per cent of the Protectorate was allocated to tribal reserves, while the remainder of the territory was designated as Crown Lands – later renamed State Lands. This category covers 23 per cent of Botswana's territorial landscape.

and southern Rhodesia, the white settler population of Bechuanaland was comparatively very small. 99 per cent of the inhabitants of the Protectorate were indigenous Africans; and 95 per cent of them lived in their titular tribal reserves. Tribal land was deemed 'inalienable'; that is, unlike freehold, it cannot be bought or sold.

In strange twist of intra-imperial geopolitics and border-making, what used to be the capital of both parts of Bechuanaland, Mafikeng (alternatively transliterated *Mahikeng* or *Mafeking*) ended up on the Cape Colony side of the border with the 1895 Proclamation. During the 1885 Warren Expedition, a small plot of land (3.4 square kilometre) adjacent to the railroad in Mafikeng had been declared a British Military Reserve. The British High Commissioner in Cape Town then ceded this piece of land technically within the borders of the Cape Colony (which had dominion status with representative government) to the Secretary of State for Colonies who oversaw the British colonial Protectorate from London.[25] But the Mafikeng town council would continue to provide municipal services. What then happened was an anomaly in comparative territorial governance: the very capital of this British Protectorate ended up outside its own territory. And this engendered a smaller scale territorial anomaly, albeit without much significance for regional geopolitics: Mafikeng also happened to be the capital of the Native Authority of the Barolong tribe who were one of the titular tribes recognised in the Bechuanaland Protectorate a little further up north.

Following the creation of the Union of South Africa and accompanying home rule (based on limited franchise), the capital of Bechuanaland Protectorate had been reduced to the so-called Imperial Quarter within the town of Mafikeng. Before the formalisation of Bechuanaland's separation into two, the courts were housed in Lobatse, a settler town outside tribal territories. With the establishment of the Protectorate, this town near the border with the Cape Colony in the south became the territory's judicial capital. What mattered a great deal for the future of indigenous Tswana law and governance was that the overwhelming majority of the surface area of the Protectorate was declared tribal land. Places where Tswana tribes traditionally lived were demarcated into Tribal Reserves soon after the creation of the Bechuanaland Protectorate.[26] A few months after the Proclamation of the Boundaries of Tribal Reserves in March 1899, the British went to war with the Boers in October.[27]

The Anglo-Boer wars destroyed southern Tswana lands which lay in the north of the Cape Colony and the west of Transvaal. The devastation and displacement brought in the wake of the war also uprooted the institutions pre-existing Tswana paramount chieftaincies. The future politics was now about the establishment of a Union of South Africa between the two defeated Boer Republics and the two British Colonies. There was no realistic room left for Tswana political demands in South Africa reeling from the aftermath of the war and engaged in constitutional plans to bring the two sides together in a union. But right next door, the Bechuanaland Protectorate was able to chart a separate path, avoid most of the horrors of the war, and – together with the other British High Commission territories in

[25] Sandy Grant refers to A. Milner to establish the nature of the territorial transfer. Grant, Sandy (2012), *Botswana and Its National Heritage*, Ely, Cambridgeshire: Melrose, p. 19.

[26] Schapera, Isaac (1942), *A Short History of the Bakgatla-bagaKgafela of the Bechuanaland Protectorate*, Cape Town: University of Cape Town, School of African Studies, p. 17.

[27] An interesting detail from imperial documents at the time show the challenges mapping borders in mostly-desert underpopulated flat lands without clear geographical landmarks is the use of single trees (even different definite and indefinite article) for demarcations, e.g. "from *the* Motlopi tree west to *a* Makoba tree"; in "Declaration of Administrative Districts Order, 1st of January 1967", *Laws of Botswana* (1987), Revised Edition.

southern Africa, Basutoland (present day Lesotho) and Swaziland (present day eSwatini)– build a constitutional future in the Empire outside the Union.[28] The seeds of Botswana's independent future were sown in the volatile and complex regional geopolitics of late 19th century southern Africa.

2.4. Bechuanaland and the Union

The establishment of the Union of South Africa, bringing together the Cape Colony, Natal, Orange Free State and Transvaal, in 1910 was a worrisome development for the neighbouring High Commission territories. The same year the British announcement that they envisaged Bechuanaland Protectorate to be eventually handed over to either South Africa or Southern Rhodesia.[29] This was presented as one of the calculations behind holding back on moving the Protectorate's capital to within its borders. But the immediate post-War I reflections on outsourcing British imperial governance in southern Africa to the Union of South Africa did not last long. Whitehall officials quickly managed to insulate Bechuanaland from South African expansionism.

But this was not the only neighbour with designs over Tswana lands. There was another attempt at intra-Empire expansionism from Bechuanaland's neighbour to its northeast, Southern Rhodesia (present day Zimbabwe). After Cecil Rhodes' British South Africa Company (BSAC) headquartered in Cape Town saw its ambitions to expand northbound into central Africa collapse and its political wings clipped, Southern Rhodesia had become a geopolitical power in its own right. Under its new status of a new self-governing British Dominion in 1923, Southern Rhodesia expressed its desire to incorporate Bechuanaland into its territory.[30] This was again opposed by London. During the late 1920s the High Commission of Territories which governed the Protectorates of Bechuanaland, Basutoland (present-day Lesotho), and Swaziland (present-day eSwatini) was taken from the Colonial Office – which functioned more as the decision-maker for overseas territories ruled by Britain – and put under the Dominion Office – which was more of a coordinating body for the self-governing entities of the Empire with responsible government.

What might initially appear as simply as moving pieces around in an imperial board of various jurisdictions was in fact more than that. The inclusion among self-governing Dominions would provide constitutional credence to forestall any future demands from South Africa and Rhodesia. Within the multi-level jurisdictional hierarchy of imperial constitutionalism, Dominions with responsible government and home-rule sat above Colonies, Protectorates, Chartered Companies, Leased Land, Mandate Territories etc. Politically, the High Commission Territories were no match to South Africa's political, military and economic might, but this revision of formal status and representation within Whitehall's imperial bureaucracy was more of a sign of London's continued commitment to its presence in southern Africa. It would help temper South African expansionism. The outbreak of the Great War a few years after this was to strengthen and consolidate South Africa's position in British Empire.

[28] For an interesting glimpse into the geopolitics of southern Africa and the High Commission territories written right at that time; see Spence, J. E. (1964), "British Policy Towards the High Commission Territories", *Journal of Modern African Studies*, Vol. 2, 221-42.
[29] Tlou, Thomas and Alec Campbell (1997), *History of Botswana*, Gaborone: Macmillan, p.223.
[30] Parsons, Q. N. (1985), "The Evolution of Modern Botswana" in Louis A. Picard (ed) *The Evolution of Modern Botswana*, Lincoln: University of Nebraska Press, pp. 28-34.

The Government of the Union of South Africa was now led by those who had fought against Britain a decade or so earlier. Under the leadership of former Boer guerrilla leaders, Jan C. Smuts and Louis Botha, South Africa had chased and fought Germans troops throughout southern Africa. By the end of World War I, South Africa's autonomous influence in Southern Africa had started to match that of Britain who was trying to hold an overstretched global Empire together. This was change in geopolitical power was acutely felt in the High Commission Territories (who had remained under direct imperial jurisdiction from London and had successfully managed to stay independent of the South African Union). The interwar years witnessed the increasing political weight of South Africa in southern Africa. The competition between Imperial authorities and the British South Africa Company (BSAC) and its allies in the Cape Government defining the earlier era was no longer the main geopolitical dynamic in the region.

It was within this context that the South African president Roman Herzog officially demanded for the High Commission territories be transferred to and annexed by South Africa in 1934.[31] It is in Chapter 6 that we will cover the details of various forms of recognition and representation for indigenous Tswana leadership, but during this time-period the name for this institution where most chiefs and their representatives would sit was the Native Advisory Council. Since it had not formally received Herzog's proposal, the Council asked for extra time to review the proposal in detail. In the meantime, the chiefs lobbied the British High Commissioner in Cape Town, Sir William Clark, against South African designs. This was one of the periodic expressions of South African (and later Rhodesian) territorial ambitions over Bechuanaland/Botswana. Herzog's initiative was soon to fizzle out and go dormant until its next reappearance. But what is perhaps more of a unique constellation of historical factors is that the relatively smooth and uncontroversial relationship between Tswana tribal leaders and their colonial overlords was to hit a rough patch during the time Herzog's South Africa was looking at ways to annex Bechuanaland.

2.5. On the Path to Independence

In the context of the long and linear history of the relationship between Tswana tribes and imperial authorities defined by continuity, there was a blip in the mid-1930s. The period marks a rare colonial initiative to increase political control over Tswana law and governance. Details of what happened are in chapter 6, but suffice to say that after a few years of a failure to impose stricter jurisdictional hierarchy, things quickly went back to how they were in the Protectorate and the rather uneventful indirect rule was restored where he colonial and indigenous coexisted side by side with their own political sphere of influence and jurisdiction. In principle, imperial authorities were above local ones in the constitutional hierarchy of the British Empire of course, but other than this out of the ordinary blip of the mid-1930s, there was little effort to take control of reins in more direct ways.

World War II and the tectonic changes in world order that would follow initially had little direct bearing upon the internal politics of Bechuanaland. What was to mark the politics of the immediate post-war years in the Protectorate was neither the politics nor law but romance; or more precisely, the Crown

[31] For a little more on the domestic impact of Herzog's demands, see Otlhogile, Bojosi (1997), "A History of Botswana Through Case Law", *Pula: Journal of African Studies*, Vol. II, No 1, p. 91.

Prince of the Bamangwato Seretse Khama's marriage to Ruth Williams, a white English woman he met while studying in the UK. Incidentally this was around the same time the National Party had come to power in South Africa and had started the racial segregation policy of *apartheid* in 1948. British and tribal Tswana attitudes to mixed racial unions took a secondary role to South Africa's strong condemnation of the marriage. The apartheid government saw this as a threat that could spill-over into South Africa next door. Although the legitimate heir to the Bamangwato chieftaincy, Seretse was forced into exile I 1952 and his uncle Tshekedi continued as Regent. Seretse would soon return in 1956 and he was to play a leading role in the post-colonial transition.

In the meantime, the country was on fast-track to independence. Legislative and Executive Councils for the transition were formed in 1961; first free elections were held in 1965; and independence arrived in 1966. Seretse Khama was elected the first president of the independent Botswana as the candidate of the Botswana Democratic Party (BDP). BDP has dominated every single government since independence. Since political establishment has more or less remained the same and retained its national position, our investigation will not delve into the details of Botswana's political parties.[32] While the party politics could very well be relevant to many of the contemporary issues in Botswana, for our *longue durée* investigation on the relationship between the indigenous and the received systems of law and governance, modern electoral politics and party systems are of secondary importance.

Independence also brought an end to the anomaly of having a capital city outside the territory's borders. In 1956, the imperial bureaucracy supervising over Protectorate had relocated from Mafikeng in South Africa to nearby Lobatse within the borders of Bechuanaland.[33] With impending independence for the Protectorate, a new capital city was sought. Instead of picking the capital of one of the main tribal territories – with the subsequent risk to upsetting the inter-tribal balance of political power – and new capital what was then called Gaborones (named after the Tlokwe chief who had first settled there) was constructed along the strategic north-south railway connecting Cape Town to the two Rhodesias and Nyasaland.

Until then Gaboroe had been a tiny station within the lands adjacent to the Batlokwe. Amongst the eight constituent tribes of the country, the Batlokwe had the smallest land and population. The selection of Gaborone as the new capital was thus not a threat to the bigger tribes competing for political dominance. By 1961, the so-called Legislative Council (often known by its acronym LegCo) preparing the political and legal transition from Bechuanaland Protectorate to independence thus recommended what was a small settlement along the railroad situated next to tribally neutral territory, and with available freehold land and Crown lands around, as the capital of new Botswana.

[32] The most important political challenge Botswana democracy recently faced was the former president, and the country's founder, Sir Seretse Khama's son, Ian Khama to break ranks with BDP and challenge his former vide-president as an opposition candidate in the recent September 2019 elections. Despite creating an upheaval within the political establishment, the BDP party machinery held on to power ensured political continuity,

[33] The so-called Imperial Quarter in Mafikeng was sold to the South African government for 412,000 South African Rand (ZAR) Sandy Grant reports in Grant, Sandy (2012), *Botswana and Its National Heritage*, Ely, Cambridgeshire: Melrose, p.20. Richard Dale reports that it is funds from this sale which financed the construction of the new capital for Botswana. Dale, Richard (1995), *Botswana's Search for Autonomy in Southern Africa*, Westport, CT: Greenwood Publishers, p. 84-5.

The lower house of parliament of new Botswana where most of the legislative power rested was named the National Assembly. But for our investigation, it is the upper house which is more noteworthy here. In a bold piece of constitutional innovation giving form to a mix of indigenous a modern constitutionalism, representation in the upper house of the parliament would be based on the constituent tribes of the country.[34] The country's upper house of parliament is called House of Chiefs (*ntlo ya dikgosi*) composed of hereditary, appointed, and elected chiefs.[35] We should however note that even this 'innovation' reflects some broad continuity with the past. What was to be labelled the House of Chiefs in fact closely resembles the pre-independence Native Advisory Council, but now had representation for the Batswana outside the traditional big constituent tribes of the country. Chapter 6 goes into detail on the link between the colonial and post-colonial constitutional architecture, but let's take a quick glimpse into what is stated in Botswana's modern constitution:

Section 77 of the Botswana Constitution enumerates the power, composition, and the workings of the upper house.[36] The House of Chiefs is composed of 15 members. According to Sub-Section 2 of the Section 77, eight are *ex officio* members drawn from the hereditary chieftaincy of the eight tribes of the country, i.e. the Bakgatla, Bakwena, Bamelete, Barolong, Batawana, Batlokwa, and Bamagwaketse; four are so-called 'sub-chiefs' elected during National Assembly elections; and the remaining three seats are to be selected by the joint meeting of the eight hereditary chiefs and the four elected sub-chiefs. Section 78 elaborates on these who is eligible to hold thee *ex officio* seats. A noteworthy detail here is that these members are officially not called 'chiefs' but "those performing the function of chiefs" (Section 78). This wording allows legitimate holders of tribal chieftaincy position who might be involved in politics, and thus ineligible, the possibility to appoint a senior member from the traditional tribal leadership to this post. Section 79 enumerates how tribes outside the big eight Tswana ones in the districts of Chobe, North East, Ghanzi, and Kgalagadi get their four seats in the House of Chiefs. Different from the ex officio members, these elected four vacate their seats with elections and/or dissolution of the parliament (Section (2)).

3. BOTSWANA SETS THE SCHOLARLY COURSE

Botswana is our first case-study, and as such, sets the course for the rest. Our quest to distil comparative lessons and insights from the Botswana case-study requires an immersion in the true workings of law across time. As we will see in further details in Chapter 6, the wordings of black letter laws written by successive political authorities and long-term patters of law and governance on the ground might often diverge. Legal history helps set the scene for the analysis of more recent times. Chapter 6 contains an in-depth examination of the various legal mechanisms the country has practiced throughout its existence. The chapter aims to provide a *longue durée* picture of the political, historical legal, and social context within which the relationship between indigenous Tswana laws and received modern ones have evolved.

[34] While being part of the country's parliamentary architecture, the legislative powers of the House of Chiefs is limited to advisory matters.
[35] For more details, see Proctor, J. H. (1968), "The House of Chiefs and the Political Development of Botswana", *Journal of Modern African Studies*, 6, 1, pp. 59-79.
[36] The Constitution of Botswana, Section 00, *The Laws of Botswana*, Revised Edition 1987, pp. 1-75.

In Chapter 5 immediately following this one, we take a deeper look at the indigenous Tswana system of law and governance, and variations across tribes. It is especially what we might call indigenous constitutionalism that is under focus here. The second part of chapter 5 takes a further step into the examination one of the country's constituent tribes, the Bakgatla-ba-Kgafela and the balancing act between local traditional concerns and the demands modern politics in the tribal capital, Mochudi.

In this case-study, we managed to identify certain broad patterns. These lessons, insights, and observations help provide some comparative reflection for all the three case-studies but is yet incomplete. It still awaits the addition of comparative lessons and insights from the other two case-studies. This comparison will help highlight the remarkable degree of continuity across pre-colonial, colonial, and post-colonial times. There is a lot Botswana contributes to comparative scholarly debates in Constitutional Law, Comparative Political Science, and Legal History, but it is especially in conjunction with South Africa and Ethiopia that the message comes out stronger.

Chapter 5:
The Indigenous System of Tswana Laws and Governance

Kgosi ke kgosi ka batho
(a chief becomes a chief by the people)

1. THE BATSWANA

In some contemporary political debates currently underway in South Africa, traditional leadership has become almost synonymous with tribal and patriarchal despotism. It seems the current political and economic powers enjoyed by many chiefs in South Africa has led to a misinterpretation of the powers of traditional leadership in African history – especially the pre-colonial and early colonial periods throughout the continent. There is thus a need to nuance this simplistic, and by extension, a rather dismissive, interpretation of the indigenous system of law and governance in South Africa and beyond. And one does not have to be an historian with a knowledge traditional structures across Africa. Some historical reflection, followed by reasoning in the abstract, will quickly reveal why chiefs could not have been despots. Most of this chapter looks as indigenous constitutionalism and a home-grown system of checks and balances as explanations for limits on chiefly powers, but there is also something which we might call the 'force of circumstances': most African traditional leaders simply lacked the political and military capacity to become despots. Let us unpack this a little further:

Lacking an extensive state machinery at his disposal and without military and economic resources necessary to impose despotic rule and enforce royal prerogatives, Tswana chiefs ruled through a mix of indigenous constitutional legitimacy (i.e. hereditary lineage of senior sons) and popular legitimacy (i.e. the power to convince people, build consensus, and deliver). Even scholars currently working on indigenous law and governance sometimes tend to overlook the historical limitations on the autonomous power chiefs. Leaders relied on the cooperation on other members of the nobility, on the support of the elders and tribal counsellors, the willing participation of young men in military

expedition, the popular support amongst the tribe-at-large, and they were constrained by legal precedents in tribal customary law and the teachings of the ancestors recorded in oral history of the tribe. What is more, in a sparsely inhabited territory perpetually short on manpower, Tswana chiefs had to govern carefully without antagonising select sub-segments who could potentially secede and move away. Thomas Tlou's observation shows how this possibility had functioned as a natural check on chiefly behaviour: "It was also in the king's own interest to rule justly, because aggrieved subjects could leave the kingdom and join neighbouring states. This would have entitled loss of tribute".[1] As the Setswana epigraph opening the chapter symbolises, the chief is powerless without the people on his side.

The way the chief was held to account differed across ethnic groups and tribes. Each African society, sometimes even the different branches of the same tribe, had their own indigenous forms of constitutionalism and checks and balances which can vary across. And this presents a scholarly challenge. In the comparative discussion on indigenous law we pursued in Chapter 2, one of the main leitmotivs we pursued was how difficult it was to incise and separate 'the law' from other elements of the indigenous culture. This means that we have to cast a wider net in order to capture the true workings of the law. A wider net means the inclusion of indigenous governance practices, social structures, public ceremonies, and the like in the analysis. But we cannot seek to cover all aspects of the indigenous culture the way Anthropologists do. Broader discussion on culture will enter our discussions only as long as it has relevance to indigenous law and governance.[2]

The general introduction given in the previous chapter had established that the tribe (morafe) was the basic political unit of Tswana society. The basic constitutional order within the tribe rests on a chief (*kgosi*) assisted by a council of elders whose executive powers are accountable to the tribal/village assembly (*kgotla*). Some tribes have a paramount chief (*kgosikolo*) above chiefs (*dikgosi* in plural). The chiefs' powers however are subject to an indigenous system of checks and balances ranging from the royal confidants to counsellors. Anthony Sillery describes what missionaries first encountered here in the early 19th century as follows: "The traditional constitution of a Tswana tribe consisted of a chief surrounded by a number of councils".[3] In-depth details of the traditional Tswana system of law and governance are a little later in the chapter but at this point it is imperative to underline the comparative importance of one key indigenous institution: the tribal public assembly, the kgotla. We will unpack the various functions the kgotla plays a little later, but at this point it is worth noting that amongst the other systems of indigenous law and governance on the continent, the Tswana kgotla is a particularly advanced and sophisticated example of grassroots local democracy, public forum, a people's court, and a popular check on the tribal executive. It is this system of indigenous constitutionalism that the chapter is mostly interested in.

---

[1] Tlou,Thomas (1998), "The Nature of Batswana States: Towards a Theory of Batswana Traditional Government – the Batawana case", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, p. 28.

[2] The doyen of Botswana anthropology, Isaac Schapera's oeuvre provides a multifaceted anthropological take on all aspect of Tswana culture. For matters outside law and governance, see Schapera, Isaac (1940), *Married Life in an African Tribe*, London: Faber and Faber; Schapera, Isaac (1971), *Rainmaking Rites of Tswana Tribes*, Cambridge: African Social Science Documents.

[3] Sillery, Anthony (1971), *John Mackenzie of Bechuanaland / 1835-1899: A Study in Humanitarian Imperialism*, Cape Town: A. A. Balkema, p.15.

We had referred to the force of circumstances that held chiefly powers in check throughout the continent in pre-colonial and early colonial times. Dearth in political and military capacity meant that no chief could establish a despotic political system where his decisions are imposed top-down. In addition to this structural limitation that applies to all, each community across the continent had its own variant of indigenous constitutionalism; and this is the part that we are most interested in: i.e. how the indigenous system of division of powers and checks and balances worked.[4]

Thanks to the indigenous division of powers, the existence of the office of hereditary chieftaincy has rarely translated into political despotism in Tswana history. Now, it is important to inject a comparative benchmark here and highlight the fact that thanks to relatively lower levels of colonial interference and manipulation in Botswana, most of these indigenous Tswana forms of checks and balances have survived into modern times. In other parts of the British Empire where there was more colonial intrusion; consequently, the powers of the chiefs increased throughout time at the expense of indigenous form of checks and balances.

In the introductory chapters to the thesis, we had visited a phenomenon central to the discussion on indigenous law and governance within the multilevel jurisdictional hierarchy of imperial constitutionalism: 'indirect rule'. The official recognition granted to traditional chiefs across the British Empire was not necessarily out of principled reasons of course but more out of a desire to outsource day-to-day governance to local leaders without the need to commit colonial personnel and resources. Traditional leaders often came to function as co-opted agents of British rule in the so-called system of indirect colonial rule. Traditional divisions of political power, checks on the executive, institutions of deliberation were not that necessary in this system and their decline was thus not that alarming for colonial authorities across many parts of the Empire. The more representative nature of Tswana law and governance in pre-colonial times is noted by P.T. Mgadla: "It would appear that chieftainship and the role of the chief prior to the advent of European contact embraced some characteristics of democratic principles".[5] The relatively low levels of colonial interference and manipulation also means that indigenous law and governance in Botswana has not gone through successive and sometimes contradictory phases of institutional redesign – the leitmotiv that marks our South African case-study. In contrast, continuity is the historic leitmotiv here.

2. TSWANA CONSTITUTIONALIM

Any investigation of indigenous constitutionalism starts with the basic political unit of Tswana governance, the tribe. The first part of the discussion will be on the political system *above* individual tribes. As we will see in the similar patterns marking the coming case-studies on the Transkei amaXhosa and Guii-Borana Oromo, the Xhosa political system has historically been a little more than a loose confederal arrangement bringing tribes together in face of common enemy. The preceding chapter on the history and politics of Botswana mentioned the different tribes inhabiting the land and the different forms of recognition granted to indigenous leaders and laws. The indigenous system of

[4] The recent more history of all our case-studies indicate the decline in such indigenous *multus politica* (as outlined in Chapter 3) and an increase in chiefly powers.

[5] Mgadla, P. T. (1998), "The Kgosi in a Traditional Tswana Setting", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, p.7.

law and governance is not replicated symmetrically in each tribe. So here our aim is not to identify all the specific variations to Tswana law across the constituent tribes but to highlight the commonalities and paint a picture of Tswana constitutionalism in comparative context. Who makes the tribe is thus an indispensable element. The different the legal and political status of the constituent groups of the tribe is thus part of the discussion as well. The next section covers the component elements of indigenous constitutionalism: the powers of the chief, the role of communal deliberative assembly, the function of counsellors, constitutional hierarchy between paramount chiefs, chiefs and headmen. We will see how the relative balance between the different component elements of Tswana law and governance, despite having a history defined by *longue durée* continuity, has undergone some ebb-and-flow across different political episodes marking the country's history.

Set in comparative context of Sub-Saharan Africa however, such ebb-and-flow has rarely altered the historic continuity defined by early recognition of Tswana law and the incorporation of tribal leadership into the ranks of the Empire. But early recognition and historic continuity have come with both pluses and minuses. One might even portray early incorporation into the colonial system as the Bechuanaland Protectorate as a mixed blessing for Tswana traditional law. While most aspects of indigenous law and governance have benefitted from official recognition – especially those that seem to have clear parallels in Western notions, other form of indigenous constitutionalism left outside the formal system have retained some social influence but have bene on the decline. We will also examine the influence of these unofficial cultural components of traditional Tswana culture. Age-groups are one such example. They have historically played a big role in social order – albeit not at the very centre of social order as we will see in the Oromo Gadaa system. A related component of the age-group system is the initiation ceremonies, which have also faced steady decline in recent decades. The indigenous political and legal structures left outside formal channels includes the secret societies, rituals, and ceremonies. In Chapter 3's sub-section 2.2. and the review of the anthropology literature, on what was alternatively called *primitive / preliterate / indigenous* / *native* / *Bantu* / *customary* / *African* law in different times in history, we had seen the pervasiveness of such secret societies (usually meeting at night, wearing masks to conceal their identities) in many parts of sub-Saharan Africa – especially West and Central Africa. We had also briefly mentioned how the indigenous Gadaa system of law and governance of the Oromo had been conducted in secret until the military regime was toppled in the mid-1990s (further details in the case-study itself). In comparative terms, we do not see much of this in Botswana. Again, early incorporation into the fold of British colonial system has likely to have obviated the need to continue indigenous practices in secret.

2.1. Inter-Tribal Relations and Confederalism

While the tribe (*morafe*) was the basic political unit, Tswana history also includes long periods where the tribes (*merafe* in plural) would coexist under a loose confederal umbrella where they would occasionally come together for defensive purposes against common enemies but would otherwise remain separate within their own territories where they would have self-rule. One of the more important of such loose unions in Tswana history is the Baphofu Confederacy of the Bahurutse,

Bakwena (with their affiliates Bangwaketse and Bangwato), Batlhano, Bakgatla, Bapedi tribes which was in place during for over two centuries (1500-1700).[6]

In the context of to the volatile political history of the region, there has been remarkable continuity and some parts of this very system have found their way, with a period of colonialism in-between, into the modern times. The post-independence Botswana constitution recognises eight constituent tribes, the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana, Batlokwa. These are the tribes who inhabited the territory of the Bechuanaland Protectorate of the British Empire which would eventually transform into independent Botswana.[7] However, this aspect of indigenous confederal constitutionalism above the tribe, especially in terms of *inter*-tribal law and governance, is not the main focus of investigation here. Ours is more of a quest to chart *intra*-tribal indigenous constitutionalism; that is looking at division of powers and checks and balances within the basic political unit of the tribe.

2.2. Constituting the Tribe

As we had seen in previous chapter introducing the Botswana case-study, the tribe (*morafe*, plu. *merafe*) is the main political unit of the Batswana. Although serfdom officially no longer exists and laws on individual rights and freedoms no longer allow differences in legal status among citizens, historically the tribes were constituted along a number of distinct collective groups with different legal, political, and social status.

While the exact terms can occasionally vary across the constituent tribes of Botswana, there are usually four categories of 'citizenship' status. Tribes are composed of four main groups: royalty (*bakgosing*), commoners (*batlhaka*), immigrants/settlers (*baagedi*/*bafaladi*) and subjects/serfs (*malata*).[8] In most cases, it was only royalty and commoners who were deemed titular members of the tribe. Despite the existence of such internal stratification, which often came to function in somewhat akin terms to the Indian caste system, it is important to note that the tribe itself was not a closed group fixed at birth. There was more fluidity and mobility to Tswana social structure, but such intra-tribal social stratification existed in settlement patterns as well.

One of the notable settlement habits of the amaXhosa was the spread of homestead and kraals over the rolling hills and plains without much concentration. The Batswana on the other hand tend to live

[6] Tlou, Thomas and Alec Campbell (1997), *History of Botswana*, Gaborone: Macmillan, p. 104. During the late 19th century, the Wesleyan missionary reverend Joseph D. M. Ludorf tried to revive the Tswana confederation at a time of increasing Boer incursions. Ludorf drafted a constitution for the 'United Barolong, Batlhaping, and Bangwaketse Nation' in 1871, however he died the following year and the confederal idea was lost to history. From Jeff Ramsay, "Forgotten Giant – Joseph Ludorf" posted in The Botswana Society, *@TheBotswanaSociety*, 18 February 2019, retrieved 25 September 2019; see also Ramsay, Jeff, B. Morton, and T. Mgadla (1996), *Building a Nation: A History of Botswana from 1800 to 1910*, Gaborone: Longman Botswana.

[7] All tribes had acquired their titular reserves with Proclamation of the Boundaries of Tribal Reserves, No. 9, in 1899; Schapera, Isaac (1942), *A Short History of the Bakgatla-bagaKgafela of the Bechuanaland Protectorate*, Cape Town: University of Cape Town, School of African Studies, p. 17. Except the Batlokwa who got theirs in 1933. Parsons, Neil and Michael Crowder (eds) (1988), *Monarch of All I Survey: Bechuanaland Diaries 1929-37, by Sir Charles Rey*, Gaborone: The Botswana Society and London: James Curry, p. 248.

[8] The four group categories are common to all Tswana tribes but the exact titles of these groups can differ across.

in clusters of villages and towns; and have done so historically.[9] This is a point that the doyen of Tswana Anthropology Isaac Schapera also notes in contrast to the settlement practices of other Bantu communities of southern Africa.[10] Historically, the settlement practices in villages and towns reflected the internal social stratification. Chiefs and royal family members lived at the centre, their *kraal* surrounded by clusters of their tribal kin, while outside neighbourhoods would house immigrants/settlers, with the final concentric circle reserved for subjects/serfs.

The headmen leading the villages and wards are often hereditary (patrilineal). Historically they would be drawn from within the ranks of the titular tribe and represent the link between the community-at-large and the paramount chief. Their role was a mix of being the local representative of the kgosi as well as the local community's voice vis-à-vis the centre. And with the subject peoples without chieftaincy structures such as the Basarwa (Khoisan), headmen from the titular dominant tribe would be appointed to play this role for them. Recent years have witnessed a relaxation of this hierarchical structure and the emergence of non-hereditary chiefs among communities who had historically been subject peoples of the Batswana.

2.3. Division of Powers, Checks and Balances

One of the main scholarly contributions this research pursues is to situate traditional institutions within the context of comparative constitutionalism. The recent global domination of the ideal nation-state model of one-citizen-one-vote electoral democracies with written constitutions should not blind us to the fact that historically there been has a lot more variety in constitutionalism. From Church-held lands to self-governing chartered cities, the history of constitutionalism shows us that a variety of proto-democratic forms of self-government existed throughout the world. Instead of pigeonholing African traditional structures into pre-colonial forms of non-Western tribal governance, and thus leaving it within the scholarly monopoly of Anthropologists, we want to make sure that we cast a wider web of constitutionalism and place Tswana law and governance within this comparative context.[11]

By now it has become quite clear how official labels themselves can be controversial. At different points in history, with some differences in content, the adjectives *primitive* / *preliterate* / *indigenous* / *native* / *Bantu* / *customary* / *traditional* / *African* have all been used for what we are examining here. Yet all these terms have been accused of carrying political messages and normative overtones. What is more, the sensitivity of terms can vary across geography. While the adjective 'tribal' is used without any apparent controversy in Botswana, in neighbouring South Africa this is a politically loaded label. We had seen in Chapter eight on South Africa how the seemingly more neutral adjective 'traditional' is currently the preferred one.

[9] Hardie, G. J. (1982), "The Dynamics of Internal Organisation of the Traditional Capital Mochudi", in *Settlement in Botswana*, A Symposium, Gaborone: The Botswana Society, p. 205.

[10] Schapera, Isaac (1971), *Rainmaking Rites of Tswana Tribes*, Cambridge: African Social Science Documents, p. 3.

[11] One rare example is a short piece by Thomas Tlou. In his chapter entitled "Towards a Theory of Batswana Traditional Government", Tlou examined the Batawana tribe and their system of law and governance in the broader comparative context Tlou, Thomas (1998), "The Nature of Batswana States: Towards a Theory of Batswana Traditional Government – the Batawana case", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, p. 11-31

2.3.1. Chiefs

The office of traditional Tswana tribal leadership, and the various rights and responsibilities which accompany, are together known as *bogosi*, from the same etymological root as the chief, kgosi. The most important point to establish before we proceed to the further details of checks-and-balances in the indigenous constitution of the Tswana is that the chief was neither an absolute ruler in Tswana tribal history nor was governance simply one of tyranny. Contrary to what most political observers nowadays seem to believe the chief was neither a tribal despot nor was he the only one holding office in traditional leadership. While in stronger constitutional position compared to Oromo and Xhosa traditional leaders, Tswana chiefs shared ceremonial/religious power with rainmakers, could not challenge the prerogatives of traditional doctors, had to share military glory with war chiefs, rely on various counsellors and sundry advisors for decision-making, manage the tribal public opinion expressed in communal assemblies, and navigate the maze of local politics where members of the royal family vied for influence. What the chief could do was subject to unwritten but widely known and accepted customary practices defining the culmination of indigenous constitutionalism across time and place.[12]

According to the practice of royal succession, it was the eldest sons from first wives who were the legitimate heirs to chieftaincy. If the heir still underage, it was often the paternal uncle who would govern as Regent until the new kgosi would be crowned. In some rare cases, queen mothers would assume his role. Even without succession and regency in the picture, royal counsellors were a part of the executive branch of government.

2.3.2. Royal Counsellors - Dikala

Traditionally, the chief governed through the aid of a number of close counsellors from within the ranks of the tribal nobility. This was sometimes a reflection of the way the process of royal succession worked. When the young legitimate heir to the office of chieftaincy, i.e. hereditary lineage senior son, assumed power, male relatives would help assist the new chief and ensure continuity in tribal law and governance. These counsellors, known as the Dikala, functioned as the chief's confidants.

Dikala literally translates as 'branches' (also used is the 'branches of the chief', i.e. *dikala tsa kgosi*). The dikala were drawn from within the ranks of tribal royalty, often paternal uncles of the kgosi. They performed a number of executive, judicial, economic, religious, ceremonial, and military functions. In addition to being confidential servants to the chief, the dikala would also assist him in judicial matters, help allocate tribal grazing land and allotments, perform tribal ceremonies and religious rituals, serve as war-chiefs in cattle-raids or war parties.[13]

2.3.3. Non-Royal Counsellors/Headmen – Dintona/Basimane

Another branch of the executive within tribal constitutionalism were the non-royal counsellors.[14] These were known as *dintona*, which means the lieutenants of the chief. The dintona were often

[12] Schapera, Isaac (1957), "The Sources of Law in Tswana Tribal Courts", *Journal of African Law*, Vol.1, No.23, pp. 150-62.

[13] These categories of functions reflect the Western classification scheme which has become the international norm. In traditional Tswana polity, these categories would historically often blend into one another.

[14] Mgadla, P. T. (1998), "The Kgosi in a Traditional Tswana Setting", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, p. 6.

drawn from within the more senior ranks of the non-royal headmen appointed to various wards and villages. Mosimane (singular) is another word for such a non-royal headman. As a group of senior counsellors composed of commoners, they were known as *basimane bakgosi* (chief's servants). Part of their economic power rested on the tributary cattle the chief had temporarily allocated to them for their tenure as headmen. The practice was an important 'power of the purse' available to the chief. There was even a specific name for these tributary cattle, *kgamelo*. Not surprisingly this tributary practice had made the non-royal counsellors more likely to be defenders of the chief and opponents of attempts by other royals to waken or replace him.

2.3.4. Kgotla

The word kgotla has a number of meanings in Setswana; all of them relevant to what we are investigating in this thesis. The word refers to both the physical assembly grounds where traditionally all adult male members of the tribe would gather[15]; it is where public ceremonies and celebrations would take place; the term also refers to the institution of grassroots deliberation where the tribe would practice an indigenous form of direct democracy; it is also a public forum for holding the chief to account, for criticism, and in some rare cases, for deposing and replacing him; and finally, the term also refers to the indigenous form of courts where disputes would be settled under the guidance of tribal elders and precedent. The kgotla is thus a unique institution which, in addition to its role as a forum of direct democracy and the venue for tribal ceremonies, combines the *trias politica* functions of the legislative and judiciary.

While generally used as a blanket term for grassroots deliberation, there are in fact a few subcategories of the kgotla. *Letsholo* is a semi-secretive tribal meeting with select members of the titular tribe on controversial and crucial matters. Makgala informs us that attendance at the *letsholo* is not only obligatory but the historic tradition calls for those who attend to come armed.[16] As noted earlier, across tribes the exact names, and sometimes even contents, of the indigenous practices can very well differ. There is thus a need to inject a note of caution here. In fact, a broadly similar system of law and governance exists across tribes but with minor differences. All tribes have a version of letsholo; it is the degree of formalism and transparency that varies across.

What is generally more standardised across the country's tribes is the general meeting attended by all members of the tribe – including titular members, settlers, and subject peoples – throughout the chieftaincy. This plenary assembly is called *pitso*. While there is little concrete role for the pitso in the indigenous constitutional order, it is nonetheless an indigenous version of the people's voice. Not surprisingly, at the pitso "rarely did kings go against the opposition of the people".[17] There is also a more localised version of the pitso where only the village gathers. What is generally known as *phutego* is a village meeting attended by men where local matters are discussed.

[15] Despite opposition from the more-traditional minded, women now are accepted as part of kgotla deliberations throughout Botswana. However, in many tribes, women are subjected traditional and conservative restrictions on dress code on kgotla grounds.

[16] Makgala, Christian John (2006), *Elite Conflict in Botswana: A History*, Pretoria: African Century Publishing, p. 15.

[17] Tlou, Thomas (1998), "The Nature of Batswana States: Towards a Theory of Batswana Traditional Government – the Batawana case", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, p. 28.

The next chapter specifically examines the relationship between the indigenous system of law and governance we summarise above and the received modern laws passed by the country's colonial and post-colonial political regimes. The whole chapter is devoted to tracing this relationship, but before that let us quote Richard Vengroff's observation. After completing his lengthy field-research on Botswana's first decade of self-rule, Vengroff drew attention to the role of kgotla between the people and the state:

> "The main importance of the kgotla lies in the fact that it represents the point of intersection of the traditional political system and the organisations of the central government and district council. It acts as the means of providing traditional legitimacy to the introduction of new ideas, ways of doing things, and regulations issued by the new elites at the central and local level".[18]

While the indigenous Tswana system of check-and-balances and the communal deliberation of the kgotla do not look like the one-citizen-one-vote electoral democracies with written constitutions, from the customs dividing political power to public venues for expressing popular opinion these are in many ways the building blocks of indigenous constitutionalism. In line with the Legal Realist perspective which advocates situating law within the broader political, historical, and cultural context, we approach these as home-grown varieties of constitutionalism in self-governance.

2.4. Parts of Indigenous Constitutionalism in Decline

Not all of changes within the indigenous system of law and governance is attributable to colonial manipulation. True, strong centralised chiefs with no formal accountability to indigenous forms of check-and-balances historically came to serve the interests of the British colonial practice of indirect rule across sub-Saharan Africa. The Bechuanaland Protectorate should be no exception. But some of the positions which historically served as indigenous checks-and balances on the powers of the chiefs have lost their once influential positions in recent times – especially traditional doctors/medicine men and rainmakers.[19] Intra-tribal political centralisation is thus a reflection of first colonial manipulation (followed by political interference in post-independence times) combined with the broader social impact of modernisation. The biggest sociological casualty of development, modernisation, and accompanying demographic changes, has been the age-group.

2.4.1. Mophato (mephato) age regiments

The Tswana social structure includes age-groups (alternatively called *age-sets*, *age regiments*, or *age-cohorts* by Anthropologists) based on the same principles defining the Oromo Gadaa age-groups we will examine in detail in Chapter 11. In his piece entitled "Towards a Theory of Batswana Traditional Government", Thomas Tlou highights the historic importance of the age-groups in Tswana tribe:[20]

> "Every adult belonged to an age regiment. Each regiment had a name and took great pride in being addressed by the name of his age regiment. The many activities they

[18] Vengroff, Richard (1977), *Botswana: Rural Development in the Shadow of Apartheid*, New Jersey: Associate University Press, p. 60.

[19] The roles of these positions have not become irrelevant. The decline in their influence is a relative one which gradually unfolded since the 19th century.

[20] Elsewere Tlou has written with Alec Campbell on the historic importance of the age regiments which remained in place for life; Tlou, Thomas and Alec Campbell (1997), *History of Botswana*, London: Macmillan, p. 74.

> performed as a corporate body while big initiated, and throughout their adult life gave members of a regiment a strong felling of group solidarity, cutting across parochial loyalties of family, ward, or village. Next to kingship, it was the most integrative institution".[21]

We had seen how the absence of formal recognition by the Ethiopian state, and even the persecution of traditional Oromo cultural practices, had forced the Gadaa and its age-groups 'underground', leaving it in somewhat untouched and unchanged. The parallel existence of two systems of law and governance – one officially in place but rarely enforced outside the reach and range of the Ethiopian state infrastructure, and one that governs all aspects of communal life but practices behind a veil – means that the age-groups carry the same centrality in Oromo society as they did historically. In Botswana, on the other hand, the early official recognition of the traditional system of law and governance has brought the Tswana social and cultural practices into the open and thus exposed them to changes that come with modernisation, development, and urbanisation. This means that the age-groups still exist, but they no longer play the central role to social organisation they historically used to. The age-group system lacks the detailed structure of 8-year cycles that defines the Oromo Gadaa. To quote the doyen of Tswana anthropology, Isaac Schapera, once again: "A new age-set (mophato) was created by the chief every five or six years. It comprised all youths about the same age, usually 17-21, and they belonged to it as long as they lived."[22] The less formal role in socialisation into a select group of life-long loyalty remained in place. The age-cohorts define one's social circles and bonds – historically cemented during the initiation ceremonies (*boguera* for boys, *boyale* for girls). Semi-secretive Xhosa initiation ceremonies for young men of the same age-cohort we will see in Chapter 8 are also the relic of a similar societal structure.

In terms of the scholarly goals of our investigation, the fate of the Tswana system of age-groups presents an interesting outcome that deviates from other traditional structures like the chieftaincy or the kgotla. These were never granted in any of the official documents from the early days of the Protectorate to up till now. Without formal recognition their relevance has been in steady decline in social, political, cultural, and economic terms. However, it is also important to note that modernisation and urbanisation have challenged indigenous forms of social stratification throughout the continent. Their decline has not been solely due to the lack of formal recognition but should be seen within the context of overall social, cultural, and demographic changes the continent has undergone. An interesting indication of the declining relevance of Tswana age-regiments is the space it occupies in the oeuvre of the doyen Botswana legal Anthropology, Isaac Schapera: His 1933 field research report devotes a sizeable section the indigenous system of age-regiments.[23] In his prolific publication output of the coming decades, by the 1970s the space devoted to age-groups and their centrality to Tswana society shrinks to a few sentences and footnotes.[24]

---

[21] Tlou,Thomas (1998), "The Nature of Batswana States: Towards a Theory of Batswana Traditional Government – the Batawana case", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, p. 19.

[22] Schapera, Isaac (1971), *Rainmaking Rites of Tswana Tribes*, Cambridge: African Social Science Documents, p.21.

[23] Schapera, Isaac (1933), "Preliminary Report of Field Investigations", in John L. Comaroff, Jean Comaroff, Deborah Jones (eds) (2007), *The African Photography of Isaac Schapera*, Chicago: University of Chicago Press.

[24] See for example, Schapera, Isaac (1970), *Tribal Innovators, Tswana Chiefs and Social Change, 1795-1940*, London: Athlone Press.

2.4.2. Secret Societies

One of the scholarly challenges involved in investigating indigenous political and legal institutions is the subject of secret practices ranging from secret societies to rituals where members wear mask concealing their identity. As a result, short visits supervised and managed by national bureaucrats and academics, or local guides/drivers/fixers will often fail to record these. Not only would giving standard survey questionnaires miss these deeper, more secretive elements of law and governance, but there also might be a deliberate desire to conceal these local institutions from national bureaucrats, academics, or guides or local 'fixers' from other tribes or ethnic groups who accompany visitors. It is here where Anthropologists play a vital role for scholarship. Since their work requires length immersion in one locality and a gradual process of integration and trust-building, they are more likely to uncover political and legal institutions which would fail to appear on the radar screen of other researchers.

One such part of indigenous Tswana law and governance is the secretive meeting the '*phuthêgô ya lesaka*'.[25] The Anthropologist Isaac Schapera had spent a long time among the Batswana – specifically among the Bakgatla-bagaKgafela tribe – and thus was able to identify the more hidden elements of local decision-making and deliberation. The *phuthêgô ya lesaka* is different from the community-wide *kgotla* or the *letsholo*, although it takes place within a corner of the same compound. Schapera describes it as "an important secret meeting held inside the cattle-kraal adjoining the *kgotla*".[26]

Compared to other parts of Sub-Saharan Africa, the secretive side to indigenous law and governance plays a smaller role in the day-to-day affairs of the tribe. While many parts of the Tswana system of law and governance still play a role in indigenous constitutionalism today, we should also acknowledge that some aspects of the indigenous system have been in steady decline; some of them already extinct. Some of the decline is due to social changes, in particular modernisation and urbanisation. The decline of age-groups is mostly sociological. The comparative dearth of secret societies, rituals, and, ceremonies might be reflection of earlier recognition and incorporation of the Tswana system of law and governance. Put simply, there was no need to go underground to practice the indigenous culture.

3. HISTORY, POLITICS, CULTURE OF THE BAKGATLA-KA-KGAFELA

Part of our case-study on Botswana zooms on one constituent tribe in order to get richer account of the ups-and-downs of mixing the indigenous with the received. The Kgafela branch of the Bakgatla tribe is one of the main constituent tribes of the country, it rests on uncontested tribal territory, and the percentage of non-titular Batswana and minority tribes is very small. This means that we do not have to deal with *intra*-tribal legal pluralism in our analysis of the Bakgatla.

[25] While falling under the general label of secret societies, there is a variation of such traditional practices across the continent. The emphasis on secrecy here is for descriptive purposes. It is not a judgment on whether carrying out traditional practices in private is wrong or practising publicly is more beneficial.

[26] Schapera, Isaac (1942), *A Short History of the Bakgatla-bagaKgafela of the Bechuanaland Protectorate*, Cape Town: University of Cape Town, School of African Studies, p. 7.

Bakgatla were part of Sotho-Tswana tribes of moving south in the course of the Second Millennium AD. Most historians believe that they were part of the southward movement of the Bantu-speaking peoples of West Africa.[27] Historically the Bakgatla tribe of the Batswana lived in a territory between the Crocodile, Marico and Eland rivers, which saddles the present-day border region between Botswana and South Africa. The oral history of the tribe contains somewhat conflicting accounts about the historical origins of the Bakgatla. They most likely moved into this region from the north during the 16th century and for centuries were part of the loose Baphofu confederation of Tswana tribes. Late 18th and early 19th century brought two invading forces into this region, first King Shaka's marauding Zulu, then the Afrikaner Boers. The ancestral territories of the tribe along the Crocodile river had seen the arrival of *Trekboers* who had left the Cape Colony once it had fallen under British rule in 1809 and had trekked up north. We have to remember that during those times these were mostly underpopulated lands. Plus, the death and destruction the Mfecane wars unleashed by the Zulu King Shaka in the late 19th century had forced decimated communities to flee the Zulu onslaught. It was during this time that the Bakgatla and the Boers found themselves cohabiting the same lands.

The history of the Bakgatla, in one of those a strange twists of regional politics, is entwined with someone who would later become the international face of the Boer cause against the British, a popular figure for many of Europeans opposed to British imperialism, and the president of the Transvaal Zuid Afrikaanse Republiek, Paul Kruger. Before he became the leader of the entire Boer national cause, Kruger was the field-cornet of the Rustenburg district in western Transvaal where the Bakgatla tribe also lived. Field-cornet (*veldkornet* in Afrikaans) is a military/administrative rank equivalent to that of a lieutenant. Enlisted civilians would be appointed to these positions which would combine military leadership of the local Boer citizen militia with that of a magistrate.

A turning-point for the Bakgatla came in 1869 when Paul Kruger publicly flogged the Bakgatla paramount chief (*kgosi*) Kgamanye for his failure to provide a steady supply of labour for the local Boer farms. As response, the Bakgatla ended up secretly leaving western Transvaal depriving the Boers of the much-needed workforce which was constantly in short supply throughout southern Africa at that time and eventually settled in Mochudi formally within the traditional territories of the Bakwena tribe. In fact, the Bakwena chief Sechele had invited Kgamanye to bring his people to settle in the Kwena capital Molepolole. We have to once again highlight the fact that people were in short supply across the region due to wars, diseases, and famine. Demographic size equalled military and economic strength. Kgamanye however wanted to preserve Bakgatla autonomy and opted for the then uninhabited Mochudi surrounded by defensible forested hills overlooking the plains.

While paying tribute to the Bakwena, the independent-minded Bakgatla were a force in their own right and had a reputation for martial prowess. In 1874 Kgosi Kgamanye died and was replaced by Lentswe (alternatively transliterated *Linchwe* in some accounts). The following year a large contingent of Bakwena warriors led by the Bakwena chief Sechele's son attacked Mochudi but walked into a trap, they were encircled and decimated, the survivors escaped to the Bakwena capital Molepolole – including the chief's son who left his warriors behind and galloped his way back. Oral history of the

[27] Present-day Cameroon is credited as the historic region of origin of Sotho-Tswana peoples. Tlou and Campbell refer to Tswana oral history and the specific references to a 'place of lake's in North East as the ancestral region of origin. Tlou, Thomas and Alec Campbell (1997), *History of Botswana*, London: Macmillan, p.92.

tribe credit the apes living on the trees on the hills behind Mochudi with alerting the Bakgatla to the approaching Bakwena – hence the tribe's totem, the ape (*kgabo*).[28] According to both written and oral history from 1875 onward the Bakgatla established their new home in Mochudi and the surrounding areas.[29]

This was a territory beyond the borders of Transvaal the British had recognised with the 1852 Sand River convention. The Bakgatla's first contact with the British had been with the missionaries; the most prominent being Dr. David Livingston who had spent time with them between 1843 and 1846 when the Bakgatla still lived in Transvaal. Following the establishment of the Bechuanaland Protectorate in 1885 and its Statutory Provision in 1891, the British starting demarcating what were known as Tribal Reserves. The border between the Bakgatla and the Bakwena was thus formalised in 1896. Once the other internal demarcations of the Bechuanaland were also agreed upon, Proclamation of the Tribal Reserves Number 9 was announced in March 1899.[30]

That year also marked the beginning of the Anglo-Boer war. While the war devastated Tswana lands south of the Bechuanaland Protectorate, the Bakgatla in the Protectorate were able to stay out. After the end war, the Bakgatla found themselves subject to heavier colonial interference and a growing rift between the Crown Prince Molefi and the regent, his uncle, Isang. This also seems to be generational rift between conservative Isang and young Molefi who had studied in Cape Town and had come back to Mochudi with a modernist outlook.

While having his own ups-and-downs with the subsequent British Resident Commissioners he had to work with, Isang did not share his nephew Molefi's blanket disdain for colonial involvement. As representative of the Bakgatla in the African Advisory Council 1927 he spoke in favour of codification of indigenous Tswana laws "because there are young chiefs coming on who do not know these laws and may seek advice from those of their own age only".[31] Kgosi Lenchwe II of the Bakgatla – Molefi's paternal grandfather and Isang's father – had more mixed views of the dual court system and its advantages and disadvantages – even when they fall short on procedure and technicalities. Regardless of this, Lichwe's belief was that "customary Courts… are relatively accessible, open, egalitarian, understood and culturally consistent with other institutions in society".[32] The next chapter addresses the very indigenous constitutional order within which these developments took place. The next chapter addresses the very indigenous constitutional order within which these developments took place.

[28] As narrated by Lesego Maano, at Phutadikobo, Kwatleng province, 20 August 2019. Considering the fact that tribal totems often go back to much earlier times in history, it is also possible that this story of the apes making noise and the Bakgatla climbing to see the enemy approaching could have happened long before the tribe settled in Mochudi.

[29] We should add one qualifier to this account of Botswana's Bakgatla. There is a much smaller branch of the Bakgatla tribe, the BaKgatla ba ga Mmaaana who had arrived separately and settled in two villages elsewhere under Banagwaketse and Bakwena overlords. Matemba, Yonah Hisbon (2003), "The Pre-Colonial History of Bakgatla ba ga Mmanaana of Botswana, c. 1600-1881", *Botswana Notes and Records*, Vol. 35, pp. 53-67.

[30] Schapera, Isaac (1942), *A Short History of the Bakgatla-bagaKgafela of the Bechuanaland Protectorate*, Cape Town: University of Cape Town, School of African Studies, p. 17.

[31] Quoted from the 7th Session of the African Advisory Council, 1927, p. 7; in Schapera, Isaac (1956), "The Development of Customary Law in the Bechuanaland Protectorate", in The *Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique*, symposium / colloque 1955, Leiden: Universitaire Pers Leiden, p. 110.

[32] Nserenko, D. D. Ntanda (2002), *Constitutional Law in Botswana*, Gaborone: Pula Press, p. 204.

Chapter 6:
The *longue durée* Relationship between Tswana Laws and the Modern State

---

1. RECOGNITION AND JURISDICTION

This chapter is where we take a more in-depth look at the relationship between indigenous Tswana customary law and formal statutory laws. We trace the evolution of this relationship across the different political episodes the country underwent. In doing so, our interest is not confined to studying how specific laws are applied today in Botswana and the legal minutiae surrounding the application. Instead, the aim is to seek broader patterns marking the *longue durée* history of the politics of law in Botswana. The chapter identifies a handful of such broad historical patterns marking the relationship between the indigenous and the received. These range from the dual system where indigenous and received exist side-by-side to a single legal hierarchy with the supremacy of colonial laws is firmly established at the top. The chapter seeks to excavate the political and legal consequences of these different types of relationships, with an eye to distilling comparative lessons, insights, and observations.

At this point as we prepare to embark, we should preface the analysis with a clarification of the terms used. The legal history of the country shows us the need to revisit and temper the watertight terminological separation between uncodified indigenous customary laws on the one hand and received statutory laws on the other. Bechuanaland Protectorate's comparatively early recognition and endorsement of indigenous laws have resulted in formalisation, and sometimes even codification of parts of Tswana law. So, the dichotomy between the unofficial customary and the official codified itself has been challenged from the very start of the country.

At the time of the declaration of the establishment of the Bechuanaland Protectorate in 1885, or more precisely, at the time of the Order-in-Council of 1890 enumerating the constitutional status of the new Protectorate and the division of jurisdiction, indigenous Tswana laws were unwritten, uncodified, and unofficial. Yet the following decades would see a steady and linear process towards the official recognition of Tswana laws. Once brought into the fold of the imperial constitutional order of the British Empire, this conceptual dichotomy between the uncodified and formal becomes somewhat less watertight. They do however function as labels for the two legal systems which came to co-exist in a jurisdiction within the multilevel imperial setting. The dichotomy is between the Tswana laws

applicable to the members of the tribes and colonial laws applicable to non-tribal inhabitants of the Protectorate. It is this principled 'dualism' – instead of the force of circumstances where legal pluralism emerges out of practical reasons – that defines the early episode of the relationship between the indigenous and the received.

From the outset, official imperial documents indicate a strict separation between Tswana customary laws on the one hand and the written statutory laws of Britain. This is because different legal systems apply to indigenous and the European residents. As we had seen in Chapter 10, the Tswana indigenous system of law – compared to most other African colonies – was granted formal recognition. In tandem, the Tswana indigenous system of governance of tribal authority was incorporated into the constitutional architecture of the Protectorate. Consequently, the strict separation between uncodified Tswana laws on the one hand and written colonial ones on the other had been reduced to an abstract principle – that is, on paper they appeared separate from one another, but the practice was more mixed. Most indigenous Tswana laws and courts have been brought into the fold of the official structure. Chapter 4 provided an overview of the complexities of the multilevel jurisdictional set up of the Empire. But due to its direct relevance to internal Tswana politics, we should briefly revisit the multilevel jurisdictional hierarchy of the British Empire; and take a closer at how colonial constitutionalism worked.

2. THE MODERN STATE AND INDIGENOUS LAW AND GOVERNANCE

2.1 Colonial Constitutionalism

At the top of the imperial constitutional hierarchy stood the British Parliament in Westminster. It was the office of the Dominion Secretary in London which governed the overseas imperial territories. After 1948, this office was renamed the Commonwealth Secretariat (i.e. the Secretary of State for Commonwealth Relations). The High Commissioner in Cape Town was the representative of the imperial government in London and sat on top of the colonial constitutional hierarchy in southern Africa. After 1931, the new office of the Governor General became the nominal head of British government in the Union of South Africa. The office of the High Commissioner remained at the top of imperial order for Swaziland (present-day eSwatini), Basutoland (present day Lesotho), and Bechuanaland (present-day Botswana) and would appoint a Resident Commissioner to each Protectorate. While below the office of the Governor General in the Union of South Africa four Lieutenant Governors served in a similar capacity in the four constituent provinces of the Union (the Cape, Natal, Free State, and Transvaal). What makes this formal jurisdictional arrangement even more complex was the fact that until 1931 the very same person sent by London held both offices of the High Commissioner and the Governor General.[1]

The High Commissioner would appoint the Resident Commissioner as the representative of imperial authority over the Bechuanaland Protectorate. The Resident Commissioner was responsible for the overseeing the day-today management of colonial prerogatives on behalf of the High Commissioner in Cape Town as well as issuing minor regulation. Below the Resident Commissioner, District

[1] Further details of the imperial constitutional architecture in southern Africa are covered in the coming Chapter 7 on South Africa, Sections 2.5 and 2.6.

Commissioners would be the representatives of the imperial government on the ground in the constituent regions of the Protectorate. Their work went hand in hand with the Resident Magistrates who nominally worked under them. We had emphasised this in the previous Chapter 4, but it is important to reiterate that Bechuanaland – along with other High Commission territories of Swaziland and Lesotho – did not have sizeable European settler populations compared to other British colonies in Africa such as Kenya or Rhodesia. Nor did it house a sizeable imperial presence in military/bureaucratic terms. The resident imperial bureaucratic corps overseeing the Protectorate were miniscule. This means that despite official designation of responsibilities, in practice there was a great deal of overlap and mixing between what District Commissioners, Resident Magistrates, Bechuanaland Border Police, local representatives of the British South Africa Company, and Missionaries did.

Due to the historical twists and turns of late 19th geopolitics we had covered in detail previously, the capital of Bechuanaland Protectorate, Mafikeng, in fact lay to the south of the territory in the adjacent region of British Bechuanaland, which had been annexed into the Cape Colony.[2] While the Cape Colony and all other British colonial possessions were under the authority of the British High Commissioner in Cape Town, such jurisdictional asymmetry did not have much impact on the day-to-day governance. But once the Cape Colony was granted responsible government as a Dominion, the jurisdictional asymmetry started having political implications since the Cape was demographically, territorially, and economically much bigger than the High Commission territories of Swaziland, Lesotho, and Bechuanaland. The establishment of the Union of South Africa and home rule further strengthened the political power of South African politicians while limiting Whitehall's reach.

While the constitutional architecture undoubtedly holds the centre-stage in the legal history of Botswana, we should inject a caveat here. The formal, the official, the codified represent one side of the picture. The informal, the unofficial, the uncodified represents the other half. Uncodified influence of stronger political actors can influence the workings of law; geopolitical concerns elsewhere can change colonial policies; and sometimes the personalities holding various offices at a certain point in history can go against the grain. What we have summarised above were the formally designated powers represented the official prerogatives of the High Commissioner. There was also the mostly undefined but ever-present political and economic weight of the office which represented London's imperial authority. This means that we have to take into account the fact that the relations between the Cape Colony government, the British South Africa Company (BSAC), and Imperial power was more than a matter of *stricto sensu* jurisdictional distribution of power. Or to put it differently, it was both more and less than the formal lay-out of jurisdiction. 'More' in the sense of projecting imperial power in policies and territories beyond the High Commissioner's official prerogatives, but also 'less' in the sense that his power to project imperial power was tempered by the limitations of personnel, infrastructural reach, and military and economic resources.

In chapter 5 on Botswana history we had mentioned how the person holding the office and his views towards imperial, Cape, and BSAC interests played directly role on the fate of Botswana. In addition

[2] In addition to housing the headquarters of the Bechuanaland Protectorate, Mafikeng was also the capital of the Barolong tribe of cape Colony's British Bechuanaland. Dale, Richard (1995), *Botswana's Search for Autonomy in Southern Africa*, Westport, CT: Greenwood Publishers, p. 80-1.

to the personality of the High Commissioner and his views on the global projection of British imperialism, it was attitudes to Sir Cecil Rhodes and his British South Africa Company (BSAC) in Cape Town impacted on the way colonial jurisdictional divisions existed on paper and they functioned on the ground. While the balance of powers between the locals and the imperial regime remained fairly consistent throughout Bechuanaland Protectorate's history from 1885 until 1966, evolving at a gradual pace, the personalities involved could inject crises that would momentarily upset continuity.[3] In broad terms over the *longue durée* of history however, the leitmotiv has been broad continuity.

2.2. Legal Dualism

On 30 May 1890, the Bechuanaland received its first written 'constitution', i.e. the Protectorate's Order-in-Council, establishing tribal and colonial governments. This was followed by High Commission Proclamations defining the various jurisdictional spheres of each within the multilevel constitutional order to the Empire. In 1891, the first Resident Magistrate was appointed. The Order rested on an endorsement of legal dualism as the constitutional foundation of the new protectorate and its future. The dual system of law and governance where indigenous and colonial traditions of constitutionalism coexisted was not one of two equal partners, however. The principle of the supremacy of imperial authority over Tswana tribal law was already established with the Order-in-Council. Once in effect, supplementary provisions provided more hand's-on details to the arrangement. According to the Order of May 9, 1891, Section 4:

> "In the exercise of the powers and authorities hereby conferred upon him the High Commissioner may amongst other things from time to time by Proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this Order, including the prohibition and punishment of acts tending to disturb the public peace. The Commissioner in issuing such proclamations shall respect any native laws and customs by which the civil relations of any Native Chiefs, tribes or populations under Her Majesty's protection are now regulated except so far as the same maybe incompatible with the due exercise of Her Majesty's power and jurisdiction". [4]

Section 19 of the General Proclamation of 10 June 1891 established what deemed to be the Common Law of the protectorate for those who are not members of a designated official tribe of the Protectorate. Reflecting the historical of influence of the Cape (and to certain extent, the Transvaal) combined with legal professionals trained in the laws of the Cape Colony, the Common Law that would apply in non-tribal matters was deemed to be the common law of the Cape, i.e. Roman-Dutch Law,

[3] One such crisis between the Regent of the Bamangwato tribe (and the uncle of the country's first president Sir Seretse Khama), Tshekedi Khama and the Resident Commissioner Sir Charles Rey marked the mid-1930s. The dispute between the two personalities was over the degree of colonial control over indigenous Tswana law and governance, but there is a now mostly-forgotten episode when Tshekedi wanted to display his powers by deciding to publicly flog a young white mechanic working in tribal territory to punish him drunkenness and dalliances with local Tswana women. The leading historian of British colonialism in Africa, Michael Crowder has written a book on what was a widely reported scandal at the time. Crowder, Michael, *The Flogging of Phinehas McIntosh: A Tale of Colonial Folly and Injustice*, New Haven: Yale University Press.

[4] Order of May 9, 1891, Section 4, reproduced in AJGM Sanders (1992), "Bechuanaland and the Law in Politicians Hands", *The Botswana Society*, p. 32.

with increasing precedents from Britain following the take-over of the colony. The European courts in this dual legal system were also to act as Appellate Courts for all cases.

In parallel to the official incorporation of Tswana law into the fold of imperial legal pluralism, there was also recognition of indigenous politics in the governance of the Protectorate. Again, the principle was one of dualism: there was to be one Native Advisory Council and one European Advisory Council. The arrangement was similar to what existed in other British colonies in southern Africa (outside the Union of South Africa). The same dual system, whereby one council with co-opted local representatives and one with elected members from the settler population, would often be in place with the intention to provide a voice to the political concerns of both communities, but one that fell short of genuine political representation and without a formal input into the legislative process. We see the same dual system in Northern Rhodesia (present-day Zambia), Nyasaland (present-day Malawi), and Tanganyika (part of present-day Tanzania). With the High Commission Proclamations in 1919 the Native Advisory Council was renamed African Advisory Council, while the title of the European Advisory Council remained unchanged.[5] This was going to be one of the many instances where the label of what we study has changed. The change also signalled the beginning of a historic phase of more colonial intrusion.

2.3. A Move Towards a Single Hierarchy of Laws

With the benefit of historical hindsight over the legal history of Botswana, one can spot a fleeting spike in efforts of colonial interference the indigenous system of law and governance in the decade following the end of World War I. It is for this reason that this case-study is portrayed as one of unbroken continuity over the *longue durée*. While macro-historical perspective shows broadly linear progression, the micro level contains the inevitable twists-and-turns which do not have a detrimental impact on long term continuity. One such moment was the early 1930s which included colonial attempts to re-establish a clearer hierarchy of colonial supremacy over and local laws and to hollow out traditional indigenous institutions of governance. Two new laws were put to this use. The 1934 Natives Tribunals Proclamation (No. 74) and the accompanying Native Administration Proclamation (No. 75).

Under the supervision of Resident Commissioner Lieutenant Colonel Sir Charles Rey, the kgotla was to be replaced by a non-tribal council where the chief's political office would be renamed as council president, and his appointment would require approval by the High Commissioner on the advice of the Resident Commissioner. In tandem, Tswana law and custom would be officially recorded by colonial authorities and codified.[6] The 1934 Native Tribunals Proclamation also required case records to be written (but not published).

We do not have direct archival evidence attesting to a co-ordinated imperial policy across southern Africa, but reflecting the political context of the time captured in secondary sources and personal diaries of the Resident Commissioner overseeing the reforms, Sir Charles Rey's, it seems the 1934

[5] In an interesting side-note, while the European Advisory Council was advocating joining the South African Union at this time, the newly renamed African Advisory Council was adamantly opposed to this idea.
[6] Grant, Sandy (2012), *Botswana and Its National Heritage*, Ely, Cambridgeshire: Melrose, p. 3.

Proclamations were intended to be a step on the path to eventual standardisation and codification Tswana tribal law.[7] This period also happens to coincide with the publication of Isaac Schapera's *Handbook on Tswana Laws*.[8] Bechuanaland Protectorate's Sir Alan Pim had more practical justifications for codification:

> "[The compilation of tribal customary law] has become a matter of great importance and urgency. The old Chiefs, who had a wide knowledge of the subject (a knowledge sometimes misapplied), have gone and very few remain of their old advisors who were also experts in the subject". [9]

What was happening in Bechuanaland in the 1930s seems to be inseparable from what was happening in other British colonies. As part of the co-ordinated imperial policy towards African law, an interesting development in a neighbouring British Protectorate to the north was underway to coincide with what was happening in Bechuanaland. In the newly set up Livingston Institute in Lusaka Northern Rhodesia (present day Zambia), a number of similar initiatives to record the indigenous African laws of British colonies was taking place.[10]

The reason for bringing up political developments in other parts of the British Empire in Africa is to ensure that we situate the significance of what happened in the mid-1930s in Bechuanaland Protectorate within the broader imperial geopolitical calculations of the time. The imperial desire to prepare the locals for (limited) self-government through their own laws seems to have created a similar top-down political pressures on colonial officials throughout the British Empire. What was different in the Bechuanaland Protectorate was that the Batswana had already been involved in their own governance to an extent that did not exist elsewhere (perhaps with the exceptions of the two other High Commission territories, Swaziland and Basutoland).

While the mid-1930s reform initiative to identify, standardise, and incorporate native laws might have been interpreted as a progressive move in colonies where no such comprehensive and official recognition had hitherto not existed. In Botswana, with a colonial history that started off with this very recognition and with strong tribes within their designated tribal reserves, and politically prominent paramount chiefs, the Natives Tribunals Proclamation and the accompanying Native Administration

---

[7] From Sir Charles Rey's Diary, 13 December 1934, in Parsons, Neil and Michael Crowder (eds) (1988), *Monarch of All I Survey: Bechuanaland Diaries 1929-37, by Sir Charles Rey*, Gaborone: The Botswana Society and London: James Curry, p. 175.

[8] In his deposition to the 1955 international symposium on the future of African law, Isaac Schapera acknowledges that he wrote his Handbook of Tswana Law as a guide in the application of law with its regional diversity and that it was not intended as a legal code – a point reiterated by the Resident Commissioner's introduction to the very handbook. As Schapera puts it: "… it is not and was never meant to be anything more than a description of recognised legal usages"; Schapera, Isaac (1956), "The Development of Customary Law in the Bechuanaland Protectorate", in The *Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique*, symposium / colloque 1955, Leiden: Universitaire Pers Leiden, p. 110.

[9] Quoted in Lewin, Julius (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, Cmd 4368, parag 218, p. 4.

[10] Chapter 2, under the heading 'Applied Legal Anthropology' included more detailed reference to the country studies the Livingston Institute pursued. The availability of extensive research support for African legal anthropology and the coordinated team-projects to this end all suggest that this was more than an academic fad but more of an applied quest to map out the various indigenous laws in place with an eye to eventual standardisation and subsequent codification.

Proclamation were seen as attempts to turn the clock back. This attempt to limit chiefs' powers, to create new tribal councils separate from the traditional one, and to place Tswana customary law under colonial statutory laws in a hierarchical legal system would eventually fail, albeit after a decade of a tug of war between Tswana traditional leadership and different jurisdictional levels of the British imperial hierarchy, i.e. Bechuanaland Protectorate and the presiding Resident Commissioner, the High Commissioner's Office for Southern Africa and the British High Court in Cape Town, and eventually the Dominions Secretary in London.

The new arrangement enumerated in the 1934 Proclamations left little autonomous role for Tswana law and custom, and it also seemed to go against the grain of existing political dynamics. As a sign of the existing political power of Tswana traditional leadership, all chiefs joined forces in voicing their opposition to the bill. Chief Bathoen of the Bangwaketse and Regent Tshekedi of the Bamangwato petitioned the British High Commissioner in Cape Town, Sir Herbert Stanley to overturn the Proclamation. Bathoen and Tshekedi formally lodged an appeal against the Proclamation with the new High Commissioner, Sir William Clark. Theirs was a legally sophisticated argument which rested on the constitutional foundation of the Protectorate. Bathoen and Tsekedi argued that the Proclamations 74 and 75 violated the Order-in-Council of Bechuanaland Protectorate which established that 'native laws and custom' would be respected. By extension, this meant that the British imperial government did not have the liberty to unilaterally change the constitutional balance of power.

The case at Cape Town's High Court was watched closely by all political actors in British Southern Africa. This was after all a political challenge to the way general colonialism functioned and could potentially establish a legal precedent which empowers the indigenous. Sandy Grant describes how the case captured the attention:

> "The dramatic case in the High Court lasted for twelve months. It was eventually decided not on the anticipated question of whether or not Proclamations violated native law and custom, but on whether the Crown had unfettered and unlimited power to legislate for the government and administration of the native tribes. The question was referred to the Dominions Secretary in London who confirmed that the British government did indeed possess this power".[11]

The appeal was rejected in January 1935, and the Proclamations passed. While this was the formal verdict, attempts for colonial intrusion were scaled back after the decision was delivered. The Resident Commissioner, Sir Charles Rey, who had been seen as a big part of colonial reassertion by tribal leaders was encouraged to resign. His successor Charles Arden-Clarke was more open to tribal concerns and the controversial parts of the Proclamations were quietly dropped.[12] Looking back, the year 1934 indeed represented a spike in colonial interference, but this was a fleeting episode and (limited) Tswana autonomy was duly restored.

---

[11] Grant, Sandy (2012), *Botswana and Its National Heritage*, Ely, Cambridgeshire: Melrose, p. 4. The case is Tshekedi Khama and Ano v High Commissioner (1926-63) HCTLR 9. The details of the case are covered in Otlhogile, Bojosi (1993), "Tshekedi Khama and ANO vs. The High Commissioner: The Making of the Court", *Botswana Notes and Records*, Vol. 25, pp. 29-38.

[12] In the meantime, new legislation affecting the legal system of were passed. Proclamation of 1938 superimposed a new layer of high courts were superimposed. With Proclamation Number 50, a new High Court was created. The same legislative sitting also produced Proclamation 51 which established three classes of subordinate courts.

2.4. Preparing for Decolonisation

The year 1943 witnessed two important legislation for Bechuanaland Protectorate: The Native Administration Proclamation (No 32) and the Native Courts Proclamation (No 33). Most of our investigation so far has examined Botswana's political history both from within and also within the broader context of the geopolitics of Southern Africa. This might prevent one from realising the significance of the date. This was the year marking a turn in the world war raging across different parts of the world. With the Americans now on-board with the Allies, and the Germans and Japanese on the defensive, it initially appears a little odd that the internal politics of a distant colony away from any military conflict would receive such an attention from the British. Perhaps this angle deserves its very own book, but all this seems to suggest that the Botswana was a trial-run for the fate of British colonies once the war comes to end with the defeat of the Germans and Japanese. During the course of the war, the British had portrayed their struggle as one between liberty and tyranny, between liberal democracy and authoritarianism, between freedom and oppression. After the US joined, the war came to be cast in even grander terms as a global battle between the free world and fascism. Once set in these terms, it would be impossible to go back to how things were in the colonies.[13]

In broad terms, Proclamations 32 and 33 were a continuation of the arrangement that already had been in place in the Protectorate. The Courts were in place as they had been until 1943 but they were – in terms of imperial jurisdiction – functioning under the warrant of the Resident Commissioner, who himself operated as the local representative of the High Commissioner in Cape Town. What was new was based the strengthening of political and legal institutions situated in Bechuanaland itself. Although the higher appeal process was still extra-territorial. The formal path to appeal was from chief to local District Officer of the High Court, eventually the Privy Council in London. In formal terms, it was the office of the District Commission which had supervisory jurisdiction over what were at the time called Native Courts. Reflecting British colonial practices which originated in India, we see the emergence of the office of so-called Native Assessors ensuring the consistency in the application of indigenous customary law.It is especially Chapter II of the Proclamation 32 which contains a discussion directly relevant to our investigation on indigenous and colonial constitutionalisms. It is here that the procedural path to indigenous representation in the new Native Administration and the responsibilities of the High Commissioner are laid out. The chapter is aptly titled 'Constitution, Appointment, and Powers of Native Authorities'.[14]

In his contribution to a 1955 symposium on the future of customary law in Africa, Isaac Schapera informs us of a little-known historical detail in terms of the application of African and Western law. The original draft law of the Native Administration Proclamation of 1943 apparently included a clause which gave the High Commissioner the authority to exempt 'educated and progressive natives', but

[13] At this stage without any archival research to this end, this remains a learned speculation based on reasoning rather than evidence. The author has not unearthed any smoking-gun type of evidence from the primary sources he has reviewed for the global significance of the 1943 reforms in Botswana for the future of British Empire.

[14] Chapter II, Bechuanaland protectorate Native Administration Proclamation, No. 32, 1943, in *High Commissioner's Proclamations and the More Important Government Notices*, From 1st January to 31st December 1943, Vol. XXVIII, Pretoria: Government Printer, p. 35-37.

the African Advisory Council had strongly opposed this on account of fears that it would risk creating a class who is neither African nor European. [15]

The 1943 Proclamations would be the last one of the large-scale constitutional reform for the country as the Bechuanaland Protectorate. The decade-and-half between the end of World War II and Botswana independence represented the final phase mixed constitutionalism where the imperial and the indigenous coexisted within their separately spheres of jurisdiction. All political attention in the 1950s was consumed by preparation for impending independence (and the marriage of Seretse Khama to Ruth Williams); this means there was little change in the way the relationship between colonial and indigenous was managed. We can thus look back at this decade and seek to distil a few comparative observations concerning the recognition and application of indigenous law in multilevel jurisdictions.

There are two related aspects to addressing legal pluralism in multilevel jurisdictions; and particularly in an imperial setting. First is the question of 'Conflict of Laws' and whether there are attending notions of hierarchy between the jurisdictions involved. Questions of legal hierarchy and conflict of laws in a multilevel jurisdiction directly impact on how appeals work. At the same time, appeals – by definition –involve recourse to a level of jurisdiction above. In an imperial system of multilevel jurisdiction, this means that by moving up one gets closer to metropolitan centre of imperial authority and away from the local jurisdiction from where the legal disagreement in question has arisen. This means that one is likely to get more Empire-wide legal reasoning reflecting the metropolitan legal culture, case law, and geopolitical priorities.

The other lesson that emerges from examining the last decade of Bechuanaland Protectorate's legal history is that case law fluctuates with imperial geopolitics. This probably applies to court behaviour across time and place, but the fact that imperial geopolitics finds its way into Botswana national politics was more indirect and diffuse. The clearest example of this is the appeal against the 1934 Proclamations by Tshekedi and Bathoen we discussed a little earlier. The formal verdict could not establish such a precedent empowering local authorities over colonial ones, yet the Resident Commissioner resented by the locals was removed, the practice of the Proclamations were much looser than want was enumerated in the law, and the law itself was soon to change in 1943.

Coinciding with a large-scale retrenchment of British geopolitical power in post war years and the accompanying process decolonisation, what we in the Bechuanaland Protectorate in the 1950s was part of impending British designs to replace the Empire and its Colonies, Protectorates, and Dominions with a looser arrangement of the British Commonwealth where former colonies were granted Home Rule with a looser political union.[16] It is therefore imperative that we situate the domestic developments in the Bechuanaland Protectorate within the new international political dynamics. That

[15] Schapera, Isaac (1956), "The Development of Customary Law in the Bechuanaland Protectorate", in The *Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique*, symposium / colloque 1955, Leiden: Universitaire Pers Leiden, pp. 114.

[16] Frederick Madden's eight volume collection published between 1985 and 2000 contains details of this transition. Madden, Frederick (ed.) *Select Documents on the Constitutional History of the British Empire and the Commonwealth*, Westport, Connecticut: Greenwood Press. For an overview, see Burroughs, Peter (2002), "The Imperial Gospel According to Madden", *Journal of Imperial and Commonwealth History*, Vol.30, No. 3 pp. 110-34.

is, whatever is done in Bechuanaland was part of a strategic recalculation of British colonial presence around the globe. This is perhaps also partly the reflection of the technological and infrastructural developments which allowed for more coordination of colonial policies. During the course of the 19th century, there was more room for local variation in the way things were done in the colonies. Long distances and slow communication, limitations in the reach and range of infrastructure, all made regional variation in colonial governance reflecting uniquely local arrangements inevitable even when a more consistent international policy was pursued by imperial officials in Whitehall.

One clear reflection of this is the colonial bridgehead in the recognition and application of indigenous law is the what is generally known as the 'repugnancy clause'. As we had seen in the introductory Chapter 2 to the thesis, this gave British colonial authorities the *carte blanche* to disallow the application of native laws which, under a vaguely-worded clause, were deemed to violate the 'principles of peace order and good government' and were 'repugnant to the principles of natural justice'. The precise wording differed, both across the colonies as well as across time. But the common point was to put in writing a broadly defined but imprecise colonial prerogative to overturn unwanted local laws. Bechuanaland Protectorate version goes back to 1891. And the wording was clearly influenced by colonial arrangements elsewhere, but the difference between the history of colonial use of a repertoire of similar wordings in legal documents and the post-war coordinated move towards a new Commonwealth of former colonies now either enjoying responsible government or in the process of getting home rule was precisely this: one was the historic use of readily available colonial legal-blueprints out of necessity and convenience, the other a comprehensive and coherent quest towards a new international confederation. We of course know that the Commonwealth fell short of a confederation and ended up more of an international club of former colonies. But those involved in the process in the 1950s were not privy to what we know today of course.

By the late 1950s the colonial attention was mostly directed towards preparing the country for home-rule, but legislation on indigenous law and governance continued. The 1956 African Administration Proclamation (No 24) fused the office of tribal chieftaincy with an elected District Councils. Members of the District Councils were a directly elected at the kgotla or nominated by headmen who were District Council. Part II of the Proclamation entitled 'Constitution, Appointment, ad Powers of African Authorities' is especially relevant to our investigation.[17] The stage was set for independence.

2.5. The Laws of Independent Botswana

Unlike many former colonies who had to dismantle colonial era laws and institutions and construct new ones for independence, the transition from Bechuanaland Protectorate as a part of the British Empire (reformed and renamed as the British Commonwealth after World War II) to independent Botswana has been a remarkably smooth transition of continuity. Most laws were revised only in terms of the names of the competent political entities. That is, imperial authorities mentioned in the High Commission Proclamations were revised to refer to the new national authorities of Botswana.

[17] Part II: 'Constitution, Appointment and Powers f African Authorities', *African Administration Proclamation*, No. 24, 1956, in Bechuanaland Protectorate Legislation, Vol. XLI, 1956, pp. 23-37.

There is however one noteworthy change that has accompanied independence. Despite the inevitable overlap between political and traditional elites, there seems to be a desire to insulate some of the traditional structures from politics. Standing chiefs cannot hold political office (and vice versa), kgotla grounds should be free of party propaganda material, and the traditional leaders in the House of Chiefs (both hereditary and elected) cannot hold active party membership. Paramount chiefs cannot join politics unless they abdicate the bogosi. The same goes for chiefs and sub-chiefs with the similar requirement of at least five years of no formal involvement in party politics preceding appointment to the upper house.

One potentially influential bridgehead the new elected political authorities at the expense of hereditary chiefs is the formal government approval needed for chiefly succession. That is, the internal tribal deliberations and decisions were no longer sufficient to establish the legitimate heir to the tribal throne. The so-called *Chieftaincy Act* of 1965, which came to effect in July the following year, is the legislation that gave the government the right of approval before the tribe in question decided who the new holder of the office of chieftaincy was to be.

The same legislative sitting producing the Chieftaincy Act was accompanied by the promulgation of a number of new laws establishing avenues for political involvement in tribal affairs. The *Local Government (District Council) Act* of 1965 was one. This was closely followed by the *Local Government (Tax) Act o*f 1965. The Office of Botswana Presidency was now granted with the constitutional prerogative to establish District Councils where and when it sees fit. What is more, the Government now had now taken over the constitutional power the directly tax Botswana citizens. While these powers were also available to the High Commissioner on advice of the Resident Commissioner, the colonial government left the day-to-day management of tax imposition and collection in the hands of chiefs. By now, the *longue durée* history of the relationship between imperial and indigenous constitutionalism should have established that changes in the wording of constitutions or legislation do not automatically produce the intended political outcomes. On a number of occasions in our overview if Botswana's legal history, we had seen how black letter laws and practice on the ground often diverge. Only in two cases have the Botswana government have challenged tribal succession and refused to endorse the chosen new chief.[18] Notwithstanding this historical observation that changing the law does not always correspond to real change, we should note the political will of the new Botswana state to ensure there is constitutional bridgehead establishing jurisdictional supremacy over traditional leadership in case of a future dispute.

What is also directly relevant to our investigation is the *Customary Courts Act* of 1965 which was part of the same legislative bundle with the above three Acts. Instead of establishing a future jurisdictional bridgehead like the other Acts did, here we see more of an onslaught of attrition. That is, fields of law hitherto covered by customary courts are reduced as the colonial courts undergo a rebirth as the statutory law courts of the new state. The jurisdiction of customary courts was now limited to what were historically deemed customary law cases and common law. It is imperative to inject a tiny caveat here. The limiting the jurisdiction of customary courts is not simply a matter of changing the

[18] The first such case was Seepapitso. The Chief of the Bangwaketse was removed from office in 1994 by the Minister of Local Government. Somolekae, G. M. and M. H. Lekorwe (1998), "The Chieftaincy System and Politics in Botswana 1966-95", in W. A. Edge and M. H. Lekorwe (eds), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, pp. 186-98. A more recent case has been chief Kgafela II of the Bakgatla.

jurisdictional balance of power between the two court structures. What happened almost everywhere in the world is that modernisation and development have multiplied the number of policy areas affecting our lives, thereby also multiplying the potential for legal disputes and disagreement. What partly the 1965 Act does is to reduce the case loads of various courts to a manageable level.

There was still a large degree of continuity in the wording and contents of legislation of the Bechuanaland Protectorate and the laws of Botswana, however. Section 4(1) of the Common Law and Customary Law Act of 1969 contains only a slight variation of wording with the colonial rea repugnancy clause. This time, the application of the law is valid a as long as it consistent with "morality, humanity, and natural justice". Most legislation pertaining to what have variously been labelled Tribal, Native, African, and Customary Law remained mostly in place with similarly slight variations in wording reflecting the end of the extra-territorial jurisdiction above Botswana.

Just like the old arrangement whereby the High Commissioner in Cape Town, acting on the advice of the Protectorate's Resident Commissioner, would designate upper and lower branches of what were then first called Tribal, then Native, and then African Courts, this time it was the President, acting on the advice of the Minister who would designate the upper and lower branches of what were now called Customary Courts. Along the previous practice, it was often that one court situated at the seat of the paramount chieftaincy of Botswana's constituent tribes would be designated a high court. These courts would normally be presided over by the paramount chief of the tribe in question. Lower customary courts on the other had would be presided over by a sub-chief, a paramount chief's representative, or headmen. We had seen in our chapter introducing Botswana that not all constituent tribes were organised in symmetrical terms. For instance, the strict hierarchy of the Bamangwato tribal order would contrast with the loose and decentralised bands of Basarwa (i.e. Khoisan). The wording for who would preside over in the lower courts is therefore left slightly open. In case we have a lower court in – say – Bamangwato tribal territory in the central district, then it would be presided over by a representative appointed by the Bamangwato paramount chief. And when the lower court is in – say – the Ghanzi district in the Kalahari Desert, it would then be presided over by one of the headmen selected from amongst constituting the bands roaming the desert.

Again, following the previous arrangement in the Protectorate, every chief had a right to submit for consideration to the Minister recommendations for the "recognition, establishment, abolition, or variation in jurisdiction of customary courts within his area". Now, what is different in terms of the overall constitutional continuation is the creation of new Customary Courts in urban centres. Previously, the Protectorate had reserved the application of indigenous law (variously labelled native law, tribal law, African law, and customary law) to what were designated as tribal reserves comprising the majority of the population and the country's territory. What had changed between Bechuanaland Protectorate's 1890 Order-in-Council and Botswana's 1961 constitution was not only constitutional status. Modernisation and urbanisation had also produced a demographic change. Many members of the country's constituent tribes were now residing in urban centres (especially following the steady growth and expansion of the country's new capital Gaborone). What was new is the creation of five new 'Customary Courts' in urban centres outside the country's officially demarcated tribal territories.

There are five such customary courts in Botswana now. Since their creation is not because of a political desire to grant the constituent tribes a degree of jurisdiction over their legal affairs, these urban

customary courts represent the need for providing indigenous law to the multi-tribal and non-tribal inhabitants of expanding urban conglomerations. Instead of chiefs and headmen, it is 'court presidents' who preside over these customary courts. The selection of court president does not follow the bottom-up process where only senior tribal leaders recognised, endorsed, and supported by community; instead, the constitutional prerogative to appoint presidents to urban customary courts rests where no one single tribe dominated lies with the responsible Minister.

The High Court Act also revises the practice of creating Customary Appeal Courts. Previously, the formulation in the Protectorate was the now standard 'High Commissioner appoints on advice of the Resident Commissioner'. For independent Botswana, the wording was revised to the President appoints on advice of the responsible Minister. This means that certain customary courts designated by the Minister are given the jurisdiction to hear appeals against decisions made by lower customary courts.

With independence the new executive branch of the Tswana *trias politica* gained a few additional supervisory roles over indigenous law. One was the new office of the so-called Customary Courts Supervisor, assisted by the Assistant Customary Courts Commissioner. This was indeed a key constitutional bridgehead for establishing elected political supremacy over tribal leadership because the Commissioner was given the power to 'revise' customary courts decisions, ask for a retrial, or substitute his judgement. One argument for this arrangement is that this was the early days of independent Botswana "when there were no sufficient magistrates or other judicial officers to effectively guide or supervise customary courts".[19] This gave the new Botswana state more powers than what the colonial authorities enjoyed before that. As we had seen a little earlier in this chapter, the very 1891 Order-in-Council establishing the Protectorate had given the High Commissioner the prerogative to issue Proclamations only "from time to time".

In addition to the desire to establish the political supremacy of new Botswana state institutions over tribal ones of another explanation for the new arrangement superimposing a bureaucratic layer above the indigenous system of law and governance might be prosaic. Modernisation and urbanisation have brought in the potential for new legal disputes and courts' workload have multiplied. The new offices of the Customary Courts Supervisor and the Assistant Customary Courts Commissioner are thus needed for coordination and consistency. New legislation soon followed. The *Tribal Land Act* of 1968 is another example of this legislatively fecund first decade of independence. The Act which transferred most chiefly powers to a newly land board in was to come into effect in two years' time. It was also one of the most contested pieces of legislation.[20]

Another key legislation for us to examine is the *Customary Law Act* of 1969. This is the label under which we will examine the Act but one should note that the official title of the legislation is more longwinded than this (An Act to Provide for the Application of Customary Law in Certain Actions Before

[19] For more on this, see Nserenko, D. D. Ntanda (2002), *Constitutional Law in Botswana*, Gaborone: Pula Press, p.200. His position is that after decades this is no longer justifiable.

[20] On more on land policy, see: Maripe, B. (2007), "Land Administration, Politics, and Governance in Botswana", in Charles M. Fombad (ed.), *Essays on the Law of Botswana*, Cape Town: Juta, pp. 176-202; Ng'ong'ola, Clement and S Morolong (2007), "Revisiting the Notion of Tribal Ownership of Land in Botswana", in Charles M. Fombad (ed.), *Essays on the Law of Botswana*, Cape Town: Juta, pp. 142-75.

the Courts of Botswana to Facilitate the Ascertainment of Customary Law and Provide for Matters Ancillary Thereto), but Article 1, Section 1 helpfully states that "This Act is the Customary Law Act".[21] Article 1, Section 2, of the 1969 Customary Law Act also provides an updated description of what customary law means:

> "Customary law means, in relation to any particular tribe or tribal community, the customary law of that tribe or community so far it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice".[22]

Under its slightly revised formulation, the repugnancy clause this time empowers the political authorities of independent Botswana the same broadly defined constitutional bridgehead to disallow indigenous laws (if needed). The word repugnant is no longer in the clause, but it remains very similar in spirit to past formulations. What is important to highlight is that if found to violate the principles listed in the repugnancy clause, the indigenous law in question is deemed inapplicable for the case at hand. Laws caught in the filter of the repugnancy clause are not found unconstitutional in general terms but deemed not applicable in a modern court. Art 1 (2) – and indeed all its colonial predecessors – are about limiting the applicability of indigenous customary law in instances it offends contemporary notions of fairness and justice. There is nothing in the Customary Law Act which calls for a 'constitutionality test' for indigenous law.

The 1969 Act the treads familiar ground as past legislation on indigenous Customary Law: it defines what tribal community means, to whom customary law applies, and who the courts are. It is also important to reiterate that according to already existing practice, parties to the dispute have to express consent for the invocation and application of indigenous tribal law. But what is quite interesting in comparative terms is that the Act contains a section devoted to Conflict of Customary Law.[23] As we had seen earlier in this chapter, the laws of different tribes contained differences across. Deciding the applicable law was particularly challenging when the parties to the conflict held different tribal affiliations. It was Subsection 1 of Article 10 which addressed this challenge: Article 10 (Subsection 1): "In any case where customary law is applicable and the question arises as to which system of customary law is applicable". [In land matters this was determined by where the land was situated; in inheritance matters it was determined by which law applied to the deceased; and when there was no agreement between the parties then it was] "the customary law of the place where the action arose".

By 1969, this was of course not the first time the Batswana were dealing with customary law. It seems by now from experience lawmakers knew that Section 1 might fail to cover all bases. For this reason, Article 10, Section 2, lays out what happens when one cannot conclusively establish which tribe's customary law applies:

---

[21] An Act to Provide for the Application of Customary Law in Certain Actions before the Courts of Botswana to Facilitate the Ascertainment of Customary Law and Provide for Matters Ancillary thereto, 22 August 1969, *The Laws of Botswana*, Vol. II, Article 1.

[22] An Act to Provide for the Application of Customary Law in Certain Actions before the Courts of Botswana to Facilitate the Ascertainment of Customary Law and Provide for Matters Ancillary thereto, 22 August 1969, *The Laws of Botswana*, Vol. II, Article 1.

[23] As countries with indigenous populations around the world increasingly recognise and incorporate the traditional law of different ethnic groups/nations/peoples/tribes/bands/clans, the domestic conflict of laws will increasingly become an issue. There is thus a lot to we can learn from the Tswana experience.

> "If the system of customary law cannot be ascertained in accordance with subsection (1) or of the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity, and good conscience".

And if Art 10 (2) failed to provide a way out, then Article 11 kicked in: "If ay court entertains any doubt as to the existence or content of a rule of customary law relevant to ay proceedings", then the court could consult cases, lawbooks, opinions as long as these were available to all parties involved.

'Conflict of Laws' is more often a branch of Private International Law, but here we see how the legal pluralism inherent in the two constitutional traditions of Botswana, i.e. the indigenous tribal one and the received Western one, combined with differences in customary law across tribes means Conflict of Laws is an indispensable element of Botswana's legal system. Not unrelated to this is the need to ensure there are various venues to deal with this very challenge of Conflict of Laws in a complex system of legal pluralism. It is for this reason that judicial hierarchy between courts has been an important concern during the Protectorate. We had seen how appeals against what were initially called Tribal Courts, later renamed Native Courts, and then once again renamed African Courts) would first go to the District Commission in Lobatse, then to the High Court in Cape Town, with the final judicial authority vested in the Privy Council in London.

By the time the 1960s arrived, this judicial hierarchy for appeals within imperial constitutionalism was no longer appropriate for an independent and sovereign country. The existing courts thus changed official designation. There were now Customary Courts of First Instance; appeals from here would go to the Customary Court of Appeal; and if the parties to still disputed the verdict, eventually reaching what was now called the Higher Customary Court. While labels were changing, what was done remained broadly constant. In his contribution to A.N. Allard's edited collection *Judicial and Legal Systems in Africa* a few years after Botswana's independence, Simon Roberts took stock of how the country's traditional courts worked in the past and how the arrival of independence changed things:

> "Following the establishment of the Protectorate, the traditional authorities continued to enjoy their judicial powers within tribal areas. These powers were exercised subject to very little supervision until 1934, when the Native Courts Proclamation, which formalised the traditional courts and considerably circumscribed their powers, was introduced. The Proclamation of 1934 as replaced by a revised African Courts Proclamation in 1961, which was itself amended by the African Courts (Amendment and Supplementary Provisions) Act 1968, giving the customary courts, for the first time, some measure of multi-racial jurisdiction".[24]

Once again, we see only minor changes in the wording of legislation which had been in force earlier. For example, Article 2 of the Act to Consolidate and Amend the Law Relating to Customary Courts is identical to Act 51 of 1969, the similar to the colonial repugnancy clause – although now revised to discontinue the use of the word 'repugnant':

[24] Roberts, Simon (1970), "Botswana", in A. N. Allott (ed), *Judicial and Legal Systems in Africa*, 2nd edition, London: Butterworths, p. 267.

> "Customary Law means, in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far it is not compatible with the provision of any written law or contrary to morality, humanity, and natural justice".[25]

In 1968 with the African Courts Amendment and Supplementary Provisions Act, No 57, the label African Courts was officially changed to the new designation as Customary Courts: "Where there is any reference to African Courts this shall be construed as reference to Customary Courts".[26] Article 2 of the same Act brought in changes in official designation to a number of previously used terms. The Act declared that the term 'African' in previous legislation would be replaced by the new label 'Customary', 'Tswana Law and Custom' was to be replaced by 'Customary Law', and 'African Authority' by 'Chief'. This seems to be one of the main leitmotifs of the Tswana case study: things continue in a mostly unbroken linear process over the long term, but what is already in place changes labels over the different political episodes marking the country's history.

Now as we look back at the first decade of independence, one does not see a critical juncture where past practices end and new ones begin. Instead, the picture is one of continuity. The first decade of Botswana independence witnessed a number of new legislation where relevant colonial authorities stated in the Proclamations of the High Commissioner were replaced with newly designated national ones of independent Botswana. Like most legislation we had seen before, revisions were usually limited to changes in the name of authority responsible as the rest remains mostly unchanged. In comparative terms, the remarkable continuity in the system of law and governance has to be emphasised again – especially since this period signified the critical juncture between colonialism and independence. The following decade saw only minor tinkering with what was already in place. One new challenge was urbanisation:

As long as people lived in the places they were born, the application of customary law was a fairly straightforward affair. There were some differences in the law across tribes, but where you live determined which law applies to you. Urbanisation presented a challenge. Once people started moving to cities outside the territory of their tribe, which customary law to apply at which court became a contested issue. In 1972, urban 'customary' courts were established to deal with this challenge.

The 1972 Establishment and Jurisdiction of Customary Courts Order laid out in elaborate detail the various indigenous Tswana courts various tribal territories were to get and who was to preside over.[27] Noteworthy is the new official label 'customary court', although Sections 6 and 11 of the Order refer to Tribal Territories and Tribal Authorities as well as the 'urban' customary courts. In comparative terms what is interesting in the tribal system of courts applying indigenous law is that their internal structure differs. For example, the Bamangwato courts of the Central District are divided into senior sub-tribal, subordinate tribal, and tribal branches while Bakgatla tribal courts in the Kgatleng District

[25] An Act to Consolidate and Amend the Law Relating to Customary Courts, Vol. I, Chapter 04:05, *The Laws of Botswana*, Revised Edition 1987, Gaborone: Government Printer, pp. 351-69.
[26] Article 27, The African Courts (Amendment and Supplementary Provisions) Act, No.57, *Botswana Statute Law*, 1968, No 52, p. 10.
[27] Establishment and Jurisdiction of Customary Courts Order, Chapter 4, *The Laws of Botswana*, Revised Edition 1987, Gaborone: Government Printer, pp. 387-95.

are presided over by Chief's Representatives and not sub-chiefs or headmen. For customary in courts urban districts, the 1972 Order only refers to 'court presidents'.

3. THE COMPARATIVE LESSONS, INSIGHTS, AND OBSERVATIONS

Constitutionally, the new Botswana state institutions now had established jurisdictional hierarchy over the indigenous system of law and governance. It is imperative that we set Botswana's transition to independence within the context of British decolonisation throughout the continent – and indeed within the broader geopolitical context of the changing world order. During this phase of momentous changes in the post-World War II, Britain followed the complex agenda of spearheading decolonisation and trying to gain the support of governments of newly-independent African countries, resisting the advances of the white-minority regimes of Rhodesia and South Africa, as well as pursuing the Cold War agenda of supporting indigenous anti-communists.

Starting with Ghana and Sudan in 1957, during the course of the 1960s many former British colonies became independent. But almost immediately many of them got engulfed in large-scale political crises, sometimes escalating to civil wars (sometimes even regional ones), or, fell under authoritarian rule. Compared to most others in Sub-Saharan Africa, Botswana's *longue durée* constitutional history; and in particular, its transition from a British Protectorate to an independent state, is an outlier in terms of overall continuity of the legal and political arrangements across the two historical episodes. However, 'continuity' is a relative phenomenon here. There was of course gradual change, and what is more, there were fits-and-starts interspersing breaks to continuity, and successive changes to labelling.

Chapter 7
Introduction to the History of the Politics of Law in South Africa

---

1. INTRODUCTION

South Africa's amaXhosa, their customary laws, the traditional governance structures, and the indigenous constitutionalism from within which these have historically emerged, constitute our second case-study in the comparative investigation of the relationship between modern received and traditional indigenous constitutions. Just as we had done for preceding Botswana case-study, we approach South Africa in a format which combines a bird's-eye-view of the nation's politics and law throughout various constitutional phases of its history (in this chapter), with an in-depth look at how all this has played out in Transkei specifically, covering the region under its different official names and constitutional status (in Chapter 9). In between the two, we looked at indigenous Xhosa constitutionalism in Chapter 8.

While our final third case-study of Ethiopia is geographically and historically distant to the first two, Botswana and South Africa are not only geographically adjacent, but their histories are also closely connected. Botswana, during its political existence as the Bechuanaland Protectorate, was part of the patchwork of various British imperial territories in Southern Africa. This means that the territories under imperial jurisdiction which were to eventually come together in the form of the Union of South Africa and what was to become independent Botswana were all part of the same geopolitical and jurisdictional set-up of 19th century British southern Africa. Once the Union of South Africa was formed by bringing two British colonies (the Cape Colony and Natal) and two former Boer Republics (Orange Free State and Transvaal Republics), while leaving the British Protectorates (Bechuanaland, Basutoland, and Swaziland) directly under London's rule, the constitutional histories of Botswana and South Africa were to take very different directions.

It is this different direction they followed which renders the paired comparison interesting. The justification for the choice of two case-studies from South Africa and Botswana is neither the fact that the two countries are adjacent to each other nor that they share part of the same colonial history. What the comparison reveals is the reasons behind the separate paths of two cases sharing a number of common factors, in particular, a similar status within the British imperial jurisdictional hierarchy and their reliance on the turn of the 19th century political and geopolitical dynamics in Cape Town as the legal and political capital of British colonialism in southern Africa. Our previous case-study exposed how things took a very different turn for Botswana during early 20th century leading to a remarkable degree of continuity in Tswana laws and governance across colonial and post-colonial constitutional eras. Despite the similar starting-point, we will see how things evolved very differently for the amaXhosa of Transkei. The status of Xhosa laws and governance across South Africa's successive constitutional eras, in contrast to the Tswana one, is complex and full of political contradictions and policy reversals, with political and legal redesign often superimposed on each other. What is more, as South Africa's first ethnic homeland, Transkei is important for comparative scholarship in the way it historically epitomised the constitutional design the apartheid regime had in mind for the rest of the country's ethnic homelands. It is in Chapter 9 where we trace the non-linear path the relationship between Xhosa laws and the South African state followed across the various political episodes marking the country's future. There are a number of potential comparative lessons to be drawn from examining two case-studies which share similar beginnings but have ended in up in different places. The selection of these two also allows control for the possible existence of cross-border dynamics linking the two. Had, for example, our choice been the case-study of the South Africa's Tswana ethnic homeland of Bophuthatswana, the formal and informal cross-border political, social, and cultural links to Botswana would have complicated the comparative analysis. The fact that Transkei and Botswana are not only geographically distant from each other, but also distant in terms of political and geopolitical dynamics allows us to pursue the comparison without concerns for cross border dynamics between the two. It is along this perspective that the coming analysis is structured.

2. THE HISTORY OF THE POLITICS OF LAW

> "The mountain regions of Kafirland, both eastern and western, present many magnificent scenes. They are sufficiently lofty to be covered with snow during most of winter months. Their sides are clothed with noble forests, that are abound with excellent timber. Stream without number have their sources among them, and wind their way through rich fertile valleys, where their waters with scarcely any labour might be available for the purposes of irrigation to an incalculable extent. A lover of the sublime and beautiful in nature may find much to gratify his taste in a tour through the 'Highlands' of Kaffraria. The perpetual verdure, the rich flora, the wildly picturesque views to be found among the crags and precipices, the extensive prospects which many commanding positions afford, and the pure and bracing mountain breezes, which bring health and vigour on their wings, combine to give an untiring interest to a journey through this region of beauty and grandeur."

Reverend H. H. Dugmore (1846)[1]

The mountains, hills, and valleys of eastern Cape's highlands vividly described by Reverend Dugmore physically remains quite the same as it were at the time of his writing, but almost everything else went through momentous changes since.[2] The Cape of Good Hope halfway station of the Dutch East India Company (VOC) was replaced by the British Cape Colony; the Cape Colony itself replaced by the Union of South Africa; the Union by the Republic of South Africa (RSA); RSA then became an apartheid state; and the apartheid state was finally replaced by a multi-ethnic and multicultural democracy with a new federal constitution establishing nine provinces. Each political episode has come with different policies towards traditional structures and indigenous law. What has been an historical constant however is the presence of multiple, crosscutting, and overlapping jurisdictions.

2.1. From Dutch East India Company to Cape Colony

The south-eastern quarter of the Eastern Cape Province of South Africa, between the Drakensberg mountain range and the Indian Ocean, running to the east of the Great Kei River, lie the ancestral lands of South Africa's Xhosa people, the *amaXhosa*. At the time of Reverend Dugmore's writing, the Xhosa lands along the eastern frontier of the Cape were in the process of slowly being incorporated into the British Empire. During the continental wars which followed the wake of the French Revolution, the British had invaded the Cape. Cape Town had originally been set up by the Dutch East India Company (*Vereenigte Oostindische Compagnie* VOC) as a halfway station on the voyage to the East Indies. When the Netherlands fell under French control in 1795, the British now had the justification to occupy what was nominally enemy territory. After a few tumultuous years following the ups-and-downs of the Napoleonic Wars, the Cape was formally made part of the British Empire in 1814.

Beyond Cape Town and its immediate hinterland, the indigenous inhabitants of the region had at first continued their lives mostly unperturbed. In the sparsely populated and mostly inhospitable deserts of the Western and Northern Cape, small bands of hunter-gatherer Khoisan roamed the countryside.[3] Derogatively called *strandlopers* (beach-wanderers) or *hottentotten* (mumblers), bands of coastal Khoisan had been mixing with the multiracial inhabitants of Dutch East India Company's African outpost since the landing Jan van Riebeeck in 1652. The original settlement had expanded from a halfway station on the maritime route to the east into a vibrant city with a diverse population. This created the need for doctors, lawyers, artisans, farmers, fishermen, winemakers who could provide permanent economic presence. The early days of colonialism witnessed a lot more mixing between

[1] Originally from Reverend H. H. Dugmore's papers published in the *Christian Watchmen* 1846-7. Here reproduced from Colonel Maclean (ed.) 1866, *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers, p.3.

[2] One thing very important change is the very term, *Kafir*, which is now a poisonous racist slur in South Africa. During the 19th century, it was the official term for both the region and its laws. In our next case-study on Ethiopia we will encounter another such instance of 19th century reference to the term *Galla*, which has since been acknowledged as a derogatory label (see, Section 1.2.1., Chapter 11). No matter how distasteful and offensive, we do not have the liberty to change words written in official historic documents. Readers not familiar with the South African and Ethiopian should note the current toxicity of both terms.

[3] The tem 'Khoisan' is now used as an umbrella term but, John Iliffe, among others, has written on the historic difference between the 'Khoi' and the 'San' and archaeological findings that corroborate this. Iliffe, John (2007) [1995], *Africans: The History of a Continent*, Second Edition, Cambridge: Cambridge University Press, p. 127.

the peoples. The indigenous Khoisan had mixed with indentured labourers imported from Indonesia, slaves from the Mozambique coast and Madagascar, soldiers and sailors of the VOC, the French Protestant Huguenots who had escaped religious persecution in France and sought refuge in Dutch overseas colonies, farmer-settlers from the Netherlands, Switzerland, and Germany who were drawn to the availability of land, renegades, adventurers, and demobilised soldiers and sailors of the VOC who took on local wives. A grammatically stripped-down version of Dutch-language, combined with vocabulary borrowed from the various cultures it encountered, a new language known simply as 'African' (*Afrikaans*) became the medium between the officials of the Dutch East India Company and its soldiers recruited across parts of north-western Europe, farmer-settlers of various European national backgrounds who came to be known as the *Boer* (i.e. 'farmer' in Dutch and Afrikaans), South Asian labourers, the indigenous Khoisan, slaves, and the assortment of individuals living in this multicultural harbour city. But beyond Cape Town and its hinterland, the scale of Western intrusion into the interior of the continent was rather small scale.

The north of the Cape was mostly desert, but further along the eastern frontiers of the colony, the rolling hills and valleys around the Great Kei River seemed to offer suitable land for farming and settlement. But the land was not empty. And those who lived there were more willing and able to fight to defend their lands. In the eastern frontiers of the Cape Colony, the indigenous were not the Khoisan but various Nguni peoples of the southern Bantu, most of them martial tribes.

In the Cape Colony, all this happened at a much large scale, and the Khoisan were squeezed between the Cape Colony's stronghold in and around Cape Town in the east, and the Xhosa paramount chieftaincies and kingdoms in the east. Geographically dispersed, demographically marginalised, and without coordination across bands or political leadership, the semi-nomadic Khoisan found themselves within the pull of the political, economic, and military orbit of either the Dutch East India Company or the various martial tribes of the amaXhosa.

In her masterful study of the legal regimes in the colonies spanning 500 years, Lauren Benton informs us that the Dutch East India Company had little desire to impose Dutch-Roman civil law on the local inhabitants around Cape Town; the Khoisan were officially a free people and could practice their own law.[4] In principle, of course. Lacking economic, political, or social capital, and without a corresponding political organisation, the small bands of illiterate hunter-forager Khoisan had little chance of preserving their traditional laws within the Cape Town courtrooms of the Dutch East India Company. The semi-nomadic were the first ones to fall within the sphere of influence of sedentary cultures. As would be the case in Namibia and Botswana later, the more nomadic bands of the Khoisan ended up relocating inland further north to inhospitable desert regions where they could continue their hunter-forager lifestyles without interaction with others.

Another group which left the Cape and trekked their path up north were a part of the Boer farmer-settlers who had left Europe to come settle in the VOC colony in the 18th century but had found themselves living under British rule since 1795 (first briefly, then formalised in 1814). The destination of the so-called *trekboers* was not the distant eastern hills and valleys where the most of the amaXhosa

[4] Benton, Lauren (2002), *Law and Colonial Cultures: Legal Regimes in World History 1400-1900*, Cambridge University Press, Chapter 5.

lived but much further up north where they established their autonomy beyond the reach of the British, eventually declaring two independent states, the Orange Free State and the Transvaal South African Republic. In the meantime, the British had established another bridgehead along the coast of southern Africa, this time on the Indian Ocean coast side. The District of Natal was annexed in 1843, and subsequently declared Crown Colony in 1856. Of course, what came to be known as the Great Trek of the Boer farmer-settlers and the subsequent declaration of the two Boer Republics happened before diamonds were discovered in their territory – diamonds in Kimberly in 1867 and gold in the Witwaterstrand in 1884.

The previous case-study showed how much those developments had a direct impact on the fate of Bechuanaland Protectorate, and indeed, on the very political existence of Botswana as a country. There has been no comparable direct impact on the fate of Xhosa. That part of South African history is not directly relevant to what we are examining here, but in order to set the broader historical context, we should reiterate the importance this had for regional geopolitics. The discovery of gold and diamond and the increasing British presence in southern Africa would eventually lead to the late 19th century Boer Wars pitting the military might of a global empire against a small but effective guerrilla army of Afrikaner citizen-militia.

The British had also picked a war with the martial amaZulu, whose separate tribes and chieftaincies were now united under King Shaka. After a number of military setbacks to the disciplined Zulu army based on regiments of young men organised along age-sets, i.e. the *impi*, the British eventually defeated the Zulus and incorporated their lands into British colony of Natal on the Indian Coast of southern Africa.[5] There was no such big decisive battle between the British and the Nguni cousins of the amaZulu in the south. In Chapter 8, we will see how the indigenous constitutional order uniting the various Xhosa paramount chieftaincies and royal houses constituted something akin to a looser confederal union in contrast to the more hierarchical and centralised Zulu variant. During the successive border wars with the British, internal divisions prevented the Xhosa from fielding a joint force. There was no unified voice for the amaXhosa tribes who were more interested in acquiring external allies to defeat their next-door tribal enemies instead. In between, the British colonial forces and the amaXhosa paramount chieftaincies and royal houses, smaller communities existed in the Eastern Cape: older established Boer farms, more recent European settlers and demobilised mercenaries (mostly from Germany), a few scattered Khoisan bands, and Afrikaans-speaking mixed-race communities.

Save for a few small farms, the eastern periphery of the region had so far remained free of European settlement. During the time when the Dutch East India Company (VOC) controlled the Cape of Good Hope, there had been no organised Afrikaner Boer settlement into Xhosa lands along the far eastern reaches of the Colony. The various ethnic Xhosa Kingdoms and paramount chieftaincies thus continued their existence without much contact with the VOC, save for some limited commercial exchange. British takeover of the Colony began to change things. Small numbers of farmers and traders started to settle in the traditional lands of the amaXhosa. This inevitably created various

[5] For more details on the nature of indirect rule here, see Myers, J.C. (2008), *Indirect Rule in South Africa: Tradition. Modernity, and Costuming of Political Power*, Rochester: Rochester University Press, pp. 1-15.

conflicts with locals, but these remained small-scale skirmishes during different times with different tribes along the frontier.

2.2. Cape Expansion and the Xhosa Wars

In the course of British consolidation of their new strategic outpost on the tip of Africa where the Atlantic and the Indian Oceans meet, intrusion into the Xhosa lands of the Eastern Cape changed from the occasional small scale punitive expedition into large-scale settlement and expansion. In 1846, the first military confrontation with an alliance of tribes led to the Battle of the Axe, but there was no all-out war akin to the British-Zulu wars of late 19th century. The amaXhosa were not politically united, they lacked a centralised leadership, and long-running inter-tribal feuds within prevented a common front against the British. The region was thus slowly absorbed into the sphere of British Empire, but without being formally annexed into the territory of the Cape Colony in its entirety.

The official registry of territorial incorporation would usually be done through treaties with local chiefs or kings. This had been the practice in other British colonies in Canada and New Zealand. In a decision announced on 23 December 1847 however, the Governor, Sir H. G. W. Smith, changed all this and declared that past treaties and conventions with Xhosa chiefs and kings were unilaterally annulled. Inhabitants were now to become direct British subjects under imperial rule without the treaty protection of their traditional laws and forms of governance, but the subjects were not citizens and thus were not under the jurisdiction of to the laws of the Colony (and could not accrue the rights and responsibilities available).

While this was happening along the eastern reaches of the Colony, important political changes were taking place in its capital, Cape Town. By 1853, the Colony was granted Representative Government. Free citizens who were domiciled in the Colony as residents could now select their representatives, who would legislate for the Cape where the Colony had jurisdiction within under the imperial constitutional architecture. The franchise excluded slaves, imperial bureaucrats and officers under direct British jurisdiction, and most foreigners (i.e. mercenaries and sailors stationed in the Cape). The registry list contained free citizens of mixed race including former slaves. Franchise excluded almost all women however, except widows who were deemed breadwinners for their households.

With benefit of historical hindsight, we can see that the new Responsible Government status increased the expansionist political clout of the European settlers and Cape Town's British South Africa Company (BSAC) vis-à-vis the imperial bureaucrats and military officers who were more likely to have more broader geopolitical concerns and worry about the costs of expanding colonial control into the Cape's hinterland. What we also see when we gaze over this time-period is the slow, uneven, but relentless expansion into the Xhosa heartlands.

2.3. 'Kaffraria' Incorporated into the Empire

The name for the tribal territories of the amaXhosa in the eastern fringes of the Cape officially became Kaffraria since 1847 – the terms also exists in various official documents of magistrates and officers in the region before that. We directly addressed the sensitive question of using poisonous historical words of unknown origins under footnote 2 the very first time the term appeared earlier. Next

chapter's subsection. 1.2. looks at how to deal with historical terms and consistency in terminological choices, not only concerning such offensive connotations but also changes in descriptive denotations the terms have gone through since then.

In any case, the region of what was then known as Kaffraria was now under imperial jurisdiction, but the language, the law, and the culture of this densely- populated region was isiXhosa. This state of affairs was to create one of the first instances of the formal and the real policies diverging from each other (which is examined in detail in Chapter 9). In principle, it was imperial law that was now paramount; there was no official recognition of Xhosa law. In practice, the amaXhosa continued to live under Xhosa laws as they did before the British; and the colonial officials sought to ensure the continuity of this. In what is now the earliest written collection of Xhosa laws, Kaffraria's first Chief Commissioner, Colonel Maclean asked colonial officials, agents, and missionaries to jot down their knowledge of indigenous African law to be compiled into a 'Compendium of Kafir Laws'.[6]

The Maclean Compendium shows that across the different tribes, there were differences in traditional customary law. In the absence of a formal confederal political framework uniting the chieftaincies and kingdoms, it was the tribe and the clan that commanded loyalty. But the internal divisions within the amaXhosa were not only of tribal or clan nature. As the British intrusion started to increase in scale beyond the Great Kei River, in 1857 a young prophetess called Nongqawuse started calling for the slaughter of all the cattle in the land. She had been visited by a vision revealing to her that if the amaXhosa killed all their cattle, then their ancestors will rise from the dead, and drive the Whites to the sea. Her believers started killing theirs, and the non-believers in response tried to fend off the zeal of young Nongqawuse's disciples and protect their cattle.[7] The Xhosa civil war and the subsequent deaths from war, displacement, and hunger effectively left the region defenceless and prevented an effective military response against incremental but steady colonial intrusion. In the meantime, starving masses sought help from colonial outposts in the west of the region. Local Xhosa chiefs who had allied with the British subsequently saw their social influence increase amongst the destitute masses, since compared to the rebel chiefs on the run, they had been more successful in fending their followers from famine.

The west of the Great Kei River which was more accessible to the rest of the Cape Colony received most British colonial settlers. This half of Xhosa lands came to be known as British Kaffraria. Beyond the Kei, it was Kaffraria proper inhabited by various Xhosa tribes who were still not ready to turn their lands over without a fight. In the meantime, settlers and the British South Africa Company (BSA) were already lobbying for the entire region be declared Crown Colony even though British presence had not yet been consolidated on the ground along the frontier. Until 1859, the east of the Cape was to remain in a constant state of war.

[6] For Colonel Maclean's original letter, see 'John Maclean letter, Fort Murray 25 February 1856, in Colonel Maclean (ed.) (1859) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers, p. 54.

[7] In addition to historical studies such as the Jeffrey B. Peires' *The Dead will Arise: Nonqwawuse and the Great Xhosa Cattle Killing Movement 1856-7,* the story of Nongqawuse has also inspired the award-winning novel *In the Heart of Redness* by Zakes Mda (2000).

It is important to add a nuance to why and how amaXhosa lands were officially colonised. Formal annexation was not something the colonial authorities had really wanted. Official commitment brought in financial, political and military responsibilities, and liabilities. Instead, British colonial authorities in Africa would generally favour establishing Protectorates, with more flexibility for colonial policy and without direct responsibility for the well-being of its inhabitants. Preference was for signing treaties, avoiding large-scale military presence, delegating day-to-day governance to co-opted local leaders – be it chiefs, paramount chiefs, kings, emirs, or sultans. But whenever there was a sizeable European settler community, they almost invariably wanted direct imperial commitment. This was also the case for the eastern frontiers of the Cape Colony.

It was first British Kaffraria lying west of the Great Kei River, which was later to be known as Ciskei, was annexed to the Cape Colony in 1865. Settlers in the region wanted the lands beyond the Great Kei River to be annexed as well so that they did not live living along the frontier exposed to raids and cattle-rustling from hostile tribes on the other side of the river. In Cape Town, there was little enthusiasm for annexing Transkei, because it involved costly military commitment, manpower, and infrastructure to defend the settlers along the frontier. There were eight frontier wars during the mid/late 1800s, but as we had seen a little earlier, there was no decisive battle against a unified Xhosa army as would be the case with the amaZulu.[8] Bit by bit, the tribal lands of Fingoland, East Griqualand, Pondoland, Gcalekaland were annexed into the Cape. Between 1877 and 1894 successive acts of annexation brought into the Cape all the remaining Xhosa lands of the Transkei. As Francois Venter sums it "The territories now comprising the Ciskei and Transkei were obtained piecemeal, either because of military operations or of negotiations with tribal chiefs, either of a diplomatic or a commercial nature".[9]

2.4. Official and Practical Legal Pluralism

While its eastern frontiers were being redrawn, the Cape Colony's legal and political system was also slowly changing. From, the get-go, the legal system of the Cape of Good Hope had been defined by both official and practical legal pluralism. Soldiers and sailors of the Dutch East India Company (VOC), settlers, Khoisan locals, and imported slaves were subject to different systems of law. Eventually Roman-Dutch law was established as the Common Law of the colony. British rule did not change the foundations of this arrangement. While formally the laws of the Colony did not change, British rule brought in Magistrates and Judges who were trained in and practiced English law. Inevitably, English precedents and legal doctrines began to show in judgements of the Colony in the coming decades.

As we had seen a little earlier in the chapter, the Khoisan inhabitants of the Cape were deemed a free people by the VOC and their law was applicable in cases among the Khoisan. Ordinance 50 of 1828 guaranteed legal equality to all inhabitants of the Cape. But this was to remain at the level of abstract principle only. Most of the semi-nomadic and coastal bands of the Khoisan had already been drawn to the pull of the city of Cape Town. More nomadic bands retreated into remote parts of the continent.

[8] For an historical overview of the successive frontier wars, see Laband, John (2020), *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony*, Caper Town: Penguin, Chapter 7.

[9] Venter, Francois (1985), "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei", in Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, p. 2.

In sum, there has neither been recognition nor application of Khoisan laws in a principled official way. The main concern for the colonial government and the legal profession was how to merge Roman-Dutch and English law into a coherent system.

In 1858 a Commission of Enquiry took on this unique mix of the Cape's Common law based on a mix of Roman-Dutch and English law. But this was at a time while things were still in flux; the eastern frontier with the amaXhosa was not yet demarcated nor was the administrative presence of government consolidated in all parts of the Colony. At that point, the indigenous legal systems of southern Africa – not only that of the Khoisan – were not considered sufficiently advanced to be included in the formulation of a Common law for the British colonial holdings in southern Africa. A Native Laws and Customs Commission in 1837 had briefly looked into the so-called Native Laws of the Cape but had delivered little of import in the end.[10] What was more of an issue for colonial authorities was the type of law that was to apply not only in the Cape Colony but other parts of southern Africa.

Due to the size and influence of the Cape Colony and the economic and political domination of Cape Town, Roman-Dutch law (with English precedents) was extended to other British colonies of southern Africa – even to those which did not have a history of Afrikaner presence that would justify the use of Roman-Dutch law. But the Cape Government and its bureaucracy, the British Governor General and the High Commissioner, the Cape regional parliament, and the law chambers were all based in Cape Town. The way things were done here in the continent's 'mother city' would be the boilerplate to be extended to newer colonial acquisitions.[11] In due course, the two Rhodesias, Basutoland, Bechuanaland, and Swaziland also adopted the Roman-Dutch Common law of the Cape.

Extending the practices of the Cape Colony to the rest did bring in a common legal framework to British colonies in southern Africa, but it also paved the wave for potential conflicts of laws. What would happen when a conflict arose between the Common Law of the land and the local customary law was approached differently in different parts of the Empire. What is more, which law takes precedence would also differ across policy areas. 1910 further added to the complexity of multiple, overlapping, and crosscutting jurisdictions. This was the year that the two British Colonies of southern Africa, the Cape and Natal, joined a federal Union with two former Afrikaner Boer Republics, the Orange Free State and the Transvaal Republic, who had been defeated and occupied by the British.

2.5. The Imperial Constitutional Architecture of Southern Africa

The introduction had highlighted how the 19th century developments in the Bechuanaland Protectorate and the Cape Colony were both part of the geopolitical and jurisdictional dynamics impacting the patchwork of various British imperial territories in Southern Africa. Internal imperial politics was the very reason for the creation of what was to become independent Botswana. For the

[10] It would take half a century for another commission, the 1883 Cape Government Commission on Native Laws and Customs, to deliver a comprehensive study. Kerr, A. J. (1957), "The Application of Native Law in the Supreme Court", *South African law Journal*, Vol. 74, pp. 315.

[11] The two volume extensively detailed and documented report written by a commission of officials, commissioners, magistrates, and lawyers in Cape Town is best seen in this light. *Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs*, Cape of Good Hope Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons.

Eastern Cape, we do not have to factor in imperial geopolitics and competition with other colonial powers, or economic interests of the chartered companies, or the political interests of European settlers. Eastern Cape was neither close to Portuguese or German colonies nor was it geographically situated in a strategic spot; the region had no natural resources which interested British South Africa Company; and there had been no sizeable settler community in Transkei to lobby for annexation. That being said, in order to paint the jurisdictional background, we should take a quick tour of the imperial constitutional architecture of 19the century southern Africa.

Geopolitical calculations might not have impacted the fate of the amaXhosa to the same extent we had seen with the Batswana, but the nature of the imperial constitutional order is indispensable to what we are studying. To master the complexities of legal pluralism and the attending hierarchy of received colonial laws and indigenous laws, we have to understand the jurisdictional dynamics emanating from the constitutional architecture of British southern Africa, especially the complex relationship between the imperial Governor General, the government of the Union of South Africa, the four constituent Provinces of the Union, and the British Protectorates in southern Africa. The Governor General in Cape Town stood at the apex of the colonial order. Under the Governor General were four Provinces with responsible government (the Cape, Natal, Orange Free State, and the Transvaal Republic) and six Protectorates under indirect rule (Bechuanaland, Basutoland, Swaziland, Southern Rhodesia, Northern Rhodesia, and Nyasaland). The Union of the four provinces had the Governor General at the top, so did the Protectorates. But constitutionally there was no lateral link between the Union, its four constituent provinces, and the six Protectorates. The addition of the former German colonies South West Africa (present-day Namibia) and Tanganyika (the present-day mainland part of Tanzania) as a League of Nations Mandate territories – administered by the Union of South Africa under British oversight – would complicate jurisdictional issues even further. What is more, these various African parts of the Empire could occasionally become political and economic competitors with each other.[12]

The history of the Bechuanaland Protectorate (present-day Botswana) we had covered as the first case-study of the thesis revealed how much competition between various component parts of the British Empire mattered. First the Cape Colony, and subsequently the Union of South Africa, had lobbied the Colonial Office in London to absorb Bechuanaland Protectorate into their own borders. But despite its remoteness and apparent geopolitical unimportance at the time, the British would not budge. South Africa had no jurisdiction in the Protectorates; even in the tiny Basutoland Protectorate (present-day Lesotho) which is entirely surrounded by the Union and the equally small Swaziland Protectorate (present-day eSwatini) almost completely encircled.

To chart the political history of Xhosa traditional structures, one needs to pursue various levels of analysis, Imperial, Union, provincial, and local. Since our main empirical interest is the status of Xhosa laws in a constitutional system of cross-cutting and overlapping jurisdiction, we have to take into account all levels of government which have contributed to this jurisdictional complexity. In fact, after surveying the last 200 years South African constitutional politics, it becomes clear that all levels of

[12] Such dynamics existed in other parts the Empire where the same constitutional architectures extended and adopted from the Great Britain was in place. See, Bell, Duncan (2007), *The Idea of Greater Britain: Empire and the Future of the World*, Cambridge: Cambridge University Press.

government in one way or another at one point in history have had some say over Xhosa traditional leadership and Xhosa traditional laws.

2.6. The Union of South Africa and Imperial Jurisdiction

After the creation of the Union of South Africa 1910, the Cape Colony lost some of its policy competences over the Transkei and Ciskei to the newly established Department of Native Affairs in Pretoria. But the Union was a part of the British Empire, and neither the South African Provinces nor the Union government had the final constitutional authority to determine the fate of the country's indigenous population directly. The African communities of South Africa were under the authority of the Governor General's in Cape Town. The various reserves that had been designated for the Native population throughout southern Africa – in the Provinces as well as Protectorates – were under imperial jurisdiction. With the creation of the Union, the Protectorates now had a direct link to the Governor General in Cape Town and the Colonial Office in Westminster. This means that these territories could be ruled by Royal Proclamation or the Governor General could delegate crown authority to others.

In 1913 the various Native Reserves inside Union territory were recognised under statute. In 1936, the list of the competences traditional structures held was extended, but this also went parallel to an increased role of the Department of Native Affairs played in the management of Reserves. The same year saw the establishment of a part indirectly elected / part co-opted advisory Native Representative Council. Without a surefooted knowledge of the local political history and the accompanying complex constitutional arrangements, this new entity might first be interpreted as a progressive political step. While the Council did provide (an indirect) political voice to the hitherto disenfranchised Black Africans in Orange Free State and Transvaal, it also turned the clock back on what until then had been a comparatively inclusive electoral registry in the Cape. Since there was now a Union-level political representation, Blacks were removed from the Cape electoral roll. They were now to vote for three White members of parliament to represent them instead.

Here we have to stop for a second to highlight the pronounced asymmetry which marks South African constitutional affairs. Especially before the Union, each Province had its own policies towards indigenous law. Then within the Provinces themselves different indigenous communities often inhabited different parts of the territory – sometimes alone, sometimes co-existing with either other indigenous communities or settlers, with their own versions of traditional customary law and their traditional leadership structures. What is more, different branches of very same indigenous community could be entrusted with different degrees of political power. Ciskei for example did not hold the same list of competences as Transkei. Policies and practices did not only asymmetrically vary across and within Provinces, but also across different policy areas at different points of time.

The Union of South Africa would fail to qualify as a democratic multinational federation based on multicultural equality between its peoples of course. But we should also reflect on how things were at that time in other parts of Sub-Saharan Africa. The Union was ahead of many other Colonies at the time in terms of acknowledging indigenous peoples and their laws. Even if expressed and practiced in the paternalistic language carrying the tones of a *noblesse oblige*, the Union of South Africa contained various political experiments which potentially could be extended to other parts of the Empire. That

is, whatever was done in South Africa would have repercussions for other parts of the Empire. And this was not only about indigenous peoples in Africa but also about rebellious imperial subjects elsewhere.

Two of the Provinces of federal South Africa were in fact the two defeated Boer Republics whose citizen-militia had only recently managed to give the Empire a bloody nose. Generosity towards the vanquished and the co-optation of their leaders and fighters into the imperial ranks had been done in Scotland, Ireland, and Québec. Afrikaner Boer were yet another such people. The timing however is critical in all this. From its South West Africa colony (present-day Namibia), Germany had been trying to extend its political influence amongst the Afrikaners. The Union of South Africa was designed to stonewall this. One of the leaders of the Boer Kommando fighters, Jan C. Smuts, came to epitomise these changing times. By the First World War, General Smuts had become a loyal servant of the Empire he had previously fought against and he was now chasing German forces in Africa. After the war, the general from the colonies also became one of the champions of the League of Nations and internationalism.

The promotion of internationalism and integration abroad could not be separated from things at home. Despite his fame as the international statesman, General Smuts was politically not as strong at home. His former Boer comrades in particular resented his recent rebirth as the Empire's international fixer. But fixing things internationally was in fact easier than fixing South Africa. The Boer Wars were only recent memory; and the victors had brought the vanquished into the new Union they had created. But the Union was new, and the ambers of resentment and bitterness were still glowing.

There were some signs that Jan C. Smuts' government would eventually put domestically into place what the general was promoting internationally, but it was not a priority at the time when the Union was still going through its birth pains. The main concern was the stability of the Union built on the ashes of a traumatic war. During the first phase of the war, guerrilla-style fighting of the small bands of Boer Kommando had paralysed the thinly stretched British Imperial Army fighting on unfamiliar African terrain. The second phase was the intensification of the war effort under Lord Kitchener and the subsequent internment of Afrikaner women and children into concentration camps in order to choke off the supply and support network of the insurgence. The Boer eventually capitulated, but it had been an unforgiving and brutal war. Without co-opting the vanquished into the system and consolidating the Union, it would have been politically premature to engage in other political reforms targeting the indigenous.

That being said, it is imperative to note that amongst the British colonies in Africa at that time, the Union of South Africa had more venues for political representation of the indigenous population – even if one factored in the step-back from Cape native franchise in 1936. None of the other big British colonies in Africa, neither Kenya, nor Ghana, nor Uganda, nor Nigeria, had any political representation for Natives that came close to anything in the Union of South Africa. There were treaties with the Asante Kingdom of the Gold Coast (present-day Ghana), the Buganda Kingdom of Uganda, and the Emirate of Kano in Northern Nigeria. But these treaties gave the traditional African states corporate recognition; they were different from (in)directly elected individuals we see in South Africa's Native Representatives Council.

2.7. The Arrival of Apartheid

General Jan C. Smuts' vision of a Union of South Africa committed to internationalist goals came to an abrupt end in 1948. After serving in the Imperial War Cabinet and penning the United Nations Charter, Smuts came back to South Africa to lose elections to the opposition National Party, who were to undo every recent reform and build something new: a political system based on official racial segregation. The first formal designation of this policy was 'separate development'. Indigenous communities were subsequently removed from the frame of reference of national politics. They were to have their own statelets. The term apartheid, 'separateness' in Afrikaans, became the common term for the new political order. In urban areas, official policies of racial segregation were put in place. In rural areas, the existing reservations were given, sometimes the trimmings, but mostly the appearance, of self-governing statelets.

A self-evident historical pattern which nonetheless needs to be highlighted here is that time does not always bring political progress. The Cape Colony had granted enfranchisement to all its free citizens – subject to certain qualifications but not race. Until 1910, Native Africans were eligible to vote for their political representatives in the Cape. But the price of forming a federal Union with Natal, Orange Free State, and the Transvaal Republic who were fearing domination by the much larger, populous, and economically advanced Cape – especially on the coattails of defeat and occupation – was a compromise. The three other Provinces did not want the progressive policies of the Cape to extend to their Provinces. And then came the even harsher policies of apartheid. It seems there is no linear path of historical progress. In South Africa and elsewhere, the distant past can sometimes be politically more inclusive than the recent past.

The urban racial segregation policies of the apartheid regime tend to be better known internationally but parallel to this was the policy of creating nominally autonomous homelands for the indigenous in rural areas. Giving indigenous reserves a new political status as African Homelands, outside the frame of reference of representative national politics, was a way to quarantine the demographic threat to Afrikanerdom and ensure the continued domination of national politics. We now see what apartheid for what it is, but at a time when no other British, French, Belgian, and Portuguese colony had any version of territorial autonomy for the Natives, South Africa's homelands were seen (and presented) as trailblazers of African local autonomy. And it was indeed Transkei itself where the apartheid network of Homelands – later to be derogatively dubbed 'Bantustans' – where things started.

The first phase of administrative redesign was the establishment of four districts in eastern Cape under the framework of the so-called Transkeian General Council; the official name later changed to the Transkeian Territories General Council. As we had remarked earlier, the history of this region is one of almost constant institutional redesign. By 1931, the Transkeian Territories General Council had absorbed the neighbouring district of Pondoland and had once again changed its name; this time the United Transkeian Territories General Council. But it was the common name for the General Council, *Bunga*, which in isiXhosa stood for a traditional meeting place of discussion and deliberation, that would leave a mark.

The first legislation laying the constitutional groundwork for this came in 1951. The Bantu Authorities Act of 1951 strengthened the power of the chiefs at the expense of other indigenous forms of checks-

and-balances, especially that of the senior counsellors and spiritual leaders as well as the practice of *lekgotla* where community members would gather and voice their concerns to the leadership. The 1953 Bantu Education Act consolidated chiefly prerogatives in this important policy area. The reserve already had a weak advisory body composed of chiefs and councillors called the Bunga. It was this Bunga in due course endorsed the new system that was being constructed:

> "Among members of the Bunga – most of them chiefs or headmen – the government's powers of persuasion, mixed with the promise of enhanced authority and hard evidence that opposition was fruitless, produced what appeared to be a successful breakthrough for official policy: the unanimous vote of the Bunga members in 1955, to accept the Bantu Authorities system in principle".[13]

In 1957, the Transkeian Territorial Autonomy formally came into being. It had a territory of 16,000 square miles. Its capital Umtata (now renamed Mthatha) housed the Transkei General Council, which was the new Bunga. The amaXhosa of eastern Cape were thus the first indigenous people in South Africa to get a territorially demarcated Homeland, a government, and an assembly. This was an exclusively African and (partially) elected body governing the internal affairs of the amaXhosa. The Bunga had 109 seats; 64 of these were reserved for chiefs (later 65), 45 were directly elected. Governance was based on a Westminster style parliamentary system, with the executive drawn from within Bunga members. The Chief Minister was accompanied by a cabinet of five Ministers.

Taking a step back from domestic South African politics and looking at the rest of the continent at this moment in time, we see that the Transkei's official birth as a Bantu Homeland coincides with the unprecedented dynamics the independence of Gold Coast (present-day Ghana) as Africa's first decolonised nation. The organising principle of the new post-Second World War international order was one of independent free nations – even if the applicability of the principle remained uneven and patchy. From Indochina to Aden, colonialism was under attack everywhere. Africa was no exception. This was the time when demands for home-rule and self-government were starting to challenge the non-representative colonial rule by imperial bureaucrats. The Second World War, or more precisely its immediate aftermath, had severely curtailed British (as well as French, Belgian, and Portuguese) ability to maintain a world empire. The war had not only bankrupted Britain, but it had also exposed its rapidly declining ability to project military, political, and economic power in a new emerging world order defined by the two superpowers. In addition to its declining material inability to maintain its empire, Britain had also become a victim of its own propaganda during the war. The war against Germany, Italy and Japan was presented as the battle to defend freedom, rule of law, and democracy. Once set in those terms, it then became impossible to continue with the same imperial policies of the pre-war years. The creation of Transkei was not only a matter of domestic politics of the Cape, nor was it exclusively a Union matter of using the Transkei as pilot study for the rest of the indigenous communities elsewhere the other Provinces. We also have to factor in the geopolitical contours of the international context.

2.8. The Homelands Archipelago

[13] Carter, Gwendolen M., Thomas Karis, Newell M. Schultz (1967), *South Africa's Transkei: The Politics of Domestic Colonialism*, Evanston: Northwestern University Press, pp. 18-9.

The creation of the homeland of Transkei was followed by others, yet not all would have the territorial compactness. Bophuthatswana, in particular, was made up of dozens of smaller territories demarcated as part of the same homeland, sometimes adjacent to each other, sometimes disconnected. The map of the country's various homelands would come to look like the map of archipelago of Indonesian or Philippines islands. Transkei was the first one.

The 1959 Bantu Self-Government Act, Number 46, created eight National Units within the Union: Northern Sotho, Southern Sotho, Swazi, Tonga, Xhosa, Tswana, Zulu, and Venda. While some overlap exists, it is important to note that these newly created indigenous enclaves are different from the four nominally independent and the six nominally autonomous homelands which will later come into being in the following two decades. As it is the case in the history of indigenous law in South Africa, we see new institutions and policies co-existing with the already existing or even formally defunct ones. Once again, change and continuity are inextricably interlinked.

2.8.1. Territoriality and Transkei Autonomy

There is a reason why Transkei was the first Homeland. Compared to other regions of South Africa, Transkei had a population, which save for a small number of White bureaucrats, police, and commercial traders, was almost exclusively Black African. Furthermore, the Transkei was regionally compact and consolidated, preventing the tensions that accompany ethno-linguistic groups who live side-by-side and have competing claims to the same land. The kingdoms, chieftaincies and paramount chieftaincies of the Transkei could also claim a long lineage of historical continuation. That is, they were not like some of the other traditional authorities only recently set up by the British for reasons of expediency. Consequently, their legitimacy was unchallenged. The fact that these were ancestral lands of the amaXhosa and not some artificially demarcated reservation added to a sense of historical continuity.

Transkei is not only remarkable for being the first Homeland. Compared to other indigenous ancestral lands of South Africa, the region also has the longest history of having variations of territorial self-rule. Amongst all the Native Reserves/National Units/Homelands of South African history, Transkei is unique in terms of historical continuity across the different political episodes of South Africa. Its borders have shifted little since the British Kaffraria frontier days. S Gwendolen Carter and her colleagues remarked:

> "The area of the modern Transkei coincides almost exactly with the traditional country of the Cape Nguni occupied before contact with White farmers, although a considerable number of the Cape Nguni themselves lived in reserves and on White farms in the Ciskei, a closely allied and still more densely populated area lying west of the Kei river and closer to Port Elisabeth and East London".[14]

Compared to the other Homelands, Transkei was also remarkably unified in territorial terms. Bophuthatswana, for instance, was a veritable archipelago of dozens of territorially disconnected autonomous regions spread over different Provinces. Other than its two exclaves in the north, territorially Transkei was a compact regional entity spanning the lands between the Great Kei River

[14] Carter, Gwendolen M., Thomas Karis, Newell M. Schultz (1967), *South Africa's Transkei: The Politics of Domestic Colonialism*, Evanston: Northwestern University Press, p. 81.

and the Umzimvubu River along the border of Natal. While continuity across the *longue durée* marked Transkei, the new laws creating Black African Homelands represented a major change in constitutional foundations of the country. The emergence of a government narrative emphasising political autonomy and economic separateness for the constituent indigenous communities of the South Africa went parallel to the projection of more direct control of some policy areas than before. This change in fact represented a shift in the underlying foundational logic of the country. Let us unpack what this means a little further:

We have so far been covering the various changes concerning the recognition and application of traditional laws in South Africa in a system of overlapping and crosscutting jurisdiction. We had started with the status of Xhosa laws in the Kaffraria frontier on the eastern reaches of the Cape colony in the mid-19th century. Following the annexation of the frontier region, we then looked at the relationship between Dutch-Roman and Xhosa laws within the Cape Colony. While keeping our focus on the Cape, we then looked at the formation of the Union of South Africa in 1910 and the new policies towards traditional law and politics which were to mark the coming decades. These included the creation of an advisory Natives' Representative Council in 1936. We then moved on to a series of legislation which starts with the 1951 Bantu Authorities Act and leads to the 1959 Bantu Self-Government Act.

While listing these institutional and policy changes over the years, there is a little risk that they start to appear as incremental additions (and occasional subtractions) to a list of competences which rests on the same constitutional logic and sense of political legitimacy. But between 1936 and 1951, the underlying foundational logic of the Union changed. South Africa gave up the notion of a Union bringing together all inhabitants around national politics – albeit with different degrees of political enfranchisement. One sign of this was the steady elimination of Native Peoples' Representatives in parliament. Even if the Union curtailed the Cape's mixed electoral roll, this was presented as a transitionary measure until the indigenous of other Provinces were able to reach a comparable level development. It does sound more paternalistic than progressive, but the frame of reference was still national. The election of the National Party in 1948 was to shake the political hold Jan C. Smuts and his Unionist Party had over the country. What 1951 signifies is an end to the idea of one country. From now on, the indigenous were to have their own homelands – in principle, outside South Africa.[15]

The following years saw the consolidation of apartheid regime's ideology of what was euphemistically known as 'separate development'. By the 1960s there were no longer Black African members left in the Senate or House of Assembly of the Union. There were three seats directly voted for by the Blacks inhabitants of the Cape; but these seats representing this constituency were held by White members of the parliament. In the three British controlled protectorates outside the Union of South Africa, that is, Swaziland, Basutoland, and Bechuanaland, Black Africans enjoyed indirect representation.

A little earlier we had looked at the post-Second World War decolonisation process and had stressed the need to factor in the geopolitical contours of the international context in order to fully comprehend the reasons for South Africa's successive experiments with limited indigenous self-rule. By the late 1950s, the decolonisation of the British Empire was well under way, while the newly

[15] It is perhaps interesting to note that the main architect of apartheid, Prime Minister Verwoerd, had been the Minister of Native Affairs in the previous Unionist government.

established United Nations had become a profile global forum for many of the newly independent former colonies. The Commonwealth was yet another international organisation where the former British colonies were flexing their international politics muscles. In both institutions, South Africa came under constant criticism – mostly for the internationally wider-known apartheid policies and not necessarily the lesser-known Homelands. The international context was not only about these two international organisations however. Relations between the new National Party government which had by now consolidated its control of South Africa and the British Government were particularly toxic. The status of the three British High Commissions territories, i.e. Basutoland, Swaziland, and Bechuanaland, were becoming a matter of contention. British were preparing to grant home-rule to these three. South Africa on the other hand was worried about potential spill-over. Add to this the status of South West Africa (present-day Namibia); a former German colony, post-First World War League of Nations Mandate territory governed by Britain, post-Second World War United Nations Trust territory under British tutelage but with the administration outsourced to South Africa.

As things got tenser between South Africa and Britain, and as both the United Nations and the Commonwealth became venues to highlight and criticise South Africa's *de facto* colonisation. The homelands regime became one way to justify South Africa's continued presence in Namibia: the land was parcelled between various indigenous communities, while more strategic locations along the coast and agricultural lands in the south were exempted. Put simply, "the acceleration of the Bantustan policy was undoubtedly a part of the government's strategy for counteracting domestic and external pressures and improving South Africa's case for retention of the international territory of South West Africa".[16] But none of this helped stem widespread international criticism. South Africa simply left the Commonwealth and declared its independence in 1961.

2.8.2. Territorial Autonomy and Migrant Labour

One of the main theoretical premises guiding the research is the need to employ various scholarly perspectives, and examine local, regional, national and international levels of analysis over the *longue durée*. This means that after looking at the role of the international community in South Africa's Homelands, we will now take on an angle which at first might not strike the international reader as relevant: domestic labour mobility. The industry in question is the mining. The employment practices of the mining industry of South Africa, devised and sanctioned by the government, has had a large-scale disruptive effect on the social fabric of indigenous communities throughout the country. We cannot understand the workings of the Bantustans without paying attention to the phenomenon of migrant labour which would see hordes of men leave their villages to toil away in the mines of Gauteng and elsewhere for lengthy periods.

Compared to the other homelands, Transkei had a number of factors stacked in its favour: the region was compact and consolidated, it only had small pockets of White settlers, there were no other indigenous community with competing claims to the same land, the paramount chieftaincies and kingdoms had a historical lineage and thus enjoyed popular legitimacy compared to the some of the traditional leaders recently hand-picked and appointed by the British elsewhere. These were Xhosa ancestral lands, inhabited by the amaXhosa, and ruled by Xhosa chiefs and kings according to Xhosa

[16] Carter, Gwendolen M., Thomas Karis, Newell M. Schultz (1967), *South Africa's Transkei: The Politics of Domestic Colonialism*, Evanston: Northwestern University Press, p. 40.

laws. All this should have worked in the favour of Transkei, bringing in a sense of bottom-up ownership to Union-imposed political institutions. But it was economics that was not among the factors favouring Transkeian autonomy.

Unlike other parts of the country, Transkei was not endowed with extractable natural resources; nor did it have large-scale agricultural industry. The local economy of this over-crowded region criss-crossed with small plots of subsistence farming could not provide enough jobs for its inhabitants. South Africa's booming mining industry around Gauteng was constantly short of manpower however. The solution was the construction of an extensive network of labour mobility across the country to man the mines. Here they would not be considered residents, but migrant labour from the Homelands on temporary work permits. The large-scale social disruption – for the miners living away from home for lengthy spells as well as those left behind who had to manage the villages without the menfolk – undermined the viability of a self-sustaining autonomous homeland.

The Homelands were to stay however. There was soon to be ten of them, albeit without identical jurisdictional powers. The apartheid regime created two tiers of these so-called Bantustans. There were there were four 'independent Black states' (*Onafhanklike Swart State*) and six 'National States' (*Nasionale State*).[17] Transkei, Bophuthatswana, Venda, and Ciskei were the nominally independent states. Unofficially the acronym TBVC came to be used for the four. The six nominally autonomous ones were Gazankulu, Lebowa, Kwandebele, Kwazulu, Kangwane, and QwaQwa.

2.9. Transkei Independence and Impending Change

We had marked the foundational change that took place between 1936 and 1951 when the underlying foundational logic of the country changed. This was when the constitutional principle of one country ended and the indigenous were removed from the national frame of reference. In 1970, the Bantu Homelands Citizenship Act, Number 26, underscored this foundational change. From now on, the indigenous were to have 'national citizenship' in their respective Bantustans. The Bantu Homelands Constitution Act, Number 21, was the second legislative act consolidating the new political vision and came into force a year later.[18] Accordingly, the Bantustans were to draft their own constitutions. The Act was later renamed 'The National States' Constitution Act'. The meandering story of jurisdictional design and redesign in Homelands continued however.

In 1974, the Transkei Bunga voted to ask for independence. By 1976 Transkei proclaimed its constitution and became nominally independent.[19] Most of the intended audience for the declaration of the independent Republic of Transkei Constitution was abroad however. Not many were convinced.

[17] Olivier, Nicholaas Johannes Jacobus (1986), *Regpluralisme in Suider-Afrika*, Pretoria: Universiteit Pretoria.

[18] For future research, it is worth to note here that two such homelands Bophuthatswana and Venda deviated from the others and incorporated foreign constitutional ideas into their charters. Francois Venter, for example, mentions the inclusion of the notion of a Grundnorm into Boputhatswana's constitution. Venter, Francois (1985), "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei", in Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, p. 17.

[19] Republic of Transkei Constitution Act 1976, Iriphabliki Yetranskei, reproduced in M.P. Vorster, M. Wiechers, D. J. Van Vurren (eds) (1985), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, p. 63.

The international community saw through the South African political agenda and was unwilling to recognise what was viewed an apartheid satellite statelet. The presentation of South Africa as a Union of four provinces together with independent and semi-independent Homelands, and one with legal pluralism where ethnic groups would pursue their 'separate development' was of course an attempt to repackage and sanitise apartheid and the Bantustans. What is more, Transkei was completely dependent on South Africa on many policy areas ranging from energy to finance. It would however be misleading to portray the entire notion of Transkeian autonomy as a sham. While the apartheid regime was dominant power behind the changes in Transkei's official status, there was also genuine self-rule in certain policy areas – of course, as long as the political and economic interests of the regime were not directly challenged.

The new country had a president, it had a flag (three horizontal stripes of ochre red, white, and green), a national assembly, a capital, regular elections, a bureaucracy, an army, and a national anthem (*nkosi sikelel 'i Afrika*) which eventually would be integrated into South Africa's post-apartheid democratic anthem. What it did not have was international recognition. Transkei was perhaps more appropriately a contemporary example of the continuation of the spirit of Lord Lugard's colonial 'indirect rule' in northern Nigeria which outsourced day-to-day governance to traditional structures under the overarching but thin tutelage of the colonial authorities.

The creation of the Bantustans did little to sort the country's troubles out. In fact, the coming years witnessed the steady deterioration of things. Domestically, the situation in the townships was one of constant battles between the security services and the locals. Townships were the commuter towns on the outskirts of cities the apartheid's urban planners had created. While the townships had become the hotbeds of insurgency, the Bantu Homelands run by the locals were comparatively calm. But the country was also fighting an insurgency in South West Africa (present-day Namibia). The end of the white minority regime in Southern Rhodesia and the collapse of Portuguese rule in Angola and Mozambique brought hostile regimes onto South Africa's doorstep. The so-called 'Bush War' in Angola was particularly draining for the country's resources and traumatic for conscripts. The overall mood was one of an impending Armageddon.

The popular history of the end of apartheid glorifies a compromise between Nelson Mandela and the regime as a ground-breaking initiative which ushered in a negotiated end to the country's divisions. The result was a nation-wide popular movement which led to a new democratic constitution for the 'rainbow nation'. It is a nice story, but a bit incomplete. By the mid-1980s the apartheid regime was already looking for ways out from domestic unrest, regional encirclement, economic isolation, and international opprobrium.

While political violence and security crackdown continued domestically, there signs that the idea of excising the indigenous from the national politics was no longer the constitutional goal. By 1986, the Union of South Africa had abolished the Commissioners' courts, ended the separation of court networks between Union and Homeland courts, and merged all under a single hierarchy. Transkei independence had marked the peak for the Bantustans system. A quick downwards, triggered by the sudden changes in international geopolitics, followed.

2.10. Transition and Democracy

One little known precursor to South Africa's democratic transition happened right next door a few years before. With the encouragement of the country's western allies, South Africans had quietly entered talks with the Soviets during the mid-1980s, and a breakthrough had been achieved. Under its new name and new constitution, Namibia was to become independent. The insurgents would assume political power, but White settlers would keep their farms, international companies would continue extracting minerals, and the Khoisan who fought as trekkers for the South African Defence Force would get amnesty. Namibia was a trial run for South Africa. As the end of the Cold War approached and the Soviets started to disengage from Africa, the background for negotiations between Mandela and the regime was set. A new era of democratic politics had arrived. It is tempting to present this as a tectonic shift in the country's politics, but as our survey of the last 200 years of political history has repeatedly shown how continuity and change have always been inseparable.

By the early 1990s, the apartheid regime's secret negotiations with the African National Congress (ANC) were now open. This episode of democratic transition, and the subsequent presidency of Nelson Mandela – himself a prince in the abaThembu royal family of Transkei – in South African history tends to be better-known internationally. So, ours here will be a condensed overview only.

The country had its first free elections in 1994. Under a transitionary constitution, former political adversaries started working together towards a permanent democratic constitution with a national frame of reference for all South Africans regardless of their race or place of residence, albeit with strong multinational and multicultural guarantees for group rights to accompany nation-wide individual rights. During the transition, South Africa had adopted a number of constitutions. The interim constitution of 1993 had contained a rather generous clause towards the recognition of traditional authorities. Articles 181 and 182 not only formally recognised traditional authorities, but also made them *ex officio* members of local government. Act 3 of the 1994 Constitution even allowed the establishment of traditional monarchies in the provinces. But what was finalised in the form of the Constitution of 1996 took a step back in terms of the powers of traditional authorities. In its decision certifying the new constitution, the Constitutional Court acknowledged the "institutions of traditional leadership, customary law and, at the provincial level, traditional monarchy" but endorsed the removal of governmental roles for traditional structures (in local government) included in the 1996 constitution (CCT 15/96).[20]

The new constitution was drafted in 1996 and came into force in 1997. For students of federalism the best way to describe the essence of the new constitution is that there was a lot of 'federalism' in its political foundations, but without the official designation of a 'federation'. Apartheid era's four Provinces and the ten Homelands of were abolished. Instead, the country was to have nine provinces now.[21] The Cape itself was divided into the Province of the Western Cape, Northern Cape, and Eastern Cape. Xhosa ancestral lands in the Transkei were now within the borders of a new Province demographically dominated by the amaXhosa. Xhosa politicians were not only to electorally dominate

[20] For more on the constitutional designs during the transition, see Steytler, Nico (2019), "The Dynamic Relationship Between Devolution and Constitutionalism in South Africa", in Charles M. Fombad and Nico Steytler (eds), *Decentralisation and Constitutionalism in Africa*, Oxford: Oxford University Press, pp. 152-154.

[21] Western Cape, Northern Cape, Eastern Cape, Kwazulu-Natal, Gauteng, Limpopo, North West, Free State, Mpumalanga, and the Northern Province – later renamed Limpopo.

the Eastern Cape, but they also constituted the upper cadres of the party leadership of the African National Congress (ANC), and due to ANC's electoral might nationally, they thus controlled the parliament and presidency.

The opening up of national politics and the prominence Xhosa politicians in the ANC lessened the political importance of traditional structures in Transkei. These had historically been the main outlets for Xhosa politics. The new constitution did not try to legislate indigenous institutions out of existence, but within a new democratic South Africa where diversity was now celebrated and recognised within a national frame of reference, Transkei was no longer the primary national reference point for the amaXhosa.[22]

The 1996 Constitution, Section 211 (1) recognises the institution, status, and role of traditional leadership. The same section recognises indigenous African law as a source of South African law alongside the common law. The subsequent Section (212) (2) establishes the path to provincial and national houses of traditional leadership. This came with theSection 4 (1) of National House of Traditional Leaders Act, Number 10, 1997. So far, eight provinces have Councils of Traditional Leaders; the Eastern Cape is one of them. Politically, these Councils have so far maintained a low profile. Party politics and competition is now being conducted in exclusively national terms. Yet as this chapter is being written, national party politics is being challenged by the Zulu King Zwelethini in the Province of KwaZulu-Natal. He has declared that he will tell his subjects to oppose government plans to nationalise the land collectively owned by the traditional Zulu *ingoyama* trust. How that conflict evolves will have repercussions for traditional structures throughout the country.[23]

3. SOUTH AFRICA AND THE SCHOLARLY CHALLENGES

With new institutions, policies, and reforms superimposed on one another throughout the successive constitutional phases marking South Africa's history of the politics of law, the biggest scholarly challenge is to define the frames of analysis. Where to draw the lines of what is to be examined is complicated by the fact that formally defunct policies and practices could influence the workings of new policies and reforms. Since change and continuity are inextricably interlinked, one also faces the challenge of picking a cut-off point in the past for investigating the origins of some of the present dynamics. What is more, as each historic period in the politics of law in South Africa above attests, international and regional politics can have consequences; thereby, introducing additional challenges to the decisions about what to include in the analytical frame of analysis. Such complexity calls for a

[22] One of the concerns at the time was that the removal of state institutions from the Transkei capital Umtata would turn the city into a 'ghost town'. For a study on the regional and municipal effects of Transkei's absorption into national politics, see Siyongwana, Pakama Queenscious (2009), "The Impact of Political Transformation on Employment in the Transkei Bureaucracy and Civil Service in Umtata, South Africa since 1994", *GeoJournal*, Vol. 74, No.4, p. 310.

[23] The power of the chiefs over land remains a controversial issue in contemporary South Africa. Ntseba, Lungusile (2004), "Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa", *European Journal of Development Research*, Vol. 16, pp. 71-89. For a national overview, see Oomen, Barbara (2005), *Chiefs of South Africa: Law, Power, and Culture in the Post-Apartheid Era,* Oxford: James Curry.

holistic perspective where the frames of reference are set in macro terms across the historic *longue durée*.

The chapter exposes the complex historical path South African politics has taken in the last 200 years. During this time, the political landscape of South Africa has been subject to large-scale changes. At various intervals, the country defined and redefined how it sees itself and the corresponding constitutional foundations for this. Borders have been drawn and redrawn; territorial units have expanded, shrunk, merged, and split; the political system has moved from a small halfway-station of a Dutch chartered company to a British colony, from a white-minority ruled federal union of four provinces to a post-apartheid quasi-federal republic; and the formal status of indigenous African law has undergone large-scale and micro changes along with these political changes.

All the various political experiments the country has embarked upon have one thing in common however. The constitutional architecture is always one of multiple, cross-cutting, and overlapping territorial jurisdictions. Add to this the co-existence of various different legal systems with different degrees of national, regional, and local recognition and applicability. While research into a topic where all the component parts move at the same time presents inevitable scholarly challenges, the nature of what is studied justifies the endeavour. Chapter 9 will trace the details of the complex relationship between traditional laws and governance structures indigenous to the amaXhosa and the modern state along the country's successive constitutional phases discussed here. But before that, we turn to Xhosa law and governance.

Chapter 8:
The Indigenous System of Xhosa Laws and Governance

---

1. THE AMAXHOSA

1.1. The Southern Nguni Meet the Khoisan

Nguni is the ethno-linguistic umbrella name for southern Bantu peoples which includes the amaXhosa, amaZulu, and amaNdebele ('ama' is a plural prefix in Bantu languages). The amaXhosa are the southern branch of the southern Nguni. The geographic heartland of the Xhosa people is the present-day South African province of the Eastern Cape. During the 19th century expansion of the Cape Colony, the region lying to the south of the British Protectorate of Basutoland (present-day Lesotho) and the Boer Republic of the Orange Free State, situated to the southwest of the British colony of Natal along the Indian Ocean, came under successive waves of colonial expansion. As result of a successive frontier wars, Xhosa lands were step-by-step incorporated into the Cape Colony and the Xhosa inhabitants became subjects of the British Empire. This history of colonial expansion into Xhosa lands was covered in the previous chapter. Here, we turn our attention to Xhosa law and governance, and it cultural and ethnographic components.

On the east of the Kei River, the amaXhosa managed to protect their demographic dominance and the continuation of their traditional laws and governance structures under its status as British Protectorate of Kaffraria akin to Basutoland and Swaziland, and indeed our previous case-study, Bechuanaland. Next chapter will show how, despite quite similar beginnings, how the history of the politics of Tswana and Xhosa law took on two separate courses after this. The formation of the Union of South Africa, and the subsequent end of direct imperial jurisdiction over the region, put the future of Xhosa law and governance on a path different from that of the Tswana.

With the historic movement of peoples and tribes throughout southern African history, the Nguni have had extensive interaction and mixing with the aboriginal Khoisan bands living scattered across southern Africa. Among the Nguni peoples, the amaXhosa were the ones who had the most extensive

interaction with the Khoisan living along their western reaches. Long before the arrival of the Europeans, the southwestern branches of the Nguni had been meeting, fighting, and mixing with the Khoisan. But the Nguni were militarily more advanced and demographically more numerous. They quite often picked fights amongst themselves, ensuring battle-readiness. Small bands of Khoisan hunter-foragers had no chance of withstanding the martial prowess of the Nguni honed across centuries and countless wars. The Khoisan in were thus either killed, chased away, enslaved, or assimilated into the Nguni tribes.[1] The click sounds in isiXhosa and isiZulu were in fact originally taken from Khoisan language. Their prevalence indicates the extent Khoisan women were taken as wives or concubines and influenced the way new generations spoke.

Squeezed out from the Cape from the west since the arrival of the Dutch, on the eastern fringes of the region the Khoisan were this time exposed to the expanding Xhosa tribes. We should note here that the term Khoisan is in fact a relatively recent amalgamation of two separate ethnographic labels. Historical ethnographers of southern Africa differentiate between two indigenous communities prior to the arrival of Bantu peoples, and later, Europeans. *Khoikhoi* were the pastoralists with more stratified and developed social structures speaking one distinct language while the more dispersed various hunter-forager *San* bands spoke different languages (all containing variations of the 'clicks'). Crossing across the two communities was not uncommon, and outsiders tended to label the two indigenous communities together. The now commonly used *Khoisan* is in fact an ethnographic umbrella term covering both.

It is of course not only in the Cape Colony that the Khoisan faced hardship. While they are the oldest inhabitants of southern Aftica, the Khoisan have been unable to systematically resist the intrusion of various militarily more advanced peoples into the region. And this is not confined to the southern tip of the continent. The histories of Namibia and Botswana are marked by similar patterns: the semi-nomadic bands of the Khoisan were either assimilated, enslaved, or subjugated; the more nomadic bands retreated into the remote corners of the Kalahari Desert to avoid the same fate.

1.2. The amaXhosa of Qumbu, Kaffraria, Ciskei/Transkei, and Eastern Cape

In the previous chapter on the history of politics of law, we had seen how there was no real political union to match the cultural unity of the amaXhosa, but only a very decentralised union without a permanent political centre, in what would be akin to a loose confederation in modern terminology. There was however a distinct language uniting the people divided along the constituent chieftaincies of the amaXhosa, a belief in shared lineage across the tribes, and ancestral lands to identify with.

Before proceeding further, it might be necessary to inject a note of caution here. There is the risk of *presentism* and the subsequent projection of a sense of common peoplehood and unity on to a past that was not only diverse but also evolving. We should acknowledge how, in parallel to political and social changes, terms have changed in meaning and connotation throughout the region's history. Some of the changes are orthographic only and reflect the changes in the transliteration and spelling

[1] Our main focus is the Transkei amaXhosa in the east of the region, but we should add a note here and acknowledge the demographic patterns in the west of River Kei where the first Xhosa tribe, amaGqunukwebe expanding westward had absorbed the local Khoisan people into its ranks.

of indigenous words; some of the changes are indeed of meaning yet others are in connotation. What is more, even during the same political phase, the people and the land could be called different things in different languages. We have the luxury of looking back and seeing the macro picture painted by long term history; so we are privy to the information that, despite the political and tribal divisions of the time, a sense of peoplehood did eventually emerge. The note of caution is about tempering assumptions about a sense of common Xhosa peoplehood at the time: one has to acknowledge that for most of the 19th century this was still a process in the making.

To respect historical accuracy, we should underline the fact that whom we would call Xhosa today did not identify as such at the time. Historically, the so-called Xhosa (transliterated and spelled *Xosa* during the 19th century) were original only one of the four southern Nguni tribes inhabiting the region under focus. The main competitor of the Xosa tribe under its paramount chief was the abaThembu royal house of the Thembu; alternately spelled *Tembu* or *Tamboo*. During the time when the eastern borders of the Cape Colony were steadily expanding eastward into what was then called Kaffraria, the north of this region came to be known as *Tamboo-kie*. Tambookie had originally been the Khoisan name for the abaThembu tribe of the amaXhosa inhabiting these valleys. By 1820, the British had adopted the term to denote the northern part of eastern Cape.[2] At that time, the abaThembu tribe were separate from the Xosa tribe. In time however, Xhosa evolved to become the general name for all tribes of the Nguni who spoke what would eventually be called isiXhosa.

Both texts of the previous chapter on the history of the politics of law, and the next one on the relationship between Xhosa law and governance and the modern state, seek terminological consistency. But we cannot change what is in the official documents and other historical material. It is for this reason that the reader will likely encounter differences in the transliteration and spelling of isiXhosa words over time. Xhosa – which used to be spelled without the letter 'h' – is now the blanket word covering all of these groups. The royal house of the Thembu used to be spelled without an 'h' and sometimes spelled Tambookie. Changes in the spelling and meaning of terms is not only a matter from distant history. The former capital of the Transkei, Umtata, has recently been renamed Mthatha. The main reason for the changes in spelling is the changes in the transliteration of Xhosa consonants and vowels in Latin alphabet. Recent spellings are supposed to capture the original sounds better than the previous spellings. But not all of the changes are because of changes in transliteration. One additional reason for seeing different terms over time is not because the labels have been revised; it is because real historical change has taken place.

The eastern reaches of the present-day South African province of the Eastern Cape has gone through various different names. Before the arrival British colonialism, this eastern Cape region was known as Qumbu to the locals. The British however called these yet untamed lands to the east of the Cape Kaffraria or Kafirland – as we had noted earlier, these are now terms deemed offensive and derogatory.

It is not entirely clear why the Arabic word for a religious non-believer, *kafir*, gave the region its name. It was not used for the Khoisan inhabitants of the Cape west to the Xhosa tribes. Some assume the

[2] Mager, Anne (2013), "The Colonial Conquest and the Tambookie Frontier: The Story of Maphasa, *c.* 1830-1853", *Journal of South African Studies*, Vol. 39, No. 2, pp. 250-71.

term had been brought by British soldiers who had been previously served in Egypt and Sudan and had adopted the term their Arab auxiliaries used for black Africans. Others trace the word to the Portuguese, who, in turn, had appropriated it from Arabic. Yet one other potential explanation is the mythical kingdom of *Koffa* Ottoman Turks believed existed somewhere far inland; and had reportedly used the term for black Africans who came from the interior of the continent.[3] Whatever its etymological origin, by the time the term was officially used an official designation in the Cape Colony, it had not yet acquired its racist toxicity of the current times. Back then it was used as an umbrella term for all the different Xhosa tribes inhabiting this particular region.

In the course of the 19the century, the term lost its specific association with the eastern region of the Eastern Cape and acquired its present meaning as a racist slur for all black Africans regardless of ethnicity or origin. The lands lying east beyond the River Kei then came to be known as Transkei, literally 'beyond the Kei river' (eventually becoming part of the newly created post-apartheid province of the Eastern Cape of democratic South Africa). West of the Kei was designated as the Homeland of Ciskei. In democratic South Africa, it joined Transkei in the new province of Eastern Cape. Different official historic documents and past scholarly literature employ different terms for the region and its people. In the course of the in-depth investigation of the various legal mechanisms managing the relationship between indigenous law and modern law contained in the coming chapter, we will see how official terms frequently changed both in descriptive designation as well as subjective connotations. Changes in both formal labelling and the practical application of different policies over time has to be acknowledged as we examine the long term historic relationship between of Xhosa law and governance and the modern South African state in its various constitutional configurations over two hundred years.

2. XHOSA CONSTITUTIONALISM

2. 1. The Chieftaincies, Paramount Chieftaincies, and Royal Houses of the

It is imperative to note that local forms of constitutionalism indigenous to Africa can differ widely in terms of political and territorial centralisation. Chapter 3's sub-section 2.3. highlighted what is common to traditional systems of law and governance of the continent, the unique characteristics of African constitutionalism in other words. Those general characteristics apply to all indeed, but it is also important that this is not a one-size-fits-all type of constitutionalism. As a result of complex contextualised factors emanating from local history, culture, and society, the indigenous constitutions of closely related ethno-linguistic communities can show remarkable differences in the nature of the political authority. We have a pronounced example of this in the way the amaXhosa and AmaZulu differ.[4]

Different from their Nguni cousins the amaZulu, the amaXhosa did not historically have a centralised structure and hierarchy of political leadership. Instead, the amaXhosa of Transkei were organised along, what we might nowadays call, a loose tribal confederation. Meetings between the constituent

[3] In Chapter 11 on Ethiopia, we will encounter a similarly loaded term *Galla* which is in past official documents and the scholarly literature but has since been acknowledged as a derogatory term for the Oromo.
[4] Chapter 13, subsection 2.1 discusses another example of differences in indigenous constitutionalism in terms of the collective rights of women.

chieftaincies, paramount chieftaincies and royal houses of the amaXhosa was not formalised and structured but happened when the occasion called for it. The decisions taken in that context were not enforceable on the recalcitrant chieftaincies, although various forms of softer inducements and social pressures existed of course.

There was also heterogeneity within the loose confederal union. Most of the Xhosa tribal chieftaincies were very small. These were recent offs-hots which had splintered off following the lead of a junior chief who had broken from a larger chieftaincy. It was not uncommon for unsuccessful pretenders to the chieftaincy of an established tribe to break off and move away with their followers to settle and establish a new tribe elsewhere in the region and beyond. Xhosa social system has been open to incorporation of outsiders into the tribe through conquest, marriage, or voluntary adherence. New chiefs had to deliver, so that they to their followers remained part of his offshoot. It was not hereditary claims to traditional leadership that mattered but more the very exercise of leadership itself. Their powers were a lot more personal and unstructured compared to the older and larger chieftaincies with their elaborate histories and indigenous forms of division of power and checks and balances. In the course of Xhosa history new tribes were formed, old ones split, others merged, and names changed. In addition to these newer ones, other members of the confederation came close to large scale state-like monarchies similar to the Asante Kingdom of the Gold Coast (in present-day Ghana), the Lozi Kingdom of Barotseland (in present-day Zambia) or the Buganda Kingdom of Uganda.

The confederal union did not have a permanent seat, a structured political calendar, and elaborate procedures for decision-making, but it did have more ad hoc forum for pan-Xhosa issues which needed joint action such as a threat military threat or drought or disease. The forum was named after the isiXhosa word for meeting place, *Bunga*, and was an assembly of the various constituent chieftaincies and royal houses. The meeting was an occasion to try to convince members to act together for a common cause or to explain why such action was not warranted. Meetings usually lasted long and relied on a great deal of reasoning in order to sway opinion and ensure delicate regional and tribal balances were respected.

There were twelve of these constituent tribes – some closely linked through oral history, others seemingly unrelated tribal offshoots: Xosa, Tembu, Mpondo, Mpondomise, Bamvana, Bhaca, Hlubi, Bhele, Zizi, Yesibe, Ntlangwini, and Mfengu or Fingo (who are scattered remnants of broken Zulu clans).[5] Amongst these, the Xhosa Paramount Chieftaincy and Thembu Kingdom were the strongest, but no single branch was able to control and coordinate the rest.[6] John Iliffe reminds us that the apparent lack of political unity coexisted with a sense of shared lineage across all constituent chieftaincies, big or small:

> "…[A]mong the Xhosa, the most southerly Nguni speaking group, all chiefs belonged to the Tshawe royal family – allegiance o them defined Xhosa identity – but chiefdoms

[5] What perhaps complicates things further for readers not familiar with southern Africa is that Bantu vocabulary uses prefixes to create new words from the roots: isiXhosa means Xhosa language, amaXhosa means the Xhosa people, and so on.

[6] Mager, Anne (2013), "The Colonial Conquest and the Tambookie Frontier: The Story of Maphasa, *c.* 1830-1853", *Journal of South African Studies*, Vol. 39, No. 2, pp. 250-71.

> multiplied in each generation as sons settled unoccupied river valleys, retaining only loose allegiance to the senior line".[7]

Historically the tendency for the ambitious or discontent to break off to form their own chieftaincies and subsequently new tribal lineages meant that internal political diversity was a constant. What is more, some of the older ones as well as some of the new splinter chieftaincies could refrain from joining the other pan-Xhosa causes or even establish alliances with colonial forces against their tribal Xhosa counterparts. Many internal tribal divisions were sparked by colonial expansion and the Frontier Wars. Oral Xhosa history going back centuries contains references to some of the tribes while others seem to be directly engendered by the chaos and displacement created by the successive Frontier Wars.

Within the constituent members of the Xhosa confederal union, chiefs did not rule with absolute authority but relied on the office of counsellors, the so-called *amapakati*, literally the 'middle-ones'. The chief's closest advisors were likely to come from his age-set group of childhood friends with whom he had gone through the arduous initiation ceremony marking transition from boyhood to adulthood.[8] There were also checks on chiefly powers in the form of tribal law and ancestral precedents. Notwithstanding the regional differences, most of the indigenous *multus politica*, the check and balances and division of power that is, we had outlined in Chapter 3 applies to traditional Xhosa law and governance.

Not only did Xhosa politics function in a decentralised fashion, so did its military. There were no disciplined age-set regiments similar to the amaZulu ready to be directly deployed on the battlefield. Xhosa leaders had to rely on the loyalty, goodwill, and self-interest of subordinate chiefs. What is more, the leader had to make a case for war and convince the chiefs:

> "No chief could actually compel his adherents to muster at his great place in time of war… [Members of the tribe] would not commit to marching off on campaign until their chief had harangued the, explained the causes for the war and persuaded them that it was a good cause to fight for".[9]

As matter of fact, historically Xhosa chiefs never enjoyed the political absolutism later ascribed to them in the decades after the formalisation, and thus freezing, of traditional laws. As the prolific observer of 19th century South African Nguni history, John Laband describes:

> "… [a Xhosa chief] exercised his authority only by consensus. His councillors, marked out by the headdress of a single crane feather worn as an indication of their rank, were always senior men of commoner lineages with followings of their own. They

[7] Iliffe, John (2007) [1995], *Africans: The History of a Continent*, Second Edition, Cambridge: Cambridge University Press, p. 103.

[8] Chapter 5 referred to age-sets in Tswana social structure, something which has been in steady decline as a part of the indigenous culture. Its residual impact is similar to what we see in Xhosa lands: while social and cultural relevance of age-sets remains – especially marking the male and female initiation ceremonies, the political relevance is reduced to the friendship bonds chiefs have with members of their age-set with whom they grew up. Chapter 11 on Ethiopia contains a lengthier discussion of the age-sets/age-groups in Oromo society which still forms one of the basic pillars of the very indigenous constitutional order.

[9] Laband, John (2020), *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony*, Caper Town: Penguin, p. 79.

> drastically limited a chief's freedom of action because her had to always bear in mind that dissidents could force his resignation or even desert with their adherents to another chief if he proved ineffective or unpopular".[10]

Xhosa history – especially the 19th century period covering the numerous frontier wars – has instances of popular and successful chiefs who were capable of commanding loyalty united the tribes against the British. These sporadic outbursts of popular inter-tribal unity are less about the indigenous governance structures and more about the leadership qualities, military prowess, wisdom, and charisma of the chief. That is, indigenous Xhosa governance structures themselves did not provide venues for inter-tribal collective action. This was a decentralised system wherein the constituent unts of the confederal union functioned autonomously.

2.2. Internal Diversity

The decentralised nature of Xhosa governance has been both a plus and minus for the resilience of indigenous constitutionalism over time. While disunity exposed the confederation to external attacks and occupation, the system also allowed the separate pieces to continue functioning autonomously, thereby ensuring survival under different types of challenges, albeit while being subjected to political manipulation along the way.

For comparative purposes, we should inject a bookmark here to highlight how the degree of political centralisation could show variation across indigenous constitutions and constitutionalism of Sub-Saharan Africa. The traditional laws and governance structures of the Ethiopia's Oromo which we cover in the next case-study contain a similar decentralised characteristic – once again reminding us how much variation exists across the continent's ethno-linguistic communities and the need to exercise caution in avoiding the appearance of a one-size-fits-all conceptualisation of indigenous constitutionalism.

One historic consequence of a decentralist indigenous constitution is the failure to establish a territorially based polity uniting the people. But such internal diversity also ensures the demographic and cultural resilience from the bottom-up as some separate parts have retained, with varying degrees, their autonomy, while others less so. Differently put, not putting all eggs in one basket have ensured the survival of Xhosa and Oromo language and culture. Compared to nation-building processes elsewhere in the world, it has not been 'the state', its institutions, and policies that has defined the people. There has been no top-down political and constitutional engineering towards nation-building. What has been top down has been the steady increase in interference by the modern state, its policies, and bureaucrats – the defining feature of the next chapter.

While the internal diversity of Xhosa constitutional order and the (relative) autonomy of its component parts might have ensured the resilience to withstand the various waves of political and cultural disenfranchisement that would defined the coming decades of the 20th century, this very

[10] Laband, John (2020), *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony*, Caper Town: Penguin, p. 21.

characteristic had also militarily exposed them to more unified adversaries in the past and made them susceptible to political interference. These two opposing dynamics are juxtaposed below.

2.2.2. Resilience

Scholars who study traditional systems of law and governance around the world tend to acknowledge their resilience and ability to survive both incorporation into officialdom and political manipulation on the one hand, and exclusion from formal politics and subsequent marginalisation on the other. But resilience does not mean indigenous law and governance have remained unaffected but modernity. That is, modernity in terms of becoming exposed to the expanding reach and range of the state, its infrastructure, policies, and bureaucrats; as well as modernity in terms of demographic, social, cultural, and economic changes. Throughout Sub-Saharan Africa, what is indigenous to the continent has indeed managed to withstand the historic winds in many places, but what survives is not undamaged. Gardiol van Niekerk's observations in the South African context highlights both the resilience of indigenous law and the intrusive impulses of the modern state:

> "State regulation, which often resulted in distortion, and conflict with imposed State law underscored by fundamentally different values, could not suppress the natural development of indigenous law and its institutions. The unofficial application of indigenous law by both official and unofficial institutions bears witness both on the resilience of indigenous law and to its inherent ability to adapt to changing circumstances without losing its indigenous character".[11]

Next chapter on the relationship between Xhosa laws and the modern state document the resilience of traditional law throughout the various constitutional phases the country went through. But the result of this two hundred years of various forms of political interference has ended up severing the direct cultural link of continuity between the pre-colonial and post-colonial versions of Xhosa law and governance. In Botswana, we saw how early official recognition had put on indigenous Tswana constitutionalism on a safer footing – combined with a number of qualifying factors such as the country's early historic insignificance for colonial geopolitics which allowed traditional leaders more voice in local self-government and the near demographic majority of the Batswana ethno-linguistic community. In Ethiopia, we will see the opposite. Excluded from modern state structures and policies indigenous Oromo constitutionalism became an idealised political and cultural and social identity for the Oromo people otherwise divided along four religions, different regions, and competing political identities. It is for this reason the chapters on the Tswana and Oromo systems of law and governance devote more space to the details of indigenous constitutionalism.

For South Africa, as one of the comparative case-studies of the thesis, the discussion of traditional systems of law and governance indigenous to the Xhosa cannot be carried out in a symmetrical manner to the other two. Unlike the Oromo and the Tswana indigenous systems of law and governance, we have to track the ups-and-downs of successive constitutional phases South Africa has gone through and the accumulated impact of 200 years of outside political interference. Internal diversity has contributed to resilience of traditional law and governance, but such resilience is inseparable from the various policies of the modern state. What also sets South Africa a little apart

[11] Van Niekerk, Gardiol Jeanne (1995), *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective*, Pretoria: University of South Africa, p. 98.

from the other two case-studies is the sheer size of the country and the various ethno-linguistic communities that inhabit its various constituent parts. This means what happened elsewhere in the country had, both direct and indirect, impact on Xhosa law and governance – the topic of section 3 below.

2.2.2. Official Interference

Just as it is the case with almost every aspect of the history of politics of law in South Africa, things have changed, evolved, gone back, skipped ahead, clashed with what was installed earlier, or consolidated what was put down before. This also applies to the manner and extent of official interference. What we have ranges from the near indifference of early indirect rule to punitive military expeditions of the Frontier Wars; from the paternalistic policies of the 19th century of the Cape Colony to the growing intrusiveness of the Union; from the Bantustans of the apartheid to the current phase of the democratic constitution. Intrusion has been a constant, its manner and extent has fluctuated.

It is the apartheid era where we see the most systematic and comprehensive intrusion into the workings of traditional law and governance. This included the scholarly sphere as well. Chapter 2's subsection 2.8. looked at the literature from South Africa's known as Bantu Studies. Apartheid South Africa had established a number of so-called Bantu studies programmes to coincide with the creation of the homelands. These programmes were different from the earlier approaches in Legal Anthropology (also covered in Chapter 2 a little before the review of Bantu Studies). The scholarly outlook of Bantu Studies was more of applied ethnography rather than academic anthropology. These programmes were designed to help train the modern state's bureaucrats, soldiers, and lawyers.

Notwithstanding the political agenda behind the creation of Bantu Studies, many within these programmes were indeed scholars of indigenous law and governance; and did not refrain from criticising the extent of intrusion; in particular, the imposition of political centralisation on traditional leadership. One such scholar, and the author of the standard text on the topic *The Bantu Peoples of Southern Africa*, W. D. Hammond-Tooke was alarmed by the new policies on traditional leadership which, he believed, distorted the traditional role played by the chiefs.

Hammond-Took was of the opinion that brining the state into tribal leadership, would weaken the consensual element of the traditional system.[12] Legitimacy of traditional leadership was not an official matter on state registry bit more of a local one in the eyes of the members of the community. In addition to matters of governance, leadership traditionally had a paternalistic and symbolic element to it, combined with ceremony, ritual, mystery, knowledge, and secrets. Turning chieftaincy into a salaried position of the state ran the risk of hollowing out the indigenous constitutionalism. Writing on the impact such intrusion has on the indigenous constitutional order in Ciskei and Transkei, Gwendolen M. Carter, Thomas Karis, and Newell M. Schultz dismissively label the new status of traditional leadership as a 'stipendary':

> "While the chiefs were allowed to try cases under traditional law, they were 'assisted' by the magistrates and received an annual stipend in lieu of court fees and confiscations that traditionally formed the basis of their wealth. Later magistrates

[12] Hammond-Tooke W. D. (1985), *Command or Consensus – the development of Transkeian local government*, pp. 211-3.

> assumed sole authority, and in the Ciskei the chiefs were reduced to mere figureheads with judicial and administrative authority passing wholly out of their hands. As the Transkei was progressively annexed – from 1877 to 1894 – they were similarly reduced to stipendaries".[13]

The lead character in Shaun Johnsons' autobiographical novel *The Native Commissioner* observes the fundamental changes that altered the essence of indigenous constitutionalism:

> "[the Native Commissioner] registers that dealings here between powerless black men and powerful white men are conducted in a formally bureaucratic manner – every exchange is through the Chair, every word is minuted, every resolution proposed and seconded. There are none of the long, discursive, cross-legged discussions of the kraals, discussions which end in unspoken understandings rather than punctilious agreements …".[14]

Such official interference was of course not limited to the practice of customary law in Transkei alone. As Dial Dayana Ndima puts it "the colonial influence left the whole of the African life, including customary law, grossly distorted".[15] In addition to deliberate manipulation for political ends, incising the law from the broader context further exacerbated this distortion: "the colonists attempted to understand the rules of African law in isolation from their social context, and produced a monstrous system of distorted institutions".[16] The extent and manner of official interference into Xhosa laws and governance is tracked along the different constitutional phases marking South African history in the next chapter. We now turn to the policies in neighbouring imperial jurisdictions and the direct and indirect consequences on the fate of indigenous Xhosa constitutionalism.

3. OTHER TRADITIONAL LAW AND GOVERNANCE SYSTEMS INDIGENOUS TO SOUTHERN AFRICA

The relationship between indigenous and received laws in Transkei remains the focus of this case-study, but one cannot easily incise and quarantine Transkeian politics and law from what happened in the other provinces of South Africa. It is especially one of the four provinces of the Union of South Africa, Natal, that has played a particularly important role in terms of the recognition and application of indigenous African law. And this role precedes the establishment of the Union in 1910; and goes back to the mid-19th century.

3.1. Natal and Indigenous Zulu Law

The District of Natal which lies along the Indian Ocean coast of southern Africa was annexed in 1843. The colonial presence was mostly around the coast, especially the harbour of Durban. The British did

[13] Carter, Gwendolen M., Thomas Karis, Newell M. Schultz (1967), *South Africa's Transkei: The Politics of Domestic Colonialism*, Evanston: Northwestern University Press, p. 84.
[14] Johnson, Shaun (2006), *The Native Commissioner*, Cape Town: Penguin, p. 178-9.
[15] Ndima, Dial Dayana (2003), "The African Law of 21st Century in South Africa", *The Comparative and International Law Journal of Southern Africa*, Vo. 36, No. 3, p. 340.
[16] Ndima, Dial Dayana (2003), "The African Law of 21st Century in South Africa", *The Comparative and International Law Journal of Southern Africa*, Vo. 36, No. 3, p. 326.

not expand further inland which had been part of the mighty Zulu Kingdom of King Shaka. Natal had briefly been occupied by the Boer farmer-settlers who had left the Cape Colony and had trekked north in order to escape British rule. Here in 1839 they founded one of the short-lived Boer republics, which soon afterwards fell under British control. For us, Natal's importance is not necessarily about its historic role in extending British colonial rule inlands binging about both the defeat of the Zulu Kingdom and the two main Boer states, the Orange Free State and the Transvaal South African Republic. It is Natal's treatment of indigenous law that makes it important.

In terms of African indigenous law and its relationship statutory law, Natal is a trailblazer because of the unique path the colony laid down under Governor Sir Theophilus Shepstone. The Natal Native Commission of 1852 launched by Shepstone predates all such initiatives on the entire continent. Sir Theophilus cuts an interesting figure here; more willing and able engage traditional structures than previous and subsequent colonial administrators. In fact, Shepstone had initially been sent to Natal as the so-called Diplomatic Agent to the native tribes in 1845. Somehow Shepstone managed to get himself appointed as the nominal Supreme Chief of the natives in 1850. Natal was declared a Crown Colony in 1956 and Shepstone became the governor.

During his governorship, traditional leaders and indigenous law were granted recognition.[17] Now, 'recognition' is a noteworthy term here. It is important to highlight that recognition, recording, and codification are not the same thing. Shepstone was in favour of recording the various customary practices as a first step in the recognition of Zulu traditional laws. These records were supposed to function as a non-binding guide to help colonial Magistrates in Natal. The act of officially recording various existing laws in legal terms did not equal the codification of a law.

This practice of recording and recognising indigenous law into a guidebook rather than an enforceable code of laws was soon exported to Natal's neighbour (and one of the four provinces which would eventually form the Union in 1910), the Transvaal South African Republic. Taking advantage of local uncertainty and instability, in 1877 Shepstone invaded and occupied the independent Boer Republic with a forced of only 25 mounted police, leading to its annexation by Britain. Three years later, the territory was ceded back. Retrocession did not put a lid on the geopolitical tensions however. Transvaal, together with its sister Boer Republic the Orange Free State, would eventually declare was against the British. At the end of Anglo-Boer wars, the defeated and occupied Transvaal became first a Crown Colony in 1902, and then a province of the Union of South Africa in 1910.

During the three years of rule by Natal, Shepstone extended his system of recognising traditional structures to Transvaal. The Natal model of administering indigenous African law would remain Transvaal policy even after the Boer Republic regained its sovereignty in 1881. Transvaal's sister republic, the Orange Free State did not contain sizeable indigenous population. It had been annexed by the British in 1848, but with retrocession sovereignty was established in 1854. Like Transvaal, the defeated and occupied Orange Free State fist became a Crown Colony in 1902; and then a province of

[17] Holleman, F. D. (1956), "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique : Symposium-Colloque Amsterdam 1955*, Leiden: Universitaie Pers Leiden, pp. 235.

the Union of South Africa in 1910. Shepstone's influence did not reach this Boer republic; no formal recognition was extended to traditional structures here.

In comparative terms, Natal has thus had more influence for the recognition and application of indigenous laws in South Africa. And Sir Theophilus Shepstone himself seems have been aware of one of the big challenges that indigenous law faces everywhere: codification. Shepstone himself wanted to prevent the freezing customary laws into a rigid unmoveable block and had to resist requests by his colonial superiors to do so. Sir Theophilus' fears that codification could ossify indigenous law proved to be rather prescient.[18] Eventually the pressures became rather persistent however. Sir Theophilus gave up and resigned in 1875. The 1875 Natal Native Administration Act transferred most of civil jurisdiction by chiefs to courts of native law. The provincial Natal Code of Native Law came into being a couple of years later in 1878. But Shepstone's fears turned out to be justified. Following the defeat of the Zulu Kingdom in 1879, there was momentum for consolidating the military gains. 27 April 1889, Zulu traditional leadership was dismantled.[19] By 1891, the Code of Native Law was made rigid and binding:

> "[A]nd Zulu customary law, with all its virtues, was discarded and replaced by a rigid written version of what the Administration wanted the Zulu customary law to be: thus substituting a lifeless, written image of Zulu customary law for the living reality of it".[20]

Now, all of this was happening before the establishment of the Union of South Africa. This means that, in principle, what Shepstone policies and what those came after him did apply only to Natal. In formal terms, this was a separate and autonomous jurisdiction within the British Empire. But in practical terms, what happened in individual British colonies in southern Africa had a tendency to influence policy choices in neighbouring ones. This is partly because the bureaucrats, soldiers, magistrates, and missionaries were likely to see themselves as part of the broader British Empire and not necessarily a part of a specific territory. Treaty-based recognition of Zulu traditional structures and the internal autonomy granted to its leadership puts Natal in the same group as Northern Nigerian Emirates and Indian Princely States. These examples from different corners of the Empire epitomised the British colonial practice of 'indirect rule'. In places where strong indigenous states existed, the British would sign treaties recognising the legitimacy of traditional structures and indigenous leaders; and outsource day-to-day governance to these local political entities. British colonial experiences in places as diverse as Northern Nigeria, India, and Natal helped turn a pragmatic policy of working with the grain into a more principled colonial policy of indirect rule. Put differently, even if jurisdictionally separate, what happened elsewhere in British southern Africa was likely to ripple effects in Transkei as well.

3.2. Basutoland and Swaziland

[18] Shepstone himself did not use the term 'ossify' when he expressed his reservations about codifying and thus 'freezing' indigenous law. The etymological origins of ossify, (from *osteo* in Greek: related to bone) seem more apt for the phenomenon however. Things are hardened into bones at one point, but once calcified they become rigid and stagnant.

[19] For details, see Van Niekerk, Gardiol (2007), "Manipulation of Traditional Leadership and Traditional Legal Institutions: Zululand during the 1880s", *Fundamina: A Journal of Legal History*, Vol. 15, No. 2, p. 213.

[20] Holleman, F. D. (1956), "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique : Symposium-Colloque Amsterdam 1955*, Leiden: Universitaie Pers Leiden, pp. 235.

As the two British colonies in southern Africa, the Cape and Natal were naturally in close political and military cooperation, but there were also three British Protectorates in southern Africa: Basutoland (present-day Lesotho), Swaziland (present-day eSwatini), and Bechuanaland (present-day Botswana). Botswana is one of our case-studies, and an in-depth study of the relationship between received laws and indigenous Tswana law was covered as the first case-study of the thesis. Of the two remaining British Protectorates, it is Basutoland history which has some relevance to the way Xhosa laws were treated by the Cape Colony.

The Boer farmer-settlers who had embarked on their great trek from Cape Colony had come into contact with a number of indigenous communities along the way. King Moeshoeshoe of the Basuto had signed a treaty with British colonial authorities for their protection against Boer incursion into their lands. This put Basutoland under the supervision of the British High Commissioner in Cape Town. By 1871, Basutoland was annexed into the borders of the Cape Colony, but this was a short-lived arrangement. By 1884, Basutoland was transferred back to the direct authority of the crown as a Protectorate. During those few years as part of the Cape Colony an important legal development took place however.

In 1872, the so-called Commission on Native Lands and Customs of the Basuto wrote its report on the state of indigenous law. The report fell short of a comprehensive collection, and thus has not become a reliable historical source on Basuto laws. According to Brookes, the report was hurried, imperfect and sometimes even incorrect.[21] But the 1872 Commission had an important but indirect relevance for the Xhosa laws of the Transkei: it was to act as the forerunner to the 1883 Cape Commission on Native Laws and Customs – which to this day remains the most comprehensive collection of Xhosa laws.

3.3. From Legal Pluralism to Monism

Until the political centre of gravity of the new country was consolidated in Pretoria, the four provinces of the new Union of South Africa and the British Protectorates in southern Africa went through a period of diversity in policies. In British Bechuanaland chiefs had autonomy, in Transkei chiefs' courts existed along Magistrates' court, in Natal indigenous law was codified into law and indirect rule gave Zulu traditional governance recognition, in Transvaal there was a blanket refusal to formally recognise traditional law and governance.[22] While in the Cape, there was policy diversity and legal pluralism within: "Different approaches to the conflict between the law of the land and customary law developed in the four colonies. Within the Cape Colony, there were differences between one area and another".[23]

Due to its size and power, the Cape Colony had dominated southern African geopolitics in the years before the Union of South Africa was formed in 1910. In addition to the Government and bureaucracy

[21] Brookes, Edgar Harry (1924), *History of Native Policy in South Africa: From 1830 to the Present Day*, Nasionale Pers.
[22] Bennett, T. W. (1985), *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta and Co, p. 46.
[23] Rubin, Leslie (1965), "The Adaptation of Customary Family Law in South Africa", in Hilda Kupe rand Leo Kuper (eds), *African Law: Adaptation and Development*, Berkeley: University of California Press, pp. 199.

of the Cape Colony, the imperial 'mother city', Cape Town also housed the British High Commission overseeing the Protectorates. Following the defeat of the Boer Republics and their inclusion within the new Union, while the Cape retained a great deal of its political influence, it was no longer the dominant power. The economic boom ushered in by the discovery of gold and diamonds in the lands of the former Boer Republics brought an end to Cape Town's economic and political dominance. Johannesburg was now the economic powerhouse of the Union.

As the centre of political and economic gravity shifted to Pretoria and Johannesburg respectively, what the British did in their Basutoland and Swaziland Protectorates started to matter less for the formulation of South Africa policies. Our Botswana case-study had shown how since the establishment of the Bechuanaland Protectorate, the country had taken a different path in its policies towards traditional law and governance. The British High Commission no longer had any direct or indirect role on the formulation and implementation of native policies in South Africa. This was of course underscored by the creation of the Union of South Africa with the Cape and Natal. In parallel to what the fate of the Cape Colony, what happened in Natal was now determined in Pretoria. The local initiatives towards recognising Zulu laws and forms of governance were soon discontinued. Policies on traditional law were now nation-wide and standardised. We now turn our attention to in-depth account of the fate of Xhosa laws along the various constitutional phases defining the country's history.

Chapter 9
The *longue durée* Relationship between Xhosa Laws and the Modern State

---

1. THE NON-LINEAR COMPLEXITY OF SOUTH AFRICA

> "Among [the Xhosa between the Great Kei river and the boundary of Natal] a system of law has for generations past been uniformly recognised and administered. Although an 'unwritten law', its principles and practices were widely understood, beingly mainly founded upon customary precedents, embodying the decisions of chiefs and councils of bye-gone days, handed down by oral tradition and treasured in the memories of the people".
>
> *Cape Commission on Native Laws and Customs, 1883* [1]

To this day, the two-volume report of 1883 Cape Commission on Native Laws and Customs remains the most comprehensive collection of Xhosa laws. To set the laws in context, the report also contains a voluminous appendix of additional historical and anthropological material on the genealogy of various Xhosa chieftaincies; past reports of commissioners, field-agents, officers, magistrates, and clergy; and the conclusions and recommendations of the contemporary investigation of the Commission. The report is not only wide-ranging and all-inclusive, but it is also remarkable in terms of its appreciation of the workings of unwritten law and its openness to other legal systems – especially when set within the particular historical context of late 19th century British colonialism.

Had history followed a linear path, we would have then expected things to evolve in a direction which eventually culminates in legal equality for African indigenous law. Alas, politics does not always move towards the more inclusive. As South Africa's history reminds us, things can also go in the reverse direction. The benefit of a *longue durée* historical perspective is that it allows us to see the various

[1] *Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs*, Cape of Good Hope Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons, Part I, Section 8, p. 14.

episodes of jurisdictional and institutional change and policy redesign as part of a bigger whole – a sort of a bird's-eye-view of both the progressive and retrogressive across time. This chapter will trace the different political and legal dynamics defining the different political episodes. While big constitutional changes separate these various episodes, there is also a great deal of continuity across. After all, the people responsible for running colonial justice and administration under successive systems (i.e. the Magistrates, the Native Commissioners, the field-agents, and the clergy) remained the same; some crossover continuity is unavoidable in such scenarios when people continue with the standard operating procedures they have worked with before. Plus, new policies were often designed only in part applicable to one aspect of the law, or they were superimposed onto already existing practices rendering some continuity unavoidable. What is more, formally defunct institutions could sometimes remain in function until the new institutions were fully up and running.

What is common across all political episodes of South African legal history is that traditional indigenous law and modern statutory law always end up interacting in a system of multiple, crosscutting, and overlapping jurisdictions. Legal pluralism has been a defining feature of South African law: during its time as a half-station of the Dutch East India Company (*Vereenigte Oostindische Campagnie* VOC) ; during the time the Cape Colony of the Good Hope and the frontier wars in the region which was then called Kaffaria; during the annexation of the Kaffraria into the Cape; during the benevolent paternalism of the early days of the Union of South Africa; during the apartheid years of the Republic of South Africa; and during the new era of democratic majority rule. While the VOC years were defined by legal pluralism (the soldiers and sailors of the VOC were subject to different laws then the local free citizens, the Khoisan in the hinterland of the colony were subject to different laws than imported slaves from the Mozambique coast and Madagascar and indentured servants from Indonesia), our interest is on the bigger question of recognising and applying indigenous African law. In order to understand the steps that eventually led to the (partial) recognition of Xhosa laws, we have to examine the complex legal system that resulted from the British taking over control of a territory where Roman-Dutch law had been the Common Law of the land.

2. THE SOUTH AFRICAN STATE AND INDIGENOUS LAW AND GOVERNANCE

2.1. Roman-Dutch Law of the Colony meets English Law

Even before facing up to the challenge of recognising and applying indigenous law, the newly established Colony had to deal with the uncertainty about the relationship between English Law and Roman-Dutch Law. The VOC had established its half-station on the Cape of Good Hope in 1652. Almost immediately, the question of legal pluralism emerged as a legal challenge. In this African outpost of a private company chartered in the United Provinces of the Netherlands, it was not clear which Dutch province's laws applied to VOC soldiers and sailors. It was decided that the laws and precedents from the province of Holland would hold – not the other Dutch provinces of Friesland, Gelderland, Zeeland, Utrecht, Limburg, Groningen, Overijssel, Drenthe, and Brabant.[2] The occupation of the Netherlands by the French in 1795 and its subsequent transformation into a French satellite state under the name

[2] Faris, John Andrew (2015), "African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems, *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity*, Vol. 10, No. 2, pp. 171-89.

the Batavian Republic had given the British the wartime justification to seize what had become enemy territory.

At the end of the Napoleonic Wars, the former VOC halfway-station had been incorporated into the British Empire as the Crown Colony of the Cape of Good Hope. The British accepted Roman-Dutch Law as the Common Law of the land, but due to the arrival of legal professionals trained in English law, English legal doctrines and precedents started to infiltrate Cape jurisprudence. This was not a deliberate attempt to change the law of the land, but the consequence of the behaviour of colonial judges and magistrates who were more familiar with the laws of London. Yet over the course of centuries going back to the establishment of VOC's Council of Justice (*Raad van Justitie*) in 1685, the city Cape Town had its own prominent and powerful legal establishment trained in Roman-Dutch law. Not only did the Crown have a shortage of lawyers trained in English Law, but it also had a sizeable community of lawyers who would resist the unilateral imposition of a different legal system. In 1858, a Commission of Enquiry was set up looking into how English and Roman-Dutch law mix; but the uneasy coexistence was left in place.[3] This eventually resulted in a uniquely South African Common Law combining codified civil law with English precedents.

Ostensibly, none of this mattered to indigenous law. But one might argue that the coexistence of legal professionals trained in two different two legal systems, i.e. English common law and Roman civil law, functioned as a bridgehead for further legal pluralism; at least in principle. Roman-Dutch law was open to accepting customary law as long as certain criteria were met; i.e. that the law should be reasonable, that there should be certainty in the expression of the law, and that there should be long-term indications of its observance. We should leave no room for misunderstanding here however: The potential openness of Roman-Dutch law in principle did not lead to the inclusion of indigenous customary law. Legal professionals did not know the African law; and those who did were not lawyers. As a result, African precedents which could have played a role in the evolution of South African law were unknown or inaccessible to those who practiced law.

Cape Town's lawyers were more likely to be somewhat more familiar with the smaller bands of indigenous Khoisan, but by this time the social structure of the aboriginal inhabitants of the region had been broken down. The preceding 200 years of colonialism had decimated the indigenous Khoisan culture of the Cape. Most coastal Khoisan had been drawn to the pull of the city of Cape Town, while other Khoisan bands had retreated further inland into the deserts avoid contact with settlers. Where traditional indigenous law survived were the lands of the Xhosa people, the amaXhosa, far along the eastern frontiers of the colony in the region known to the British as Kaffraria or Kafirland. Cape Town lawyers simply did not know the Xhosa laws; they were unlikely to have ever encountered the amaXhosa. Those who did were a handful of colonial officials from the frontier itself, and the frontier was officially under martial law.

2.2. Officially Sanctioned but Unofficial Recognition of Indigenous Law

[3] For the coexistence of Roman-Dutch and English law in the Cape Colony during the 19th century, see Erasmus, H.S. (2013), "Circuit Courts in the Cape Colony During the Nineteenth Century: Hazards and Achievements", *Fundamina*, Vol. 19, No.2, pp. 266-99.

The collection of Xhosa laws known as the 'Compendium of Kafir Laws and Customs' epitomise this era defined by geopolitical fluidity and legal experimentation. It was compiled by the Chief Commissioner in British Kaffraria, Colonel John Maclean, first published in 1858.[4] Some of the documents included in compendium are the papers by Reverend Dugmore (originally published in 1846-47 on the pages of the *Christian Watchman*); some are the field-reports of the 'Tambookie' (i.e. Thembuland) agent Mr. Warner; some are the notes of the Crown Commissioner among the Gaika tribe of the amaXhosa, Mr. Charles Brownlee. Colonel Maclean had been in the process of collecting and compiling Xhosa laws before 1858. His letter to the Tambookie Agent, Fort Murray, dated 25 February 1856, gives a sense of some of the earlier openness to indigenous law among colonial officers and bureaucrats, and a willingness to learn. Either out of the force of circumstances lonely officials without much military force to support them in isolated tribal outposts faced or as a reflection of a principled appreciation of local legal systems, there seemed to be a genuine desire to understand the workings of indigenous law:

> "I am much obliged to you for so kindly acceding to my rather troublesome request, and I am the more obliged to you as without some such help, and without some insight into the nature of Kafir law, the newly appointed magistrates might feel some difficulty in forming an opinion on the cases brought before them, which would be thought fair and just, and in cases of fines, would be liable to be imposed upon and misled… As there is safety in the multitude of counsellors, so I hope, by gathering and comparing, we may get a general and correct view of Kafir jurisprudence, and I hope you will not mind your name being mentioned to the Governor as one of the said counsellors".[5]

While an attempt to accommodate Xhosa laws were in the making in the east of the Colony, political developments in Cape Town put the entire experiment in jeopardy. By 1853 the Cape Colony had been granted the status Representative Government, which increased the political hand of civilian settlers at the expense of colonial bureaucrats and the military.[6] Xhosa lands in the Transkei, called Kaffraria by the British back then, was technically outside the Colony of the Cape of Good Hope. But the eastern border of the colony was fluid and expanding; and colonial settlers often had interests different from the Colonial office in London. In a dispatch dated 13 September 1853, addressed to the Secretary of State for War and the Colonies at the time, the Duke of Newcastle, by Governor of the Cape of Good Hope, George Cathcart wrote as follows:

> "The colonists be restricted to their well-defined limits on the one hand, and Kafirs not prematurely annexed to the Colony and subject to Colonial laws and control, but

[4] There are two print editions; the first one is Colonel Maclean (ed.) (1858) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers; the second print with a different page lay-out was published the following year: Colonel Maclean (ed.) (1859) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers.

[5] Colonel Maclean (ed.) (1858) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers.

[6] Our case-study is on Xhosa laws in the Transkei, but it is imperative point out the importance of this declaration for future race relations in South Africa. Regardless of race, free citizen (male) residents were placed on the electoral roll – including the sizeable Cape Coloured Community – albeit subject to multiple franchise based on education and property. The generosity of the 1853 Cape Constitution became a sticking point during the negotiations establishing the Union.

> as recognized British subjects under Imperial rule, allowed to be governed as to their interior discipline, by their own chiefs, according to their existing laws, and retaining the usages to which they have been accustomed, until, through intercourse with European commerce and education, the gradual work of civilization shall remove those bad practices which are most objectionable".[7]

Now, this contrast between colonial policy priorities and the interests of colonial settlers is not something we see in our other case-studies of this investigation, Botswana and Ethiopia. It is however a political dynamic that was common to other British colonies in Africa where sizeable settler communities existed. In places like Zimbabwe and Kenya where the settlers had moved into indigenous tribal lands, there would be a great deal of political lobbying – in London and in the colonies – against the creation of Native reserves, and the recognition of traditional leadership and traditional (indigenous) laws. In other places without sizeable settler communities like Nigeria and the Gold Coast (present-day Ghana), the path towards recognition has been determined by the relations between colonial authorities and traditional leaders directly, without the settlers in the picture. For the amaXhosa, there is has been both.

Kaffraria beyond the Kei River, in the region that would later be called Transkei, Xhosa tribal chieftaincies dating back to precolonial days had remained in place. To the south-west of the River Kei in so-called British Kaffraria the amaXhosa found themselves sharing the land with a growing number of European settlers. In 1847, British Kaffraria where more land was available for commercial agriculture was annexed to the Cape Colony. Once the frontier wars ended in 1853, this region (which later would be called Ciskei) became the destination for more settlement. Many of the amaXhosa in the region ended up becoming labourers for colonial settlers and their farms. The legal status of indigenous Xhosa law has fluctuated as colonial borders and status changed. The main focus of this case-study is the relationship between the statutory modern laws of the South African state and traditional indigenous Xhosa law in the Transkei; but due to the changing borders and status throughout the successive political episodes defining the country's history, we will have to occasionally include Ciskei and later the new post-apartheid province of the Eastern Cape in our investigation. Just a little earlier how the presence of settler communities can impact on the power of traditional authorities and the status of traditional indigenous law. Gardiol van Niekerk reports evidence of this:

> "The application of Western law to the indigenous population proved to be so problematic that British Kaffraria remained under martial law (until 1859), thus ensuring that the Magistrates had a free had in resolving disputes in accordance with indigenous law while at the same time the Cape government steadfastly refused to recognise that system". [8]

Martial law provided the legal foundations for the discretionary power of the colonial bureaucrats stationed along the frontier. This meant that instead of the laws and directives of Cape Town, local

[7] Reproduced in *Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs*, Cape of Good He Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons, Part I, Section 15, p. 16.

[8] Van Niekerk, Gardiol Jeanne (1995), *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective*, Pretoria: University of South Africa, p.58.

colonial bureaucrats would administer the frontier according to the manner they saw fit. From their isolated tribal outposts, the small number of British colonial officials and soldiers were in no position to subdue an entire region by force. This often meant that traditional leaders were frequently co-opted into day-to-day decision-making. Out of necessity and not out principle was indigenous law recognised and applied in Kaffraria/Transkei.

Next door in British Kaffarria/Ciskei, there was more colonial presence, the land was more accessible, and there were more settlers. In 1865, British Kaffraria is annexed into the Cape Colony (Wet no 3). In principle, it is the laws of the Cape that applies across the land. In practice, there is a lot more flexibility. The British Kaffrarian Ordinance, No. 10, 1864 had left some leeway for the 'Kafirs, Fingoes, and Tambookie' along the frontier. Act 18 that follows in the same year is more open about these native locations where the application of colony law at present was 'unsuitable'.[9] It is important to note that whenever a British citizen was involve in a legal dispute, none of the above applied. It was then the laws of the Colony of the Cape of Good Hope.

The Native Succession Act passed the same year is a more explicit qualification to the Cape Colony's ostensible legal monism. According to the 1864 Act the management of the estates of permanent resident Africans will be done through African customary law in cases where both parties were indigenous to the region. This exemption from the Colony's own succession laws based on Roman-Dutch law and thus the first official recognition of Xhosa laws in South African legal history. There was no comprehensive recognition of indigenous African law in the legal system of the colony, but this exemption granted Xhosa laws on succession official legitimacy. The 1864 Native Succession Act is also noteworthy for abandoning the term 'Kaffir law' and adopting 'Native law' instead.[10]

Now, the 1864 Native Succession Act is indeed a formal recognition of legal pluralism, and by extension, of indigenous political rights. There were also semi-formal mechanisms of recognition – especially when such mechanisms could exist outside the formal constitutional architecture and away from Cape Town. One way of giving political voice to the indigenous was the so-called Glen Grey system in Transkei. This was a system of local governance which brought in Xhosa political representation to local decision-making, but it was done far away from the gaze of the Cape government, politically responsible to the settlers since 1853. While there was no formal channel giving voice to the indigenous in the existing constitutional set-up of the Colony of the Cape of Good Hope, the practice on the ground was more flexible. This had especially been the case along the eastern frontier of the Colony, paving the way for a system where colonial authorities dealt with traditional authorities directly: "The Glen Grey system amounted to a structure of more or less representative councils operating under the supervision of the magistrates and exercising some administrative function".[11] M.P. Vorster sees this as the first attempt at modern governance:

[9] *Report of the Cape Commission on Native Laws and Customs* 1883, p. 8.

[10] This could partly be because the term 'Kafir' had become synonymous with the amaXhosa; and that the authorities wanted a broad formulation that could apply to other indigenous communities as well. It could also be a reflection of imperial policies elsewhere. Across the Empire, during mid/late 19th, variations of 'Tribal law' designation were being replaced 'Native law' in official terms. The term would change to 'Black Law' during early the 20th century, and later would become 'Bantu law' with apartheid.

[11] Venter, Francois (1985), "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei", in Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, p. 4.

> "The Glen Grey Act of 1874 provided for the establishment of location boards and district councils for the administration of local affairs in the Glen Grey district. The same year the so-called Glen Grey system of local government was introduced b proclamation in the Transkeian territories, in a slightly adapted form. It provided the first substantial system of modern local government in Transkei".[12]

The Glen Grey system could have well been a noteworthy mechanism of incorporating indigenous leadership into local governance, but this did not mean that colonial expansion had ended. Most of Transkei was incorporated into the Cape with Transkeian Annexation Act 38 1877. The remaining Xhosa territories were then annexed between the years 1877 and 1894.

We had seen how the Native Succession Act of 1864 had dented the appearance of legal monism that was supposed to apply to inhabitants of the Cape. Once the remaining amaXhosa lands were incorporated into the Cape Colony, deviations from official legal monism became standard policy in Transkei. For comparative purposes, this is a point that needs to be highlighted: official declarations and policies on the ground could diverge from one another. Academic researchers have to know, not only of the letter of the law, but they also have to remain alert about how the law is put to into practice. In its survey of the state of indigenous law in Colony, the Cape Commission on Native Laws and Customs looked at both black letter laws as well as the practice on the ground. Their final report stated that there was in fact an official acceptance of deviations from Cape laws in practice, and the acknowledgement and acceptance of this widespread practice by Cape authorities. What is more, the Commission recommended the continuation of the practice:

> "In the divisions of King William's Town and Queen's Town, more particularly, the Special Magistrates and Superintendents of Natives, without any judicial authority under statute, have continued to administer customary native law; and in some locations and villages the Native Headmen deal with petty cases and disputes brought before them for arbitration and settlement, although there is no provision whatever for the enforcement of their decisions".[13]

The Commission found the practice was particularly pervasive throughout the eastern frontier of the Cape Colony – an area distant to the projection of colonial might and without much settler presence:

> "In the Transkei and Griqualand East, as well as in Gcalekaland and Bomvaland, we also found that many cases are adjudicated according to native law and custom, except where British subjects are concerned; and the Chiefs and Petty Chiefs of Tembuland – under terms of a convention made with them by the Colonial Government in 1875 – exercise authority according to native usage within their own sections".[14]

Deviations in from the official legal monism of the Colony and the application of indigenous law only occurred when all parties were Xhosa. For cases involving non-Natives, that is, Whites, Indians, Cape

[12] Vorster, M.P. (1985), "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei", in Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, pp. 22.
[13] *Report of the Cape Commission on Native Laws and Customs* 1883, Section 24, p. 19.
[14] *Report of the Cape Commission on Native Laws and Customs* 1883, Section 24, p. 19.

Coloured, then Roman-Dutch Law applied. What had started as a policy borne out the force of circumstances – in geopolitical, material, and personnel terms it was impossible for thinly-stretched colonial authorities to impose legal monism – in time became official policy, albeit technically within the discretion of the Magistrates. For example, Magistrates' courts had discretion to apply Native Customary Law when all parties are Africans.[15]

We had started this chapter off with a quote from the 1883 Report of the Cape Commission on Native Laws and Customs. The quote captures the inclusive, albeit paternalistic, views held by colonial officials from the Transkei. The tone is not very different from that of the 1858 Colonel Maclean Compendium on Kafir Laws, although the two-volume report of the Commission and its extensive appendix present a more advanced knowledge of Xhosa history and law. In any case, the Maclean Compendium is reproduced in the Report's Appendix B along many other relevant material. The commission's final report includes maps, letters, genealogy, minutes, and various forms of evidence ranging from field-reports to court cases. The second volume of the report is exclusively devoted to various ways of recognising, adopting, and giving effect to indigenous law.

The Commission was formed in 1880. Its members were drawn from the legal profession and the colonial bureaucracy in the Cape. Its ten members included lawyers, magistrates, judges, field-agents, and commissioners. The generous tone of the report we had mentioned earlier is perhaps best captured in its statement that indigenous laws were "not unlike that which prevailed among our Saxon ancestors". [16] Such generosity is of course combined with paternalism as the report frequently uses the adjective 'primitive' for indigenous law. Another theme prevalent throughout the report is the acknowledgement and acceptance of an uncodified parallel existence of indigenous Xhosa law in Transkei. Not only did the report conclude that such practices exist throughout Transkei, it effectively endorsed it:

> "It has, however, been fully brought out in evidence before the Commission that in several of the Frontier districts the mass of the inhabitants of the Native Locations, although legally subject to Colonial Law, have been only nominally so; and to a very considerable extent they are still actually under their own traditional laws and usages, to which they appear to be attracted by habit and familiarity, as well as by the fact that their mode of procedure is simple and inexpensive".[17]

Following this general tone appreciation of the workings of unwritten indigenous law, the Commission sought to turn practice into theory:

> "The result of the enquiries prosecuted, and the bulk of the testimony received by the Commission, will be found to clearly demonstrate that many of the existing Kafir laws and customs are so interwoven with the social conditions and ordinary institutions of the native population, especially in the recently annexed Territories, that any

[15] Rubin, Leslie (1965), "The Adaptation of Customary Family Law in South Africa", in Hilda Kuper and Leo Kuper (eds), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press, p. 200.

[16] *Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs*, Cape of Good He Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons, pp. 14-6.

[17] *Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs*, Cape of Good He Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons, Part I, Section 23, p. 18.

> premature or violent attempt to break them down or sweep them away would be mischievous or dangerous in the highest degree, besides as experience has shown, defeating the object in view. We consider it would, therefore, be most inexpedient wholly to supersede the native system by the application of Colonial Law in its entirety; and we have directed our attention to the subject of suggesting and drafting a special Code and Regulations which, for the present, would leave such of their customary laws as are not opposed to the universal principles of morality and humanity substantially unaltered, and the same time secure an uniform and equitable administration of justice in accordance with civilised usage and practice".[18]

Here we see one of the early uses of the 'repugnancy clause' which would eventually be employed in other parts of the empire as well: indigenous law is accepted as legally valid as long as it is not deemed repugnant to natural justice, equity, or good conscience. The Commission felt the need to inject this legal prerogative of the Crown as a preparation for potential conflict of laws that may arise in the future. Under different formulations and wording, this potential power to disallow indigenous law was granted to colonial authorities throughout the empire. Due to the formulation 'native laws valid as long as not repugnant to natural justice...', it has come to be known as the repugnancy clause. Here in the Cape Commission Report we see an *avant la lettre* version of a legal instrument that will become particularly common during the closing decade of colonial rule in Africa.[19]

A couple of years after the publication of the report, we see the first indication of its recommendations being heeded. In 1886 the colony-wide criminal law is abandoned, and a new Transkeian Penal Code is drawn up in an effort to give effect to Xhosa law (Wet no 24 1886). But the Report of the Cape Commission on Native Laws and Customs is important not for its recommendations, but for laying out comprehensively the way Xhosa laws were in fact acknowledged and applied in the Transkei, in an officially-sanctioned but unofficial way. T. W. Bennett describes the way the discrepancy between the principle and the practice became systematic:

> "The Law Department in Cape Town refused to consider allowing customary law to be applied; the magistrates on the spot realized that this policy was simply untenable and they had no option but to bow to the views of the litigants and so, de facto, customary law was applied."[20]

This was an open secret at the time. Even without official endorsement from the Cape Government, Xhosa laws had direct effect and direct applicability for cases involving permanent residents of the Transkei, only limited by a version of the repugnancy clause. According Leslie Rubin: "There was no recognition of customary law, although the practice grew of giving effect to transactions based on customary law when it did not conflict with the law of the colony, and was not repugnant to morality

[18] *Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs*, Cape of Good Hope Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons, Part I, Section 28, page 20.

[19] During the 1960s, variations of the repugnancy clause (also called the repugnancy proviso) would be adopted in Uganda, Nigeria, Kenya.

[20] Bennett, T. W. (1985), *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta and Co, p. 41.

of public policy".[21] In his 1924 book, *The History of Native Policy in South Africa: from 1830 to the Present Day*, Professor Edgar H. Brookes looks back at this time and labels this practice the 'Transkeian method': "The result of its labours is the characteristic Transkeian method of fully recognising and administering Native Civil Law without codifying it".[22]

The law of Transkei was officially-sanctioned to deviate from the legal monism of the Cape, but this *de facto* system of legal pluralism was, *stricto sensu*, officially non-existent in the law books and legislation of the colony. The Transkei Penal Code of 1886, together with the earlier Native Succession Act of 1864, were the only officially-sanctioned deviations from legal monism in favour of Xhosa laws. A more pronounced and comprehensive acknowledgment of legal pluralism came with the establishment of the Native Appeals Court in 1894. This was in fact an official acceptance that the Colony's highest court, i.e. the Supreme Court, had no jurisdiction over African indigenous law. We can thus use 1894 as a bookmark ending of the legal arrangement of the parallel existence of indigenous Xhosa law along Roman-Dutch law in an officially-sanctioned but unofficial manner.

2.3. Formal Recognition of Legal Pluralism in the Cape

In order ensure fairness and consistency in the application of Xhosa Laws, a Transkei Native Appeal Court was set up in 1894. As the preceding historical overview shows, colonial knowledge of indigenous laws was uneven and partial. This had been a problem from the Kaffraria frontier days, but since the Chiefs' Courts did not keep written records, things were managed in more informal *ad hoc* ways. With end of the frontier wars and the annexation of Kaffraria into the Cape, the case-load of the more loosely organised Chiefs' Courts multiplied. Combined with the more formal recognition of Xhosa law in some areas of the law (i.e. the 1864 Native Succession Act and the 1886 Transkei Penal Code), the need for consistency in application became a pressing concern. The way to ensure this was through the creation of a Native Appeal Court, right at the heart of Transkei in King William's Town (historically also spelled Kingwilliamstown) in 1894.

Despite the voluminous 1883 Report of the Cape Commission on Native Laws and Customs, most colonial officials on the ground were far from being in an authoritative position to determine, or even know, the applicable indigenous laws. Determining whether Xhosa law applied to the case at hand, and if it did which Xhosa law applied, and whether parties to a dispute invoked Xhosa laws properly were often beyond the knowledge of the Commissioners, Magistrates and Judges. In order to deal with this shortage, so-called Native Assessors were enlisted: "these assessors were old men, wise in tribal customs, who answer the questions asked by the court. But the court need not accept the opinions expressed by the assessors if it does not think they are correct or good".[23] Regardless of possible hiccups in its day-to-day workings, the creation of the Transkei Appeal Court is a formal acknowledgement of legal pluralism. This establishes that Xhosa laws of the Transkei were now officially recognised as a separate legal order with its own high court of appeal separate from the Supreme Court of the Colony of the Cape of Good Hope.

[21] Rubin, Leslie (1965), "The Adaptation of Customary Family Law in South Africa", in Hilda Kuper and Leo Kuper (eds), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press, p. 200.
[22] Brookes, Edgar Harry (1924), *The History of Native Policy in South Africa: from 1830 to the Present Day*, B. 1, 111, quoted in NJJ Olivier (eds), *Suid Afrikaanse Bantoereg*, *Regsversameling*, Stellenbosch University, p.4.
[23] Lewin, Julius (1944), *An Outline of Native Law*, Johannesburg: RL Esson and Co. p. 9.

Going in-depth into the details of the meandering relationship between the modern statutory laws of the Cape Colony and the traditional laws of the Xhosa in Transkei allows us to capture the nuances and the complexities of the relationship. The risk however of only relying on within-case investigation is the underappreciation of relevant factors from outside Transkei, and indeed from outside the Cape Colony. 1894 is the date marking the official acknowledgment of the existence of a Xhosa legal system, but the year also marks a tense period in southern African geopolitics. After a difficult campaign, the British finally defeated and subdued the Zulu Kingdom in 1879. Right next door in Transvaal, the relatively short and small-scale first Anglo-Boer War had seen the unprepared British military succumb to bands of mounted Boer guerrilla in 1881. The badly-planned and poorly-executed Jameson raid into the Transvaal we had covered in Chapter 4 was only a year away. Concocted by the colonial politician Leander Starr Jameson as a way to induce an uprising by the non-Afrikaner inhabitants of the Transvaal paving way for annexation by the Cape, the 1895 raid would end up being a failure and an embarrassment.

From then on, the tensions with the Boer Republics became impossible to contain, culminating in the bigger, longer, and bloodier Second Anglo-Boer War (1899-1902). Nothing in the Cape Colony during this time can be properly understood without southern African geopolitics in the picture. Britain had its eye on the two Boer Republics sitting on gold and diamonds, which were situated in-between the Crown Colonies of Natal and Cape, and the Protectorates of Bechuanaland (present-day Botswana), Southern Rhodesia (present-day Zimbabwe), Basutoland (present-day Lesotho), Swaziland (present-day eSwatini), and Nyasaland (present-day Malawi). The creation of the Cape Colony Native Appeals Court in 1894 must be set in this particular historical context. What was done in the Cape was bound to be carried out with an eye on the future of regional politics. With the benefit of historical hindsight, we also know that the two Boer Republics will have their autonomy restored after military defeat and occupation. Together with the two Colonies of the Cape of Good Hope and Natal, the Orange Free State and the Transvaal South African Republic would soon join the new South African Union that was to be established in 1910. History also tells us that the Great War is just around the corner, and the German Colony of North West Africa (present-day Namibia) is right next door.

Set within this geopolitical background, the period that starts with the establishment of the Cape Native Appeal Court 1894 is one where the chaos and displacement of Anglo-Boers war is set against the backdrop of an economic boom spearheaded by mining and growing immigration from all parts of the world. Behind closed doors the defeated Boer Republics were courted to join a new federal union (within the Empire) which would grant a fair amount of autonomy in internal affairs. The defeated Boer Republics also had to be convinced that the comparatively progressive policies of the Cape were not to be imposed onto the rest of the members of the Union. In addition to the Native Succession Act, the Transkei Penal Code, and the Native Appeal Court, what was particularly problematic was the electoral rights of the Cape Coloured Community.

In the two former Boer Republics, only literate white men had the right to vote. By 1893 Natal had acquired ‘Responsible Government’ which made it accountable to it residents – in principle including all free male citizens, while ensuring voter registration qualifications disenfranchised indigenous Africans and Indian migrants. It is therefore no coincidence that the South African Native Affairs

Commission (1903-5) was established a year following the end of the second Anglo-Boer war.[24] According to Julius Lewin "the object of improving Native law and, as far as may be, assimilating it with the ordinary Colonial law should be kept in view as an ultimate goal".[25] This was the time when political negotiations toward a federal union in southern Africa were underway and the rights of the indigenous were one of the main political concerns. It is noteworthy that the Commission itself is called 'South African' yet technically neither was there a South Africa at the time of the Commission was put together nor was there one at the time the Commission published its report. There is very little doubt that the Native Affairs Commission was laying the groundwork for the 1908-9 national convention which led to the South African Union.

The demographic size and the economic power of the Cape Colony historically held in southern Africa was a sticking-point for the other three. The Cape was used to getting its way, but the smaller members of the federal union in the making were adamant that things were not imposed from Cape Town in the new union. In the meantime, the economic boom brought in by mining was strengthening the hand of the two former Boer Republics. What this all means is that the creation of the Native Appeals Court in 1894, and by extension the formal recognition of legal pluralism in the Cape, have to be set in the broader geopolitical context. The process leading to the Union had limited the autonomy of the Colony in its internal decision-making. But this informal practice of holding back became formalised after 1910. Once formed, the Union Government became the highest political authority in the land. From now on, the status of Xhosa laws was no longer within the political monopoly of the Cape Colony.

2.4. Formalisation of Legal Pluralism and the Benign Paternalism of the Union

The 1910 Union of South Africa marks a dilution of Cape Colony's historical domination of southern Africa. From now on, the Cape would have three political counterparts as the constituent provinces of the new federal union: the two former Boer Republics going through mining booms and increased immigration, and Natal, whose Indian Ocean port Durban was fuelling a related economic boom driven by immigration and the construction of railroads linking the port to the mining regions inland. The changing power dynamics were also reflected in the constitutional architecture of the union – even in the geographic distribution of the *trias politica*.

The former capital of the Transvaal South African Republic, Pretoria, was chosen as the administrative capital housing the executive branch of the new state; the former capital of the Orange Free State, Bloemfontein became the judicial capital getting the highest court of the new state, the Appellate Division (later renamed the Supreme Court of Appeal); while the legislative branch remained in Cape Town. The British High Commissioner overseeing the British Protectorates in southern Africa (Basutoland, Swaziland, Bechuanaland, Southern Rhodesia, Northern Rhodesia, and Nyasaland) continued to sit in Cape Town. Cape Town still held a great deal of economic and political power, but

[24] South African Native Affairs Commission (1905), *Report with annexures Nos 1 to 9*, 1903-1905, Cape Town: Cape Times Limited. For historical reasons, it should be noted before the electoral victory of the Afrikaner National Party in 1948 and the subsequent state policy of 'apartheid', a comprehensive national policy of 'separateness' between the races was first officially discussed in this Commission.

[25] Lewin, Julius (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, p. 233.

the new economic powerhouse Johannesburg and the new political capital Pretoria were starting to challenge the predominance of Africa's 'mother city'. In addition to changing political and economic dynamics, the Union itself was clearly aiming to co-opt Afrikaners and project a sense of political ownership. Not only that the capitals of the two former Boer Republics were now recognised as the country's administrative and judicial capitals, but Afrikaans language and culture were put on par with English. The new imposing Union buildings in Pretoria are marked by two towers of each side, symbolising English and Afrikaans. Incidentally, the union buildings are situated not too far from another imposing but a more sombre construction, the Voortrekker Monument, dedicated to the hardship Boer farmer-settlers faced in their great trek north after leaving the British occupied Cape. The Union was supposed to symbolise Afrikaner-English reconciliation.

From now on the fate of Xhosa traditional leadership and indigenous laws became a Union matter along with the fate of other African indigenous structures in the new country. At the end of the First World War, the political attention in South Africa shifted to extra-union geopolitics. Big steps towards English-Afrikaner reconciliation had been taken with the Union. The next macro-project was uniting the British territories in Africa under a federal framework.

There were discussions on whether the Union could absorb new members and grow. Here, one has to factor in how closely connected the political and economic elites and colonial bureaucracy were across British southern Africa – regardless of the formal designation of the territory they resided, be it a Province of the Union of South Africa or a British Protectorate around the Great Lakes. Rhodesia was the leading candidate to join as the fifth province – it had also been involved in the original discussions establishing the Union but feared, and continued to fear, the might of the Cape. Now run under a League of Nations Mandate, the former German colony of South West Africa (present-day Namibia) was seen as another candidate – notwithstanding the legal complexities the Mandate regime created. The four Protectorates of Basutoland, Swaziland, Bechuanaland, and Nyasaland were also on and off on the table as potential provinces of a larger southern African federation. Similar discussions were underway in east Africa with aim of creating a federation out of British imperial holdings in the region. Behind British efforts to rearrange the constitutional architecture of its overseas colonies was in fact South Africa's very own, General Jan C. Smuts. Smuts had also been the main architect behind the post-war world order the League of Nations had attempted to create. Extra-union geopolitical matters were thus the political priorities during the first years of the Union. Once the southern African federation failed to materialise, attention in South Africa turned back to domestic affairs.

In 1927, the Union passed the Native Administration Act (No 38). The Act took the system of legal pluralism that had come into effect in Transkei and formalised it. In fact, the wording of Section II (i) introducing the new system is identical to the legislation that was in place in Transkei after annexation and before the union of South Africa.

> "Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between natives involving questions of customs followed by natives, to decide such questions according to the native law applying to such customs except insofar as it shall have been repealed or modified: Provided that such native law shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be lawful for any court

> to declare that the custom of *lobolo* or *bogadi* or other similar custom repugnant to such principles".[26]

The existence of two legal systems was now officially enshrined in national legislation: Common Law based on Roman-Dutch Law and what was now called Native Law (although that itself was an umbrella term for the variety of indigenous legal orders).[27] The discretionary powers of Magistrates and Native Commissioners to disallow indigenous law which they deemed repugnant to natural justice and morality had always existed in practice. What was new in this arrangement was the explicit hierarchy between the received and the indigenous.

The Native Administration Act, Number 38, 1927 created special courts to hear civil cases between indigenous Africans, i.e. the Native Commissioner Courts. In addition to these courts now formally run as part of the South African state, there was also room for *ad hoc* Chiefs' Courts. The previous Transkei system of autonomous traditional indigenous courts had functioned under the nominal supervision of colonial bureaucrats – with their knowledge and approval but without their official involvement in the court proceedings. This arrangement ended with creation of the Union. The South African state was now more directly involved. In fact, traditional authorities and courts are co-opted and turned into government institutions. The Native Commissioners' Courts are run by white officials – not from the legal profession but from the state bureaucracy.

The fact that Native Commissioners were to now hear civil cases between the indigenous is an arrangement that sits in-between previous legal arrangements: in the Cape Colony, legal monism was the principle: everyone was subject to the same laws. If you were a Xhosa in the Transkei however, Xhosa laws applied to your internal affairs. Colonial oversight existed in principle, but the court was run by the locals and not a state bureaucrat. In the new system, indigenous law – or a version of it deemed appropriate by the Native Commissioner on location – was not only recognised but in fact administered by the South African state.

As a standard accompaniment, a variation of the open-ended repugnancy clause common throughout British colonies was part of the new arrangement. Section II (i) of the Native Administration Act, Number 38, 1927 stated that traditional customary law was applicable, provided that t did not oppose principles of public policy or justice. The Native Commissioner himself had the discretion to apply indigenous customary law as long as he did not see the law in question to be repugnant to principles of natural justice and morality.

These Native Commissioner Courts were also responsible for hearing appeals from Chiefs' Courts. When there were no tribal chiefs' courts in a district then it was the Native Commissioner's Court that had jurisdiction over indigenous law. Appeals from these courts were to go to one of the two Native Appeal Courts of the country. Now, if all this sounds unduly complex in the abstract, the practice was

[26] *Native Administration Act*, Act 38, 1927, Section 11 (1).

[27] In their preface to a special issue of the journal *Acta Juridica* on 'African Customary Law', the editors note that, despite the passing of the act, "recognition was given reluctantly and it was strictly limited to particular tribunals; customary law was never incorporated into the mainstream of South African law"; Bennett,T.W., D J Devine, D B Hutchison, I Leeman, C M Murray, D van Zijl Smit (eds) (1991), *African Customary Law*, Cape Town: Juta (reprint of *Acta Juridica* special issue), preface.

even more convoluted. And there is reason for this. At the core was an unresolved bigger question about the political order enshrined in the Union constitution and attending type of legal pluralism: did who-you-are determine which law applied to you; or did the law itself determine which law was going to be applicable. The new system brought in by the Native Administration Act seemed to rest on asymmetrical and hierarchical type of legal pluralism – some of it the outcome of force of circumstances, some of it intended, and a lot of it at the discretion of Native Commissioners and Magistrates:

> "In European Courts [i.e. courts for the Whites], the Common law is applied to all cases; but in the Native Commissioners' Courts the Native Commissioner has a discretion whether he will apply Native law of Common law or Common law to the case. This discretion, which is granted by the Native Administration Act (Section II) arises from the fact that Native law was intended to apply only to cases involving questions of Native custom and not to *all* cases between Natives. The Common law is applied to cases which do not arise out of Native custom".[28]

In contrasting the Union era with the earlier phase of a decidedly looser arrangement, we should also mention that the Transkei system of officially-sanctioned application of Xhosa outside the officially recognised court system was during a time of flux. The Union Constitution, on the other hand, seeks to project permanence. State intrusion into indigenous law thus partly represents the desire to manage both the micro and the macro affairs of the Union. Formalisation came with a price-tag however: the nature of political accountability changed from local to official:

> "In traditional African society the chief was the center of an efficient system for maintaining social order. As he was vested with extensive political power and authority, his actions and decisions were, as a rule, required to express the wishes of his people, ascertained by constant consultation with elders and periodic consultation with larger groups. Today the chief is an administrative official performing functions whose nature, scope, and extent are determined, not by the traditions of his people, but by the governor of South Africa which appoints him and may dismiss him at will".[29]

Another sign of the growing involvement of the South African state and the increased formalisation of policies is the establishment of two Native Appeals Courts in 1929.[30] To be precise, the two high courts already existed. The Native Appeal Court established in King Williams Town for the Transkei region of the Cape Colony becomes the Native Appeal Court of the Cape and Orange Free State; the former Native Appeal Court in Natal established in 1899 is rechristened as the Natal-Transvaal court and moves to Pretoria. Both courts seemed more part of state bureaucracy rather than the legal profession. As Behrmann observed: "The practice of the Minister [of Native Affairs] seems to have been to appoint senior members of the Native Affairs Department as presidents of the Courts, and the members have invariably been appointed from the ranks of magistrates and native commissioners".[31]

---

[28] Lewin, Julius (1944), *An Outline of Native Law*, Johannesburg: RL Esson and Co. p. 9.
[29] Rubin, Leslie (1965), "The Adaptation of Customary Family Law in South Africa", in Hilda Kuper and Leo Kuper (eds), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press, pp. 196.
[30] Proclamation No. 301, 13 October 1928.
[31] Behrmann, P. (1948), "The Native Appeals Courts", *South African Law Journal*, Vol. 65, pp. 414.

These two courts were important within the political context of the time, but they also have longer term scholarly relevance. Native Appeal Courts are particularly important for legal history research because – unlike Chiefs' Courts and Native Commissioners' Courts – they were obliged to record and publish their decisions. Since the appeals were likely to be based on disagreements over the meaning of applicable indigenous customary law, court reports give voice to different opinions. The publication of law reports from these courts would also play a role in ensuring the reliable and consistent application of uncodified customary law.[32]

The inaugural meetings of the courts are also valuable to legal history research since the courts have outlined their own *raisons d'êtres*. During the first session of the then newly-established Transvaal-Natal Division of the Native Appeal Court in 1929, the main goals of the new court system were outlined: court procedures will be simple, convenient, and stripped of legal niceties; the court will be accessible with little expense.[33] This equally applied to the Cape-Orange Free State Division of the Native Appeal Court. The goal was to emulate as closely as possible the way traditional indigenous courts worked in practice. Lewin quotes the Transvaal-Natal court's president view of what was to be from the expected from this new system, stated in 1930 as the two new appeal courts were starting their mandates:

> "The purpose of the legislature is clear. It intended to establish a triple series of courts – Chiefs' Courts, Native Commissioners' Courts, and Native Appeal Courts -in which the spirit of justice rather than the letter of law would prevail. It hoped to reduce to a bare minimum the formalities and technicalities which laymen, not without some reason, usually associate with legal processes".[34]

The relationship between the received and the indigenous laws during the Union years is a complex one. As we had seen a little earlier, efforts to standardise the practice of indigenous law came with the 1927 Native Administration Act. While the Union is about strengthening the new South African state and its reach into local indigenous politics, the declaration of the Native Appeal Courts Act two years later in 1929 is also a formal affirmation of legal pluralism. No matter how politically centralised things were in practice, having separate appeal courts for Indigenous and Common Law was an acknowledgement that separate legal orders co-existed in the country. The 1929 Act means that appeals from Native Courts would no longer go to the country's highest court, the Appellate Division, and be heard under the country's common law, i.e. Roman-Dutch law. The newly-minted Native Appeal Courts would now hear appeals under within the context of indigenous African law.

The two Native Appeal Courts were created as a permanent part of the new constitutional architecture of the Union. However, both courts would fall short of their presumed role in charting indigenous jurisprudence of the country. The judges and lawyers of the court did not know indigenous law well enough evaluate the appeals, and those who happened to know the law were not trained lawyers.

[32] Despite their potential, for establishing the foundations for the application of indigenous law in South Africa, Julius Lewin states that these law reports the courts have been very hard to find, Julius Lewin (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, pp. 7-8.
[33] Lewin, Julius (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, pp. 3-4.
[34] Lewin, Julius (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, p. 16.

Neither court made much use of their powers to ensure the evolution of customary law. Julius Lewin laments their reticence and reflects on whether one should have considered other mechanisms for this:

> "To recognise Native law should not be to petrify it. Since the Native Appeal Court has shown itself so reluctant to encourage growth and change, we must look for another mechanism whereby the avowed aim of the Native Administration Act can be realised, namely the 'flexible adjustment' of Native Law to the changing social and economic circumstances of the Native people".[35]

We thus have in our hands a challenge common to all systems of indigenous law seeking recognition. What is indigenous law and who decides? This seemingly simple question is in fact one of the most contested aspects of the relationship between received statutory law and indigenous traditional law. Who has the authority to decide what uncodified indigenous law is? These were challenges beyond Transkei.

The answer came from British colonial experience in India. Transkei colonial officials had always relied on local advisors – often chiefs or other tribal nobility – in order to navigate the contours of traditional indigenous law. There had been a similar need across the Indian Ocean: British colonial officials needed the expertise of locals to determine whether the claims of the parties to a dispute were correct in the way they invoked indigenous law. This system of assessors was imported from Indian colonies.[36] What was new in the Indian model was the elevation of the view of the Native Assessors to that of a legal opinion of the court. Until then judges had normally relied on a number of local assessors to ensure the correct application of indigenous law. But, whatever the view of the assessor, the judges always had the final word and that is what went into the decision. In the system imported from British colonial practice in India, the judges were still responsible for delivering the verdict, but court proceedings would now record whether or not the opinion of Native assessors was heeded. This is somewhat subtle nudge would likely inject more prudence, reflection, and common sense into the judges' decisions as they would now know that dissenting views on what indigenous laws are and should be are recorded. Everything suggests that the *ad hoc* system of the Kaffraria frontier was now replaced by the beginnings of something more permanent and comprehensive.

2.5. Apartheid and Homelands

The 1948 elections resulted in an unexpected defeat of the Unionist Party in South Africa. Having just returned to South Africa after serving in the Imperial War Cabinet, and just days after drafting the Preamble of the United Nations Charter, General Smuts and his Unionists were in for a big disappointment. Afrikaner Nationalists were now elected to power; and they wanted to undo a lot of things Smuts and the British had been doing. As with the previous, and indeed future, changes in the country's politics, what is new interacted with what was already there. When it comes to the recognition of indigenous law, the apartheid era is also defined by a mix of change and continuity.

[35] Lewin, Julius (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell, p.30.
[36] Bennett, T. W. (1985), *Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta, p. 18.

For most observers outside South Africa, the apartheid regime in South Africa is associated with the urban racial segregation policies. What is not as well known is that in rural areas, the apartheid regime undertook a major overhaul of the British colonial system of Native Reserves. These were to become nominally independent and autonomous Homelands for South Africa's Bantu peoples. There would eventually be four of these nominally independent homelands (Transkei, Bophuthatswana, Ciskei, and Venda) and six of the autonomous ones (Gazankulu, Lebowa, Qwa Qwa, KaNgwane, KaNdebele, and KwaZulu). This is a long and complex history spanning the entire years between the start of apartheid and its fall. But Transkei's position is a little different from the remaining nine Homelands: it simply was the first one – a blueprint for the others to follow. In fact, Transkei has been at the front of every initiative of the regime's new Homelands policy. This allows us to investigate the fate of Xhosa laws during apartheid without getting in to the complexities of national Homeland politics elsewhere in the country.

The National Party upon getting elected immediately set out to pursue their electoral promises. The first important piece of legislation for indigenous politics and law, i.e. the Bantu Authorities Act was passed in 1951. This was followed by the 1959 the Promotion of Bantu Self-Government Act. Both were a preparation for something even more daring. With the 1963 Transkei Constitution Act (No 48), Transkei received its own constitution.

For the first time in history Transkei acquired official borders and the first trappings of statehood. The lands between the Indian Ocean and the Drakensberg Mountains, from the banks of the Great Kei River to the borders of Basutoland (present-day Lesotho), was now constitutionally designated as the Homeland of the amaXhosa. In territorial terms, this was a remarkably compact region, with only two small exclaves nearby.[37] In demographic terms, it was also remarkably homogenous. The amaXhosa constituted the overwhelming majority of the two million inhabitants. There were few pockets of Sotho speaking enclaves in the highlands and a small community of 10,000 Europeans.[38] In the north, a hybrid Nguni-Sotho language called Phuthi was also spoken. The official language of Transkei was isiXhosa, but for laws to have effect, they had to be published in Sotho and English as well.[39] Translation of Transkei laws into Afrikaans was not a constitutional requirement, but Afrikaans was allowed to be used in court proceedings. It was not only borders and official language policy that Transkei Homeland got. With the 1963 Transkei Constitution Act, the region now also had its capital city, Umtata (now Mthatha), and its regional Parliament, the Bunga, named after the isiXhosa word for meeting place/assembly.

Traditionally, the Bunga rested on an amalgamation of various chieftaincies. Historically it was an occasion which brought various Xhosa chieftaincies, paramount chieftaincies, and kingdoms together. This was thus an indigenous form of check-and-balances and relied a great deal on reasoning in order to sway opinion and ensure delicate regional and tribal balances were respected. Traditional Xhosa

[37] The territorial compactness sets Transkei apart from the nine other apartheid Homelands, where not only enclaves and exclaves dotted the landscape, but that their borders would change over time.

[38] In his article written the same year Transkei Homeland came into being, Neville Rubin refers to government announcements to remove the non-Africans from Transkei, but he admits that it will take some time for the traders and artisans to move, Neville Rubin (1963), "Transkei Constitution Act", *Journal of African Law*, Vol.7, No. 3, pp. 185. While a coordinated removal policy seems to have not taken place since, it is nonetheless clear that the apartheid regime saw this as Xhosa lands and discouraged European and Indian settlers.

[39] Chapter 3, 16 of *Transkei Constitution Act* 1963 (n 48).

leadership structures contained the office of counsellors, the *amapakati*. Colonial preference however has been to strengthen the office of chieftaincy. Imposition of political centralisation on traditional leadership ran the risk of undermining the traditional balances. The 1963 arrangement increased the role of chiefs at the expense of the older Bunga traditions of consensus building. State interference into the composition of the Bunga was even criticised by those who were part of the apartheid regime's new Bantu Studies programmes. One such expert, WD Hammond-Tooke expressed his fears that the "new position of the chief will distort the consensual element of the traditional tribal system and involve the chief in a role-conflict situation; it may threaten the paternalistic position of the chief who primarily performed a symbolic and ritual function".[40]

Another sign of this uncanny mix of both officially recognising traditional structures while expanding state control was the status of the traditional courts which were to apply indigenous Xhosa laws. These courts were not run by the Transkei Homeland nor by South Africa's Department of Justice. Transkei's court system was administered by the Union's Department of Native Affairs – later Department of Bantu Administration and Development. But despite increased state involvement, indigenous law was still kept separate from Roman-Dutch law. Customary courts were formally outside Supreme Court Appellate Division jurisdiction. Section 50 of the 1963 Act lays out the courts' jurisdiction. Here the wording is almost the same as in the 1927 Native Administration Act; but what we see is that the word 'Native' is now replaced by 'Bantu':

> "In all suits and proceedings between parties involving or based on questions of bantu custom the court shall apply the bantu law applicable to such custom as far as is practicable in deciding such question, except where such custom is opposed to the principles of public policy or natural justice: Provided that it shall not be lawful for the court to declare that the custom of lobola or bogadi, or any similar custom, is repugnant to such principles".[41]

In 1974, the Bunga announced its intention to declare Transkeian independence. Since Transkei was South Africa's satellite statelet, we have to see this not as a home-grown political initiative from within the Bunga but a more-controlled apartheid experiment which had started with Bantu Self-Government Act. Even if it were manipulated by Pretoria, this was nonetheless a bold step. In 1976 Transkei declared its independence.

2.6. Transkeian Homeland Declares Independence

The declaration of independence arrived with little change in Transkei's constitutional set-up. The Parliament continued calling itself Bunga. This time however there were more elected seats (45 out of 109). The remaining seats were held by hereditary chiefs. The trappings of statehood, i.e. borders, national institutions, military, flag, had already been in place since 1963. The declaration of independence did not bring an overnight change to the way Transkei was really governed day-by-day. The Transkei government led by the regional president run the administration, but their powers are held in check by a part-elected, part-hereditary regional legislature, Bunga. Subject to approval by the

[40] Hammond-Tooke W. D. (1985), *Command or Consensus – The Development of Transkeian Local Government*, pp. 211-3.
[41] Section 50 (2) of the *Transkei Constitution Act* 1963 (n 48).

president, legislation for Transkei is passed here. These show little difference from the 1963 arrangement. One issue that was deliberately left a little ambiguous in the previous set-up became clearer in 1976:

The founding of a new nominally-independent territorial entity meant that the older system of two legal orders running side-by-side would no longer provide a workable arrangement. From now on the principle was that the legal system of Transkei would be based on Xhosa law, while outside Transkei borders Roman-Dutch law would continue to be the Common Law of the land. Transkei's High Court was now obliged to prioritise customary law "in all suits and proceedings between parties involving or based on questions of Bantu custom".[42] The discretionary power of Magistrates and Native Commissioners which defined previous episodes was no more.

The external relations of Transkei would continue to be run by Union officials. A big part of Transkei independence was indeed an international public relations exercise, as a constitutional façade justifying not only the racial policies of apartheid but also preparing the groundwork for a new constitutional status the former German colony South West Africa (present-day Namibia). Namibia was nominally under British supervision as United Nations Trust territory, but in practice it was run by South Africa in a way akin to a homeland.

The reason why we are highlighting the public relations aspect is because at the height of apartheid era's homelands experiment, we also see an initiative to record the country's traditional indigenous legal orders. They even called this the 'Restatement of Traditional Legal Systems and Customary Law' referencing the ambitious Restatement of African Law project housed at London's School of Oriental and African Studies (SOAS). The apartheid regime was seeking international acceptance and legitimacy by claiming to give recognition to traditional African structures.

Despite all this, Transkeian independence was not recognised by anyone other than South Africa. The public relations effort trying to convince both domestic and international audiences that Transkei was a genuinely autonomous territory of the amaXhosa, where their traditional leaders have official recognition and where indigenous laws apply, neither seemed to have had much traction. However, despite the apartheid tarnish, the truth is that – at least officially – there was an unprecedented degree of recognition of indigenous structures. While having a strong domestic and international public relations content, Transkei's new system was also very advanced in laying out how indigenous Xhosa laws would work. The way Xhosa laws were to be applied reflected the accumulation of a century of experience since the annexation of Transkei in 1877.

One of the most important points was to establish who Xhosa laws applied to and when. Article 53 (1) of the 1976 Constitution of the Republic of Transkei gives the courts the right to determine and apply indigenous law:

> "In all proceedings involving questions of tribal customs followed by persons in Transkei it shall be in the discretion of the court to decide such questions in accordance with the tribal law applying to such customs except in so far as the court may find that such law has been repealed or modified or is contrary to public policy

[42] Section 50 of the *Transkei Constitution Act* 1963 (n 48).

> or opposed to principles of natural justice: Provided that no such finding shall be made by any court in respect of the custom providing for the payment of *lobola* or *bogadi*."[43]

Subsection of the same Article defines who the indigenous law applies to:

> "The court shall not, in the absence of any agreement between the parties regarding the system of law to be applied in any such proceedings, apply any system of customary law other than that – (a) which is observed at the place in Transkei where the defendant or respondent resides, carries on business or is employed, or (b) if more than one system of customary law is in operation at that place, which is observed by the tribe to which the defendant or respondent belong".[44]

When Xhosa laws apply and to whom has been one of the main points in history going back to the frontier days and the Maclean's Compendium. Another one has been the differences in customary law across different Xhosa tribes. That is, after deciding the 'who' and the 'when', the next challenge has been deciding the 'which'; that is which Xhosa tribe's customary law applies. One of the challenges in applying indigenous law is internal variation in customary law. Different tribes or clans may have historically ended up with laws that differ across the branches of an ethno-linguistic community. To determine whose law applies is therefore central to traditional proceedings. Article 53 (2) of the Constitution regulates precisely this:

> "The Court shall not, in the absence of any agreement between the parties regarding the system of law to be applied in any such proceedings, apply any system of customary law other than that – (a) which is observed at the place in Transkei where the defendant or respondent resides, carries on business or is employed, or (b) if more than one system of customary law is in operation at that place, which is observed by the tribe to which the defendant or respondent belongs."

The way change and continuity have been inseparable in the history of Xhosa laws has been a theme we have revisited throughout our case-study. The office of the Native Assessor is one example of this pattern. Regardless of the numerous phases of institutional and policy redesign in South African history, every successive arrangement ended up having to rely on local expertise in order to ensure fairness and consistency in the application of Xhosa laws. While indicating a constant need, this can also be seen as a historic failure to develop a canon of Xhosa laws despite efforts that go back to the Maclean's Compendium. Once again, we see the need to enlist the help of traditional leaders and elders.

Despite giving the court the authority to determine the applicable traditional indigenous law, and despite more than a century of recognising and applying Xhosa laws, Transkei courts were still short of a comprehensive knowledge of a complex, varied, and uncodified legal order – especially when differences in customary also existed across different Xhosa tribes. What then happens – precisely as

[43] Republic of Transkei Constitution Act 1976, Iriphabliki Yetranskei, reproduced in M.P. Vorster, M. Wiechers, D. J. Van Vuuren (eds) (1985), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, p. 63.

[44] Republic of Transkei Constitution Act 1976, Iriphabliki Yetranskei, reproduced in M.P. Vorster, M. Wiechers, D. J. Van Vuuren (eds) (1985), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, pp. 63-4.

it had been done during the Kaffraria days – was once again the recruitment of local counsellors to help advise what the law is. Subsection 3 of the same article allows for this:

> "For the purposes of subsection (1) a court, including any division of the Supreme Court in applications, trials and appeals, may summon to its assistance in an advisory capacity such assessors as the court may deem necessary and the opinions of any such assessors shall be recorded and shall form part of the proceedings."

2.7. From Nationwide Courts during Apartheid's Twilight to the Rainbow Nation

Popular culture tends to associate the release of Nelson Mandela with the fall of apartheid regime. That fateful day when Nelson Mandela addressed the crowds from the balcony of Cape Town's City Hall on February the 11th, 1990 remains an iconic image, symbolising the defeat of apartheid. The historical truth is a little more complex and a little less romantic. By the mid-1980s, South Africa was engulfed in turmoil on all fronts. At home, the townships were in violent upheaval, in South West Africa an insurgency was in full swing, and the military was mired in the Angola Bush War while facing various neighbours who had opened up their countries to training camps for ANC's military wing *Umkhonto we sizwe* ('The Spear of the Nation'). It was increasingly clear that the apartheid regime could not continue as it were. From the mid-1980s, during what we now know was the twilight of the apartheid regime, various reform initiatives were passed. But during this period of unprecedented political upheaval and emergency rule, we cannot pass a conclusive evaluation of the consequences of these measures. They do however deserve an overview.

The first sign that the apartheid logic of separate peoples, living within their separate territorial, political, and legal pillars, was abandoned was the recommendation by the South African Law Commission and the subsequent legislation in 1985 which sought to unify all civil registries by merging customary law and civil law marriages. No longer was the pretence that Transkei, Bophuthatswana, Ciskei, and Venda were independent states. A more symbolic recognition of the end of Homelands and a new national framework of reference case a year later when the court system of the country was unified into a single hierarchy. Instead of segregated halves, from 1986 onwards there would now be a nation-wide single hierarchy of courts. This was soon followed by another decision emphasising the new national frame of reference. From 1988 on indigenous customary law was made applicable in all courts of the land – no longer in special tribunals administered separately from ordinary courts.[45]

It was only two years after this that Nelson Mandela was to be released, and process of democratic transition openly started. An interim democratic constitution was drafted in 1993. This constitution contained a rather generous clause towards the recognition of traditional authorities. Articles 181 and 182 of the Interim Constitution not only formally recognised traditional authorities, but also made them *ex officio* members of local government. Act 3 of the 1994 Constitution even allowed the establishment of traditional monarchies in the provinces. The country's first free elections were held the following year.

[45] In 1988 54A was inserted into the magistrates 1944 Courts Act (No 32), later replaced by the section 1 of Law of Evidence Amendment Act, stating that all courts were now obliged to take judicial notice of customary law.

The permanent Constitution of 1996 took a step back in terms of the powers of traditional authorities. In its decision certifying the new constitution, the Constitutional Court acknowledged the 'institutions of traditional leadership, customary law and, at the provincial level, traditional monarchy' but endorsed the removal of governmental roles for traditional structures (in local government) included in the 1996 constitution.[46] Section 211 of the new constitution recognises the institution, status and role of traditional leadership and entrenched indigenous African law as a source of South African law alongside the common law.[47] Section (212) (2) laid out the constitutional path to provincial houses of traditional leadership, as well as a national one.[48]

The new constitution sought to reconcile the recognition of traditional structures and indigenous law with individual rights and freedoms guaranteed to all South Africans regardless of where they reside. Section 39 (2) states that "when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights". The new system continued apartheid era final reforms towards bringing the country's court system into a single hierarchy. The 1996 Constitution conclusively brought to an end the notion of separate legal orders. Every law of the country now falls under the supremacy of the national constitution; Section 311(3) now subjects customary law to constitutional scrutiny.

The projection of a new nation-wide approach to traditional indigenous structures continued with the Traditional Leaders Act that was passed the following year in 1997.[49] Instead of continuing with the division South Africa into nominally autonomous sub-sections which individually dealt with the Union government, democratic South Africa followed a nation-wide formulation to manage indigenous law. The National House of Traditional Leaders would now have a consultative role on customary law. Six Provinces where traditional authorities were represented in the regional legislature were to appoint members to this House, which would then advise the national government and make recommendations on traditional indigenous law. In the meantime, the name was changed to the National House of Traditional Leaders.

The adoption of a nation-wide approach to traditional indigenous structures does not mean that the provincial level was irrelevant in post-apartheid South Africa. Six Provinces with large indigenous communities had provincial Councils of Traditional Leaders (Eastern Cape, Free State, Kwazulu-Natal, Mpumalanga, Limpopo, North West). Everything was being redesigned at this point. Former Homelands and Provinces were abolished, borders were being redrawn, new provinces were coming into being, provincial constitutions were drafted. Six of the country's nine provinces had not formally adopted their final provincial constitutions by then, but they had nationally-recognised traditional authorities. Reflecting the progressive spirit of the new political era, the composition of traditional councils also opened up. The requirement was that 40 % had to be elected members and at least 1/3rd had to be women. The nation-wide approach was consolidated with the 2003 Traditional Leadership

[46] *Certification of the KwaZulu-Natal Constitution*, Constitutional Court of South Africa, Case 15/96 [1996].
[47] Section 211(1) of Constitution of RSA Act 108 of 1996
[48] According to Dial Dayana Ndima, Section 211 of the Constitution should be seen in conjunction with Section 30 (which gives citizens the right to use the language of their choosing and to participate in the culture they want) and 31 (which grants religious, cultural and linguistic communities to the right to practice). Ndima, Dial Dayana (2015), "Receiving African Jurisprudence in a Post-Imperial Society: The Role of Ubuntu in Constitutional Adjudication", *The Comparative and International Law Journal of Southern Africa*, Vol. 48, No. 3, p. 372.
[49] Section 4 (1) *National House of Traditional Leaders Act* 10 1997.

and Governance Framework Act. President was now entitled to revoke the official recognition of traditional leaders. Since the 1997 Traditional Leaders Act, two Provinces (KwaZulu-Natal and North West) had also joined the ranks of those with provincial houses of traditional rulers. The number of seats in the National House of Traditional Leaders were thus increased to accommodate three representatives per eight Province with nationally-recognised traditional structures.

In 2008 a new Traditional Courts Bill was put together but, it proved to be politically controversial. Post-apartheid South Africa had decided to continue with the process set in place during apartheid's twilight years and turn traditional structures and traditional indigenous law into national matters. The nation-wide frame of reference was a clear rebuttal of the Homelands fiction of the apartheid regime which allocated South Africans into ethno-linguistically distinct, nominally-independent statelets. But one consequence of the new nation-wide approach has been the politicisation of traditional structures. Many objected to the fact that only traditional leaders were consulted for the 2008 Bill. The assumption was that empowering senior traditional leader was patriarchal, and it rendered the process unaccountable. The spirit of the new law was a replication of the 1951 Native Authorities Act, critics argued, rather than the progressive spirit of the new rainbow nation. The revised Bill was reintroduced in 2012 but once again failed to win support. It has most recently made an appearance in 2017. Given the current political tensions over land, indigenous ownership, and expropriation, the Bill did not have a smooth sailing.[50] It was eventually passed by the National Assembly on 12 March 2019; and most recently by the National Council of Provinces on December 2, 2020. A related draft legislation, the Traditional and Khoisan Leadership Bill, Khoisan, which had also experienced a meandering path to officialdom, had been passed into law on 10 January 2019 after approval by the National Assembly and the National Council of Provinces.

3. THE COMPARATIVE LESSONS, INSIGHTS, AND OBSERVATIONS FROM SOUTH AFRIA

Our second case-study, South Africa's amaXhosa and their laws present a rather meandering story of jurisdictional complexity, interspersed by historical moments of institutional and policy redesign, followed by longer periods political continuity. This meandering Transkeian story contains many valuable insights however. The relationship between uncodified indigenous African law and modern statutory law is the most complex one on the continent. This complexity presents a mixed picture for scholarly analysis. It takes time and effort to decode all the fits-and-starts and bring some sense of order. After all, this is a history of 200 years of one political initiative after another, all designed to manage the relationship between the indigenous and received. Once decoded however, Transkeiean history contains numerous signposts with comparative lessons. Though helpful, not all of these lessons are immediately translatable to other cases around the world. however. Let us unpack this point a little further:

Compared to the other two case-studies of our investigation (i.e. the Batswana of Botswana we had seen and the Oromo of Ethiopia we will see), the path Xhosa laws have followed is much more complex. The various political phases the country has gone through, together with a myriad of

[50] Osman, Fatima (2019), "The Third Time a Charm? Traditional Courts Bill of 2017", *SA Crime Quarterly*, No. 64, pp. 45-53.

different institutional and legal mechanisms accompanying the recognition and application of indigenous African law, provides South Africa with a rich historical repertoire of policies. Ideally, this would have made South Africa an informative case-study for the rest of the continent. But the apartheid policies on Bantu Homelands and Bantu Law has tarnished a big part of this historical repertoire. It is difficult to successfully incise a policy or an institution out from this historical context and rehabilitate it as a workable arrangement ready to be exported elsewhere.

Another reason why the political and legal experiments from South Africa might not provide immediately applicable lessons to the rest of the continent is because there was constant policy redesign, making it difficult to isolate the consequences of different policies from one another. Constant redesign tends to create confusion and chaos for legal practitioners and bureaucrats involved in the process. During these moments of institutional and policy redesign, bureaucrats tend to continue with some of the standard operating procedures from the previous era, rendering crossover continuity across different political episodes. This is particularly the case if new institutions and policies are delayed – as was the case in South Africa. Then formally defunct institutions could end up remaining in function. Complexity is further exacerbated when new policies are superimposed onto already existing practices. What we have with Transkei is a case where the legacies of past policies sit underneath new policies.

Legal history contains fits-and-starts everywhere in the world of course, but Transkei's meandering story is particularly complex. Here not only did received statutory laws change, so did the status of indigenous law and its relationship to the Common Law of the country. The Magistrates' Courts were thus facing pressures from both ends: the statutory laws and bureaucratic mechanisms were constantly being revised on the one end, while they were also obliged to take into account indigenous laws often unknown or inaccessible to the Magistrates. Add to this the fact that Magistrates and Native Commissioners throughout their careers were likely to be appointed to different provinces, ethnic-groups, districts, or even countries in the case of South West Africa (present-day Namibia), thereby unable to fully master the local laws and customs. The consequence has been the tendency to leave indigenous law out of Magistrates' courts. N.J.J. Olivier suspects "this approach must be attributed to inadequate training and the frequent transfer of judicial offices".[51] What is more, Olivier believes "that there is and has been a fundamental lack of liaison between South African legal institutions (for example the South African Law Commission, among others) and relevant governments".[52]

The political situation in South Africa is currently in flux; and will likely remain so. Instead of a definitive verdict on where things are headed, what we can do here is take a snapshot of where things stand. And here, we are bookended by change on one side and continuity on the other. Transkei's last 200 years epitomises this: political systems change, names change, borders change, laws change, courts change, constitutions change, but most of the traditional structures continue to function more or less in the same way they did for centuries. In between, the uncodified and the formal interact and evolve in a way that navigates a path demarcated by legal principles on the on hand and force of

[51] Olivier, Nicholaas Johannes Jacobus (1986), *Regpluralisme in Suider-Afrika*, Pretoria: Universiteit Pretoria, p. 400.
[52] Olivier, Nicholaas Johannes Jacobus (1986), *Regpluralisme in Suider-Afrika*, Pretoria: Universiteit Pretoria, p 400.

circumstances on the other. But there is also continuity. What is common across all political episodes of South African legal history is that traditional indigenous law and modern statutory law always end up interacting in a system of multiple, crosscutting, and overlapping jurisdictions.[53]

Despite the complexity, the history of constant design and redesign of the relationship between received modern laws and indigenous ones still allows us an insight into the track-record of various legal reforms. The long, complex, and meandering path recognition of indigenous law has taken in South Africa has produced inevitable inconsistencies and contradictions. The progressive and the retrogressive alternate. Yet broad patterns of continuity also exist. Even while we see the way the policies of one era feed into the next, the *longue durée* perspective still provides a bird's-eye-view to get a sense of the promises and pitfalls of various policies.

The official status of indigenous laws has been one of the main political issues since the founding of the Colony of the Cape of Good Hope itself. And it was not uncommon that the declared intentions would conceal murkier political calculations. In 1991, the South African law journal *Acta Juridica* reserved a special issue to African customary law. Looking back at South Africa's legal history starting with the 1927 Native Administration Act, the editors conclude while 1927 was supposed to be applicable to the entire Union, indigenous law did not subsequently become nation-wide: "But recognition was given reluctantly and it was strictly limited to particular tribunals; customary law was never incorporated into the mainstream of South African law".[54] In the end however, traditional indigenous customary law turned out to be more resilient than what was considered 'mainstream' South African Law at that particular moment in history. We had started the concluding section of this paper by highlighting how the complexity of South African legal history with successive waves of institutional and policy redesign – some undoing the past, others superimposing the present on to the past – set the country apart from the other two in our investigation, Botswana and Ethiopia.

The holistic perspective guiding the research helps us see this very incongruence between the political, legal, social, and cultural factors. What we had seen in the Botswana case study was near congruence between the underlying social structure and the political and legal system above it. Traditional law and governance indigenous to Botswana were thus not competitors to the modern state and its institutions but integral components – notwithstanding some political division between modernists and traditionalist. Early recognition granted during the Bechuanaland Protectorate ensured traditional law and governance found its way into the political and legal system of the modern independent state of Botswana. Unchanged borders, near ethno-linguistic homogeneity, and peace with neighbours bolstered continuity.

In South Africa, by contrast, political and legal change was almost constant. There is little continuity in (domestic) borders, constitutional orders, and the legal status of traditional law and traditional

[53] Bede Harris believes this complexity comes with the benefit of flexibility: "[The South African experience] illustrates how, since colonial times, indigenous law has operated in tandem with received common and statute law, through the mechanism of statutory recognition of indigenous systems of government and a flexible statutory choice of law rule which has allowed the courts to develop" Harris, Bede (2006), "Legal Pluralism and a Bill of Rights – The South African Experience", *Australian Indigenous Law Reporter*, Vol. 10, No. 1, p. 16.

[54] Bennett, T. W., D J Devine, D B Hutchison, I Leeman, C M Murray, D van Zijl Smit (eds) (1991), Special issue: African Customary Law, *Acta Juridica*, preface.

governance structures indigenous to the amaXhosa. The number, names, borders, and constitutional status of the territorial units in traditional Xhosa lands have been fluctuating since the first Border War. While some legal and political reforms have formally undone previous policies, others have been superimposed on existing previous ones. Given the deep roots in the land and importance to amaXhosa identity, traditional law and governance will never become irrelevant.[55] But the previously interlocking parts of the traditional structure have been treated separately. What is more, during the country's various constitutional phases, these separated components have been regulated differently. Sometimes local autonomy would be granted to, say, the application of indigenous customary on family matters; other times colonial oversight would be added; yet at other times, nation-wide modern laws would directly apply. Sometimes it would be traditional courts where traditional laws are applied; at other times traditional law would be invoked in modern courts. Notwithstanding the good intentions of post-apartheid reforms to recognise traditional law and traditional forms of governance, there has been too much historical distortion that prevents a smooth path to empowerment. No other African country comes close to South Africa in terms of policy change, reversal, and reform. The historic path of successive political institutions and laws governing traditional structures is not linear. But this complex legal history provides potential for further studies examining the specific consequences for different branches law during different periods.

[55] An indication of this is the increasing incorporation of indigenous customary law into university curriculum on private law. See for example, Maithufi, IP, Sindiso Mnisi Weeks, Lesala Mofokeng, Chuma Himonga, and Thandabantu Nhlapo (2015), *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives: Private Law*, Oxford: Oxford University Press.

Chapter 10:
Introduction to the History of the Politics of Law in Ethiopia

---

1. INTRODUCTION

1.1. The New Flower Planted in Oromo Soil

Ethiopia's capital city Addis Ababa sits atop the country's central highlands at 2,500 meters above sea level. How it was built, settled, and grew into a modern metropolitan city of today in many ways symbolises some of the unresolved dynamics at the heart of Ethiopian law and governance. In this country defined by its unique ethnic, linguistic, religious, economic, geographic diversity, the city's history is in fact a mirror to the country's complex politics.

Parts of the region surrounding Addis Ababa known as Shewa (alternatively transliterated Shoa) had been falling under Abyssinian influence since the 16th century. The remaining parts were incorporated into the Empire during the late 19th century at the time of Emperor Menelik II's expansion into southern regions of present-day Ethiopia. His wife Empress Taitu herself had picked the location for the new capital and named it 'New Flower' in Amharic-language, Addis Ababa. Up in the central highlands, the new capital was not only physically more secure than the previous Abyssinian imperial capitals Aksum and Gondar in the north which were now exposed to the Italian forces trying to colonise the rest of Ethiopia from their Eritrean bridgehead on the Red Sea coast, but the new capital was also situated away from the traditional Semitic-speaking Abyssinian heartlands of the north closer to the newly incorporated southern lands.

Most of Shewa region had historically been inhabited by the Oromo people, speakers of Afaan Oromo which belongs to the Cushitic language family in contrast to the Semitic languages spoken by the northern highlanders historically and symbolically welded to the Abyssinian Empire and the Ethiopian Orthodox Church. Oromo locals called the settlement which was to be the foundation of the new imperial capital something else, *Finfinne*. With the inflow of bureaucrats, soldiers, clergy of the Ethiopian Orthodox Church, merchants, students, and settlers from across the country, Amharic-language of the northern highlanders within which imperial affairs were conducted soon became the lingua franca for the inhabitants of this growing city. In the coming decades, Empress Taitu's New Flower city constantly grew and absorbed the surrounding settlements where the Oromo lived.

Later in the chapter we devote more space to the successive phases of law and governance in Ethiopia's constitutional history, but what is common across the various political regimes succeeding each other, be it imperial or socialist, was the centrality of Addis Ababa – politically, culturally, economically, and most notably for our purposes, legally. The country's most recent constitutional phase of federalism has helped hitherto marginalised regional capitals assume higher economic and political profiles than in the past, but Empress Taitu's New Flower still plays a disproportionately central role in Ethiopia. The Addis Ababa capital is now a part of the Ethiopian federal system as one of the two Chartered Cities. The city also happens to be the capital of the Oromia region, the most populous and largest Regional State of the Ethiopian federation. According to the 1995 Federal Constitution of Ethiopia, the Oromo Regional State has, mostly undefined, 'special interests' in the running of the capital.[1] During the period when the capital of Oromia official relocated to the nearby city of Adama (formerly Nazareth) and at the time of the Addis Ababa's expansion into surrounding Oromo lands under a new economic development masterplan for the capital, the tensions flared up into violence across Shewa region.

October 2016 Violence led to government closing down communications and banning travel, as hundreds were reported to have been killed. Addis Ababa's absorption of surrounding Oromo territory was eventually reversed (although the city organically continues to grow and spread out) and Oromia's capital went back to Addis Ababa.[2]

During the course of this LLD research, Ethiopian politics went through its most dramatic changes since the adoption of federalism in 1995. First, the federal government's so-called 'Addis Ababa Master Plan' which envisaged the territorial expansion of the capital region into the surrounding lands of the Oromia Regional State brought in unprecedented reaction, some of it violent. In response the government declared emergency rule in October 2016 and closed down all communications and barred foreign journalists and international organisations.

[1] Article 59 (5) of the 1995 Constitution states: "The special interest of the State of Oromia in Addis Ababa, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administrative matters arising from the location of Addis Ababa within the State of Oromia, shall be respected."

[2] These two related developments and the Oromo opposition they triggered, i.e. the capital of Oromia relocating from Addis Ababa to Adama and back and the borders of Addis Ababa Federal Capital City Region, had in fact started separately but have since coalesced into a common popular agenda.

But Oromo discontent sparked by the Master Plan continued to convulse the cities and towns of Oromia. Popular discontent then spread to the Amhara and Somali Regional States of the Ethiopian federation. Within the ruling party, the Ethiopian People's Revolutionary Democratic Front (EPRDF), behind-doors power struggles ended up with the accession of an ethnic Oromo to the party's national leadership in April 2018, and by extension, the office of the Prime Minister (the office of federal Presidency is a more ceremonial position without real political powers).

The new Prime Minister Dr. Abiy Ahmed immediately undertook large-scale reforms. This included the freeing political prisoners and detainees, allowing dissidents to return from exile, liberalising the media, and freeing up political space for opposition parties. Dr. Abiy also sought peace with Eritrea, formally ending the long-standing war between siblings and allowing travel and family reunions to resume. His initiatives were praised by the international community and he was duly rewarded with the Nobel Peace Prize. Dr. Abiy also changed the name of the country's ruling party to Prosperity Party; and oversaw marginalisation and exit the of the very founding member of EPRDF, the Tigrayan People's Liberation Front (TPLF).

Not everyone within the political establishment was happy with the new direction Dr. Abiy was taking the country. There were various attempts to destabilise the transition. An attempt on Abiy's life in June 2018 was followed by a set of, still mostly unexplained, regional coup attempts and political murders of senior members of the country's security services. Various ethnic conflicts also flared up across the country leading to hundreds of deaths and tens of thousands of displaced.[3] This was followed by the cancellation of the upcoming August 2020 national elections; ostensibly because of the Covid19 outbreak.[4] But no news dates for the election were set. In midst of this, the most influential component with the EPRDF until Abiy's ascent to leadership, the Tigrayan People Liberation Front (TPLF) distanced itself from the election decision. In an unprecedented move, TPLF criticised the government for violating the constitution and paving the way to dictatorship. The most recent attempt to provoke unrest has been, the yet unresolved, murder of Hachalu, a singer, political activist and Oromo-rights campaigner in June 2020. At the time of writing, former dissidents who had been allowed to return publicly in the last two years were being unceremoniously re-arrested, independent journalists were once again being censored, and the harassment of opposition had resumed. The most recent episode in the uncertainties is the regional elections held in Tigray Regional State on 9 September 2020, defying Dr. Abiy's government and setting course for an escalation of confrontation. As these lines are written, news that opposition members are being arrested on terrorism and sedition charges are percolating out of Ethiopia.[5]

[3] One of the biggest of such ethnic confrontations were in the southwest Guji-Borana branch of the Oromo ethnic group which comes under closer focus in the coming chapters.

[4] The formal steps to this end started with the announcement in March 2020 by the country's Electoral Board that it would be impossible to organise nation-wide elections in August the midst of the Corona pandemic (the current legislative term expires in October). This was followed by the formation of a Council of Constitutional Inquiry, who then held a number of public meetings, and recommended the cancellation of the August 2020 elections. The Council also recommended the elections be held within 9 to 12 months of the original date. The upper house of the parliament representing all the ethnic groups in the country then voted to unanimously endorse the recommendation – but without specifying if and when the elections will be held.

[5] After the completion of the Ethiopian case-study, the confrontation between Tigray and the Ethiopian Federal Government triggered a military conflict. At the moment of submission in December 2020, Tigray forces seem defeated and the Tigray regional state is now under direct federal rule.

Disappointments, tensions, and unknowns are not only at the domestic level. The peace initiative with Eritrea lauded by the Norwegian Nobel Peace Prize committee has not progressed beyond superficial niceties since the meeting between the leaders of both countries two years ago. And the construction of the Greater Ethiopian Renaissance Dam (GERD) on the Blue Nile has pitted Ethiopia against the two downstream countries, Sudan and Egypt.

The initial euphoria championing the arrival of a more open political system now seems to be mostly deflated, but Dr. Abiy still remains popular amongst the urban youth. It is certain that the coming years will bring more changes to Ethiopian politics, a lot of it hard to confidently predict. The challenges could be managed without degenerating into open conflict, or the political system might this time fail to contain the fissiparities it had managed successfully so far. Whatever the future brings, one thing is for sure: it will be impossible to convince the Oromo to return back into their politically disenfranchised and economically marginalised past. In Addis Ababa, the new building housing the cultural centre of the Oromo government now sits atop the city's historic centre, the Meskel Square. What is notable for the purposes of this LLD research project is the vast sculptures in front of Oromia government building. The figures representing the six age-groups of the indigenous Oromo system of law and governance, known as the *Gadaa*, have now imposed themselves over a metropolitan city that for long had ignored Oromo demands.[6]

1.2. A Country Defined by Structural Diversity

The previous case-study of South Africa tends to be internationally known as one of the most diverse countries in the world. Ethiopia is in fact more diverse in its social, demographic, and geographic structures; but unlike South Africa, the underlying structural heterogeneity has been less affected by the ebbs-and-flows in state policy.[7] In South Africa one of the challenges for both the application of indigenous law and the recognition of traditional forms of governance has been the superimposition of various different policies on top of each other, some cancelling previous policies, others adding to what had been done before, yet others reversing only parts while fine-tuning the rest. Despite Ethiopia's underlying structural diversity defining the country's history and politics, there has been fewer fluctuations in policy. Section 2 below covers the four distinct phases for law and governance in Ethiopia, starting with the pre-modern constitutionalism of the Abyssinian Empire, followed by a century of modernist state-building variant of imperialism, two decades of Marxist-Leninist centralism, bringing us to the most recent constitutional phase of federalism of the last 25 years.

What makes these successive phases of constitutionalism somewhat more straightforward than the South African case is the absence of superimposition or spill-over between different eras of the Ethiopian history of the politics of law. Unlike South Africa, here we see clear breaks in between the successive legal systems. The details of the relationship between modern laws and indigenous laws,

[6] Section 2 of the next chapter provides an in-depth examination of the indigenous *Gadaa* system of law and governance indigenous the Oromo and the prevalence of age-groups as a part of Oromo society.

[7] While his interest is not on structural diversity per se, Yonatan's study of the constitutional process in both countries juxtaposes the two. Fessha, Yonatan T. (2010), *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*, Farnham, UK: Ashgate.

between state authority and indigenous structures of governance (with an in-depth emphasis on Oromo laws and governance), is covered in Chapter 9. This chapter is broader more generalist look at the Ethiopia's successive phases of constitutionalism and the history of the politics of law. But before that, we should first take a quick bird's-eye-view one of the world's oldest civilisations. While our interest on the country's structural diversity along ethno-linguistic lines and the constitutional responses to this throughout history, it is imperative we note the other structural cleavages marking Ethiopia.

Ethiopia's 100 million plus citizens speak 86 languages belonging to four different language families (Semitic, Nilotic, Cushitic, Omotic). And in between the various constituent communities of the country are those of mixed roots. Especially in urban centres, though not exclusively, one finds more instances of inter-community marriages and individuals who do not closely-identify with any of the constituent ethnic-linguistic communities of the country. Add to this those who publicly speak one language while speaking another one in the privacy of their homes.

Between the sprawling modern cities and the rural areas where subsistence farming remains the main economic activity, very different dynamics can come to impact on how the country's structural cleavages become either dormant or politically salient. In addition to the two Abrahamic faiths of Orthodox Christianity and Sunni Islam, various indigenous forms of belief systems are still practised, sometimes partially incorporated into the bigger established religions. There is also a relative newcomer: converts to Protestant Christianity now constitute the third biggest religious community in the country. Yet intermarriage across faiths is not uncommon, and the followers of the Abrahamic faiths often incorporate practices and customs from various indigenous religions as well as from each other. Then we have the country's urban centres where many secular-inclined reside. The socialist military rule from mid-1970s to the early 1990s had viewed both religion and tradition as forces holding back modernisation. Instead, it was the class cleavage that was emphasised. Political mobilisation along class lines go back to the socialist student movements of the 1970s, which in addition to *Derg* committees running the military regime, also gave birth to the very ethnic militias which were to topple them and bring federalism.[8] These militias differed from each other in terms of the ideological branch they adhered to, ranging from those committed to the principles of bottom-up Maoist peasant insurgency to Marxist-Leninists who entrusted the cadres of a central vanguard party to lead the revolution instead.

Ethiopia also has social cleavages other than ethno-linguistic, religious, class, and ideological ones. Some are politicised and prominent, others less so. For example, the sedentary-pastoralist cleavage between herders and farmers mattered more in the past than it does today. Ethiopia's social diversity is further exacerbated by the county's geographic diversity ranging from moon-like landscapes below sea level to highlands at 3,000 meters above sea level, from arid vast expanses of the east to the dense tropical jungles of the south. From settlement patterns to land distribution, the diverse geography engenders diverse social consequences. But for us it is the history of the politics of law in Ethiopia that

[8] As Asnake Kefale, and Tomazs Kamusella, and Christoph van der Beken note, "[D]uring the late imperial period, the ESM [The Ethiopian Student Movement] left a bigger imprint on Ethiopian politics and society than any parties or organizations of this time. Kefale, Asnake, Tomasz Kamusella, Christophe Van der Beken (2021), *Eurasaian Empires as Blueprints for Ethiopia: From Ethno-Linguistic Nation-State to Multinational Federation*, London: Routledge, p. 36.

is of primary concern. The country went through various constitutional forms of politics, leading to diametrically opposed political regimes, with different social consequences. Naturally, these different constitutional phases in the history of the politics of law in Ethiopia directly impacted indigenous law and governance. Chapter 9 will trace the relationship between modern received laws and indigenous laws across the constitutional phases below. The particular focus would be on the fate of the system of law and governance indigenous to the Oromo, the *Gadaa*. To help orient and steer the in-depth investigation in the coming chapters, let us first take a bird's-eye-view of Ethiopia's constitutional history.

2. THE HISTORY OF THE POLITICS OF LAW

2.1. Abyssinian Empire and Pre-Modern Imperial Constitutionalism

The use of the labels 'Abyssinian' and 'Ethiopian' for the imperial order of the country often tends to be used interchangeably in the English-language literature. Despite the overlap, it is mostly in older sources where one is more likely to encounter references to Abyssinia.[9] There is no a strict historical cut-off point separating them but, Abyssinia is more often the term used for the territorially smaller polity of the highlands with claims of direct royal lineage to Solomonic dynasties and the Axumite Kingdom of the Biblical era while Ethiopia is the term for the larger polity which came into being during Menelik II's imperial expansion into the country's present-day lands in the south.[10]

Led by the speakers of various Semitic-languages from the central and north-eastern highlands of present-day Ethiopia, the Abyssinia was the main political, military, cultural, and religious force in the Horn of Africa throughout most of the region's history. Portuguese and Ottomans were influential along the coast due to their naval power and reach, but inland, it was the Abyssinians who were the region's dominant power. While the Portuguese naval presence was more intermittent in the East along the coastline of present-day eastern Somalia down to Kenya, the Ottomans had established permanent colonies along the Red Sea in present-day Eritrea and had incorporated the various Islamic Emirates in present-day Somalia as tributary states. The nearby presence of potential military threats was one of the glues that kept Ethiopia's loose imperial union from slowly drifting apart.[11]

It was especially during the course of the mid-16th century that the scale of the external threats reached an existential level. Under the lead of Imam Ibrahim, the sultan of the Adal Kingdom allied to the Ottomans, a large multi-ethnic Muslim army equipped with Turkish firearms invaded the north and east in 1527. Abyssinia turned to the Portuguese for military support. Ottoman capture of

[9] The Amharic word for Abyssinia, *Habasha*, is the root of the country's name in other foreign languages.

[10] It was during the Axumite Kingdom (1st - 9th century AD) that imperial Abyssinia's foundations were laid out: i) the adoption of Christianity and the establishment Ethiopian Orthodox Church; ii) the Ge'ez script that would form the basis of Ethiopia's two Semitic-languages spoken today, Tigrayan and Amharic; and the Solomonic royal lineage starting with the union of King Solomon and Queen Sheba. For an in-depth look at the Axumite Kingdom, see, Markakis, John. (1974). *Anatomy of Traditional Polity.* Oxford: Clarendon Press, p. 27.

[11] Mordechai Abir argues that this, in turn, engendered a stronger sense of Christian unity among Abyssinians aristocracy. Abir, Mordechai (1968), *Ethiopia: The Era of the Princes; The Challenges of Islam and the Re-Unification of the Christian Empire, 1769-1855*, London: Longmans, Chapter 8.

Massawa on the Red Sea coast 1563 added to the external threats on the imperial doorstep and ensured competition between aristocratic alliances and factions did not pull the Empire apart.[12]

The Abyssinian Empire was a pre-modern polity which rested on a feudal order. The imperial past went back centuries and functioned in the form of a loose union where the emperor reigned over an amalgamation of territories ruled by fellow Abyssinian nobility running their own fiefdoms.[13] Notably, as reflection of this pre-modern constitutional order, the Emperor's official title was in fact *Negusa Nagast*, The 'King of Kings'. The closest parallel in terms of its pre-modern constitutional set-up is perhaps the Holy Roman Empire which, until being overrun by Napoleon's armies, had been Europe's version of imperial jurisdictional heterogeneity including constitutional monarchies, city-states, bishoprics, tributary and vassal states, and occupied lands. What is more, the same way the impending election of a new Holy Roman Emperor would engender competing alliances and factions among nobility and clergy in Europe, so did Ethiopian court politics and intrigue.

Imperial politics of Ethiopia often pitted competing branches of highland aristocracy against each other. And depending on which branch was in ascendancy, the capital city also moved (Gondar situated in present-day Amhara Regional State and Aksum in the Tigrayan Regional State were two most notable ones). Despite squabbling lords, kings, and princes, and internal wars, the imperial order had held for centuries. The external threat from Muslim Emirates to the east, and their Ottoman overlords, was one explanation for keeping the union alive. Besides, despite the internal divisions between nobility, the population of Abyssinia shared common cultural traits and spoke closely related languages from the same Semitic language family branch.

But what ensured the idea of the imperial order to persist over millennia was the Ethiopian Orthodox Church. They were the keepers of Solomonic lineage. The Church and clergy occupied a key position in all spheres of social life. The ancient language of the Orthodox Church, *Ge'ez*, which was no longer spoken, gave the imperial history a similar mystical and reverential gloss. It was an example of the pre-modern constitutional legitimacy we had visited in Chapter1. The constitution was a collection of surviving laws from the 13th century *Fetha Nagast*, the 'Law of Kings'.[14] Similar to the pre-modern constitutions of the Northern Hemisphere, the document was a complex collection of differentiated rights and obligations for different social classes, details of applicable taxes and tributes, official ceremonies marking the calendar, various aristocratic privileges, and the religious prerogatives of the Ethiopian Orthodox Church and its clergy. In complex ways, the interaction of this heterogeneity functioned as a check on possible concentrations of political power.

---

[12] Led by Özdemir Pasha, the Ottoman Turks had previously landed in Massawa in 1557 and had sent an expedition inland in 1557, in Pankhurst, Richard (1997), *The Ethiopian Borderlands: Essays in Regional History from Ancient Times to the end of the 18th Century*, Lawrenceville NJ: The Red Sea Press, p. 235.

[13] One observer prefers the label 'federation' for this pre-modern union of feudal jurisdictions and pre-modern sovereignties. Marie, M. (1954), *The Ethiopian Empire Federation and Laws*, Rotterdam: Royal Netherlands Printing and Lithographing Company.

[14] The constitution was not written in the 13th century. The various laws were had already been in effect were compiled into a collection at that time. Different sources credit the Coptic scholar Ibn- Al Assal as the author, but the author has failed to find scholarly studies which provide definitive historical evidence. The most detailed citation is in Norman J. Singer's 1970 piece in *Harvard International Law Review* where he credits Eygpt's Abu'l Fada-il Ibn al-Assal writing for patriarch Cyril III of Alexandria (1235-43). However, Singer is careful to precede this account with the adjective 'probably'; Singer, Norman. J. (1970), "Modernization of Law in Ethiopia: A Study in Process and Personal Values", *Harvard International Law Journal*, Vol. 11, pp. 73

It was not only in formal constitutional terms that Abyssinia resembled its pre-modern European counterparts, but also in terms of the concentration of political power. Similar to its pre-19th century northern counterparts, this was one with a weak centre where the emperor was seen as the king of kings instead of an absolute ruler. Similar to the constitutional orders of the Holy Roman Empire of the German Nation, the Ottomans, the Habsburgs, and the Romanovs, the Abyssinian Empire's constitution was one of a union of traditional feudal privileges where the nobility enjoyed local legitimacy, and the military, economic, and political power that came with this.[15] When practically and materially possible, Fetha Negast was imposed and applied throughout all the territories of the Abyssinian Empire. Local indigenous laws continued to function in places where the reach and range of the imperial state was weak, but this state of affairs was a result of practical limitations and not due to an official constitutional recognition of legal pluralism.

Starting with the beginning of the 19th century – broadly running parallel to the political developments towards territorial consolidation, bureaucratic rationalisation, and legal unification also taking place in the northern hemisphere – the Abyssinians also slowly started to move in the modernist state-building direction, first under Emperor Johannes IV, and later Tewodros II.[16] Although he had led the expansion, it was under Menelik II when the constitutional order of the empire started to centralise at the expense of the political power of feudal lords. In the course of the last decade of the 19th century, the constitutional order of the empire moved from the heterogeneity of pre-modern constitutionalism to one that resembled the centralised and consolidated unitary states of the northern hemisphere. This also coincided with territorial expansion beyond the Abyssinian highlands in the north.

2.2. Modernist State Consolidation from Menelik II to Haile Selassie

2.2.1. Sahle Mariam of the ancien règime *crowned as Menelik II*

The accession of Menelik II in 1889 marks an important turning-point for Ethiopian history. Menelik is not only the one who incorporated the country's current territories in the south (including the entirety of Oromia), but he is also the first emperor who pursued large-scale modernist state-building goals. Menelik is an historical figure who is revered as an all-Ethiopian hero by some; seen as an Abyssinian conqueror from the highlands by others.

Menelik's claim to fame outside Ethiopia is the defeat he inflicted on Italian troops who had attempted to expand south from their Eritrean bridgeheads on the Red Sea coast in order to colonise Ethiopia. As part of the late 19th century so-called 'Scramble for Africa' among Western powers, Italy had laid claim to the Red Sea coastal region which for centuries had been part of the Abyssinian imperial system. Establishing their foothold first in 1882, Italians had declared the coastal zone part of the

[15] For a comparison of the Abyssinian Empire with the imperial orders of the northern hemisphere, see Asnake Kefale, Tomasz Kamusella, Christophe Van der Beken (2021), *Eurasaian Empires as Blueprints for Ethiopia: From Ethno-Linguistic Nation-State to Multinational Federation*, London: Routledge.

[16] Richard Pankhurst has been one of the most prominent and prolific chroniclers of Ethiopian history. One of his studies covers this very period. Pankhurst, Richard (1992), *A Social History of Ethiopia; The Northern and Central Highlands from Early Medieval Times to the Rise of Emperor Tewodros II*, Trenton, NJ: Red Sea Press.

Italian Kingdom under the name Italian Eritrea 1890. They steadily expanded their reach upland until they faced an army led by Menelik and his wife Taitu. The fearsome Oromo cavalry played a vital role in the all-Ethiopian army raised to resist the invasion. At the battle of Adwa in 1896, they defeated the Italians.

As always is the case, history comes with inevitable complexities of course. The hero defeating foreign invaders was also the one who had conquered new lands and incorporated into the imperial order.[17] For the purposes of this LLD research project on the relationship between the modern Ethiopian state and indigenous system of Oromo law and governance, Menelik not only signifies the beginning of Ethiopian Oromia but he is also the first to start state reforms to modernise the imperial order.

Menelik had been part of the very traditional form of constitutional order that defined the Abyssinian Empire. Prior to his ascent to the imperial throne, his name was Sahle Mariam and he headed one of the constituent Kingdoms of the Empire, Shewa, which lies in the centre of present-day Ethiopia. He had been the King of Shewa between 1865 and 1889. Once at the helm, he changed the very system that had produced him. Internal political centralisation was accompanied by external expansion. As new lands fell under direct imperial rule, Menelik's power was now beyond the reach of any aristocratic challenger from within the ranks of the old order. Both the empire's reach and the ranks of its military and bureaucracy surpassed any previous episode in Ethiopian history. Firearms gave Menelik's armies the clear upper hand in regional geopolitics.[18]

Many former minorities were assimilated and integrated into imperial bureaucracy and military; regional elites were co-opted; the Ethiopian Orthodox Church and Amharic language were used as tools to consolidate imperial rule. Newly conquered lands were not ruled as small fiefdoms ruled by feudal nobility with local roots; they were directly ruled by imperial bureaucrats governing from newly built garrison towns. The more strategic territories incorporated into the empire were settled by highlanders from the historic Abyssinian heartlands of the country (creating cleavages which to this day complicate notions of who is indigenous to the land and who arrived later). The term neftanya-gabbar, armed settler, is currently used as a pejorative term to describe Amharic speakers living in these historically recent additions to Ethiopia. Not all were imperial bureaucrats and soldiers. Quite a few were forcibly settled as land-bound serfs. (Gabbar means serf)

It was not only the real powers of the Ethiopian state that were expanding at the expense traditional checks and balances and divisions of power, but this was also enumerated in formal changes in law and governance. With the benefit of macro-historical hindsight, we can see that Menelik II's expansion marks a principled change in constitutional legitimacy. In all imperial territories – be it old crown lands, feudal fiefdoms, or recently incorporated regions – what was in principle now established as the

[17] Another layer of complexity comes from the fact that the modernist reforms of Menelik included the regulation and taxation of slave trade in, and slave transport across, imperial territories. See Marcus, Harold (1975), *The Life and Times of Menelik II: Ethiopia 1844-1913*, Lawrence NJ: Red Sea Press, p. 73.

[18] One of the oddest historical detail is that the French poet Arthur Rimbaud, who was living in the ancient walled city of Harar at the time, was one of the main arms-dealers supplying Menelik's armies with western weapons. Nicholl, Charles (1997), *Somebody Else: Arthur Rimbaud in Africa 1880-91*, London: Jonathan Cape, footnote 183.

supreme law of the land was imperial. The pre-modern privileges and prerogatives of imperial jurisdiction that defined the Fetha Negast were now being replaced by modernist state-building.[19]

One of the earliest modernist reforms was the formation of a technocratic/bureaucratic cabinet. Traditional aristocracy and the Church no longer enjoyed the privileged positions they previously held in imperial policy governance. At the same time, the more traditionalist Empress Taitu had strong support from clergy and nobility, the two bastions of the old order. Husband and wife personified this balancing act. Menelik's health soon deteriorated however and day-to-day governance was taken over by his wife and ministers. His death created a period of uncertainty over royal succession. Menelik II did not have a direct male heir to succeed him. His grandson Lij Iyasu succeeded him in 1913, but young Iyasu was suspected of being too close to the Islamic faith thus did not have the support of the establishment – that is, the imperial court, the traditional aristocracy, and the Ethiopian Orthodox Church.

2.2.2. From Regent Ras Tafari to Emperor Haile Selassie I

Earlier in sub-section 2.1. on the history of the Abyssinian Empire we had highlighted how potential military threats from Muslim states was one of the glues that kept the loose imperial union intact for centuries. Not only in Ethiopia but throughout the world, real or perceived external threats can also become tools in internal politics. Most historical accounts explaining Lij Iyasu's low standing amongst traditional Abyssinian nobility argue that he was suspected of either secretly having converted to Islam or being sympathetic to the political agenda of the Muslim Emirates on the eastern fringes of Abyssinia. Accusations of such magnitude which would have unleashed patriotic outrage could also be have been tactically used by the establishment against a leader they did not approve for other reasons. Young Iyasu's reported gentle temperament and pacific inclinations might have also triggered search for a stronger replacement.

Three years after his accession to the throne, a coordinated palace coup by the Abyssinian establishment in 1916 removed Lij Iyasu from office and replaced him with Menelik's daughter Zewditu. She was now given the imperial reigns of the Solomonic dynasty and crowned as the Negiste Negest, 'Queen of Kings', in 1916. Zewditu's cousin Lord Tafari, Ras Tafari Makonnen, was appointed imperial Regent to assist her with governance. In time, Ras Tafari assumed real political power eclipsing the increasingly marginalised Empress whose traditional bases of support were being weakened as result of steady modernist reforms. Following the death of Empress Zewditu in 1930, Ras Tafari was crowned as the new Emperor under the imperial title Haile Selassie I.

Haile Selassie's long reign (from 1916 to 1930 as Regent, and from 1930 to 1975 as Emperor) is full of important developments, but for us, it is his modernist reforms in the legal sphere that hold centre. The policies enacted during this period have had the greatest consequences for legal pluralism, and pragmatic acceptance of the application of indigenous law and governance in remote rural areas. Chapter 12 covers this in detail. But we should here note an important dynamic when it comes to formal labels of constitutions. In comparative context, the state Haile Selassie was seeking to construct is a unitary nation state similar to its counterparts in the northern hemisphere defined by political,

[19] Bahru Zewde's study of the imperial changes of the period provide a comprehensive overview of this process. Bahru Zewde, (1991), *A History of Modern Ethiopia, 1855-1974*. Athens, OH: Ohio University Press, pp. 27-80.

legal, cultural, and social centralisation. While the formal designation of the polity remained an empire, the jurisdictional heterogeneity that had defined the Abyssinian imperial order was being replaced by newer forms of law and governance befitting a centralist modern state.[20]

As it was the case for many counties of the northern hemisphere, the Ethiopian state also undertook a top-down social-engineering processes. For this land of various ethnic groups, identities, and religions, Amharic language and the Ethiopian Orthodox Church were the tools of nation-building and the nation was personified in the office of the Emperor. Afaan Oromo, which is from the Cushitic language family, was relegated to the status of one of the hundreds of local tribal languages of Semitic, Nilotic, Cushitic, and Omotic origins. Amharic-language long associated with Abyssinian traditionalism was now the language of modernist state-building. From the default lingua franca allowing communication among the empire's diverse peoples, it was adopted as the tool for building nation-wide education, military, bureaucracy, and law. Linguistic diversity and legal pluralism were losers in this process. The construction of a new modern form legal unitarism with a single hierarchy of national laws is directly relevant to the goals of this LLD research project. Section 2.2. of Chapter 9 covers the in-depth the legal reforms brought in by Haile Selassie.

International politics – especially under its post-World War II guise – also worked in favour of Haile Selassie's efforts towards modern unitary state-building at the expense of all potential checks on political centralisation. Traditional Abyssinian nobility had been gradually losing power and becoming dependent on the crown for resources since mid the 19th century. They were no longer in a position to challenge someone who had once been one of them. The Ethiopian state was consolidating power at the centre and was no longer dependent on feudal militias.

Indigenous forms of law and governance were being replaced by standardised nation-wide modern statutory laws. In the process, while Amharic was expanding as the national language, indigenous checks on arbitrary rule and centralisation were being eroded. The Ethiopian Orthodox Church was welded to imperial politics while Sunni Muslims, Protestants, and followers of various traditional religions felt marginalised as communities who patriotic loyalties were suspect. But internationally Haile Selassie was better known for his modernist reforms.

The emerging new world order of post-World War II designed by the Allied powers who had defeated the Axis powers (Germany, Italy, and Japan) was favourable to Ethiopia. The country was amongst the many independent countries, mostly in Europe, which had been occupied by the Axis powers during the war. It was from their Eritrean colony on the Red Sea coast that the Italian troops moved down in 1936 and occupied Addis Ababa and other major urban centres. The Emperor manage to flee abroad before the arrival of Italians. As it had been the case with European countries under Axis occupation, Ethiopians endured six years of occupation, but they were liberated earlier than most of Europe. By 1941/42, the Emperor was back. This is also a key moment in the history of the politics of law in Ethiopia. By 1942, comprehensive reforms towards a nation-wide legal order were in place. The traditional checks and balances in imperial constitutionalism and the divisions of powers were the first

[20] This period of reform is covered in depth by Teshale Tibebu, (1995), *The Making of Modern Ethiopia, 1896-1974*. Lawrenceville, NJ: The Red Sea Press.

casualties of modernist reforms; regional diversity was another.[21] The pragmatic acceptance of indigenous law and governance which had defined earlier eras, was no more. Details of relevant legislation, court cases, and reports are in Chapter 12. But as we will see in Chapter 11 before, formal reforms did not immediately wipe out the various indigenous forms of law and governance practiced throughout the country – especially in remote regions away from the reach and range of the modern state.

Once the war was over, like the rest of victims of Axis aggression, Ethiopians were ready to assume their place in the new world order that Western Allies had started to plan for once the fate of the war had become clear. At the time of the creation of the United Nations, Ethiopia was in fact the only uncolonised African country. Before the independence of their former colonies of the West throughout the developing world, Ethiopia was a lone example of an African member of the new world order. What is more, it was a conservative monarchy and a friend of the West, and thus, a potential ally and an international example against the growing communist influence in post-War global politics.[22]

Just a couple of years after its creation, one of the first international initiatives of the United Nations was to re-unite Ethiopia and Eritrea (its former imperial territory on the Red Sea Coast which had become and Italian colony in the 19th century). In 1952 UN-brokered federal union with the Ethiopian Emperor as the head of the new federation. It was an asymmetrical union which granted little federal autonomy to Eritrea. It did not take long for the smaller partner Eritrea to lose most of its territorial and political autonomy and fall under the pull of Ethiopian imperial politics.[23] The formal end to the federal union came to an end 1962 when the Eritrean regional assembly voted itself out of existence. There was little discussion of the way the UN federal design had in fact paved the way for the incorporation of Eritrea, and there was little international criticism of the way much bigger Ethiopia swallowed up the smaller one. In fact, the following year all newly independent African states accepted and joined Ethiopia's initiative for the creation of the Organisation for African Unity (OAU) and came to Addis Ababa for the big occasion.[24] During the proceedings, the fate of the defunct Ethiopian-Eritrea federation was not brought up by anyone.

Haile Selassie's long reign brought big changes to the imperial constitutional order. The loose imperial union with a 'king of kings' at the top that had been in place for centuries eventually gave way to the concentration of constitutional power brought in by modernist unitarist reforms. The centralist direction of Ethiopian politics had taken under Haile Selassie managed to put breaks on traditional challenges to the Emperor's authority, that is, Abyssinian nobility with their respective feudal fiefdoms, and high-ranking clergy from the Ethiopian Orthodox Church. Development, modernisation, and political centralisation might have weakened traditional forms of dissent by elites, but these changes also changed the very nature of opposition. It was no longer from within the ranks of

[21] Asnake Kefale, Tomasz Kamusella and Christoph van der Beken label these set of centralist reforms 'State policy of assimilation (Amharization)", Asnake Kefale, Tomasz Kamusella, Christophe Van der Beken (2021), *Eurasaian Empires as Blueprints for Ethiopia: From Ethno-Linguistic Nation-State to Multinational Federation*, London: Routledge, p. 35.

[22] See for example, Pernham, M. (1947), *The Government of Ethiopia*, London: Faber and Faber, p. 348-50.

[23] For more, see Tekeste Negash, (1997), *Eritrea and Ethiopia: The Federal Experience.* Uppsala, Sweden: Nordiska Afrika Institutet.

[24] The Organisation for African Unity was renamed the African Union in 2002.

establishment. The student movement starting in late 1960s challenged the very system: the imperial order, the feudal control of the land, landless peasants, the centrality of the Ethiopian Orthodox Church, and the Emperor's Western friends.[25]

Haile Selassie had been chipping at the system of aristocratic feudalism which had been part of the traditional imperial order. What is more, other checks on the power of the crown, i.e. the provinces and traditional structures of governance, were also weakened. From his time as Regent, Haile Selassie's modernist/centralist reforms had already weakened the autonomy the provinces had enjoyed historically in *de jure* terms; as Emperor he removed the remaining *de facto* powers and influence of the traditional leadership at the provincial level. But pulling one order down does not necessarily mean that the new one could quickly provide a replacement. Reforms towards consolidation of state power in Europe took centuries to come close to the ideal of a unitary nation-state. Few decades of top-down state activism were not to be sufficient for Ethiopia to transform itself. Reforms needed to create a comprehensive state infrastructure capable dealing with the developmental challenges facing Ethiopia had to also be installed.

Without the traditional in-house forms of political opposition within the traditional imperial order, dissent this time came from newer – more educated, urbane, young, and idealist – social groups modernist reforms themselves had been unintentionally engendering. The late 1960s saw the emergence of a students' movement campaigning for large-scale social and economic reforms. It was especially the exploitative feudal practice of tenant farming that was at the crosshairs of the students' movement. 'Land to the Tiller' was the slogan of the student movement which drew a large following amongst the Oromo. The students' movement failed in its reformist goals, but it sowed the seeds of something more revolutionary.

2.3. Socialist Military Rule under the *Derg*

In 1975 Haile Selassie's regime was overthrown by a committee of socialist military officers. The Emperor was last seen bundled out of the imperial palace by young officers and humiliatingly forced into the back seat of a decidedly non-royal Volkswagen beetle as the footage was broadcast. The ceremonial royal ring of the Solomonic dynasty was then seen on the finger of one of the coup leaders, Lieutenant-Colonel Mengistu Haile Mariam, who, after strangling him with a pillow-case, reportedly encased the emperor's body in a cement block and buried it under his office desk at the palace.[26]

The socialism of the military regime had its ideological roots within the Ethiopian students' movement of the late 1960s/early 1970s. Their rule came to be known as the *Derg* regime, based on the Amharic word for 'committee'. The first two years of their rule was a chaotic mix of revolutionary idealism, incompetence, and infighting. The desire to put an end to feudalism and bring land redistribution did

[25] A critical, but very readable and timeless, first-hand account of the closing days of Ethiopia's *ancien règime* is by Polish journalist Ryszard Kapuściński (1978) [2006], *Emperor: The Downfall of an Autocrat*, London: Penguin Classics. A more sympathetic and recent, account of Haile Selassie's rule is Asfa-Wossen Aserrate (2015), *King of Kings: The Triumph and Tragedy of Haile Selassie I*, translated by Peter Lewis, London: Haus.

[26] Various accounts tell a similar story; see for example, Henze, Paul B. (2000), *Layers of Time: A History of Ethiopia*: London: Hurst and Company, p. 188. We should however note that others, and perhaps not surprisingly Mengistu himself, have contested this version of events.

not proceed smoothly. Contrary to the hopes of student movement, in the end the land did not go to the tiller.

In 1977 Colonel Mengistu eliminated rival leaders and consolidated power. Policies towards land reform took on a more autocratic and brutal character as subsistence farmers scattered over hills and valleys were forced into collective agricultural farms in flatlands. Many such initiatives failed to increase the crop yield and productivity; in many instances, collectivisation led to the collapse of the harvest and famine. Internal resettlement schemes were also used to collectively punish dissenting communities, subsequently implanting the seeds of future conflicts between those who are indigenous to the land and communities forcefully resettled there.

The Derg had come to power on the promises to lift the workers and the peasants from the yoke of feudalism and exploitation, but it soon after degenerated into yet another form of centralism, albeit one that replaced imperial legitimacy with a socialist one. Any opposition was brutally put down. Scorched earth policies and collective punishment inflicted on ethnic groups for opposing the regime ensured that ethnicity became the basis on which opposition rested[27]. This meant that the Derg were soon fighting various ethnic militias throughout the country. A long war with Somalia made things worse. The end of the Cold War also dried up the Soviet support for the embattled regime.

2.4. Ethnic Militias and a New Federal System

2.4.1. The collapse of the centre

By the early 1990s uprisings against the Derg had escalated to the level of a nation-wide civil war as various ethnic militias, often suspicious of each other yet in cooperation, stepped up armed opposition. By 1991, Mengistu had fled the country and the Derg regime had collapsed. Various ethnic militias controlled different parts of the country, and pan-Ethiopian forces – be it imperial or socialist – had vacated the centre. Since the military regime had decimated remnants of the Abyssinian establishment and had domesticated the Ethiopian Orthodox Church, there was no viable force for post-Derg unitary constitutional order. Concerning other instances of regime change around the world, it is quite rare to see moments when the centre evaporates and the victors get a *carte blanche* for a new constitutional order. One small, but very disciplined ethnic militia took advantage of this unique moment of the collapse of the centre.

Amongst the ethnic militias, it was the Tigrayan People's Liberation Front (TPLF) headed by Meles Zenawi which stood apart from most other militias. Despite being one of the smaller ethnic communities of Ethiopia,[28] along with the Eritreans, the Tigrayans had fought the Derg as one the most organised and efficient militias. They had also set up affiliates among larger ethnic groups, in particular, the Oromo. During the fight against the Derg, The TPLF had helped set up the Oromo Peoples' Democratic Organisation (OPDO) as its Oromo affiliate. The OPDO would eventually be part the nation-wide militia alliance, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF),

[27] Robert Kaplan's book covering this period is notably titled 'surrender or starve'. Kaplan, Robert D. (1988), *Surrender or Starve: Travels in Ethiopia, Sudan, Somalia, and Eritrea*, New York: Vintage.
[28] Ethnic Tigrayan constitute 6 % of the Ethiopian population.

where the TPLF held a strong leading position. Another Oromo ethnic militia was the Oromo Liberation Front (OLF), had separate roots and operated autonomously from the EPRDF. During the struggle against the Derg regime, OLF co-operated with other ethnic militias that were part of EPRDF.[29]

Between 1991 and 1995, during the phase led by the Transitional Government, EPRDF and its affiliates laid down the federal foundations of what eventually was to be formalised into a federal constitution.[30] 1991 was also the first time in history a polity called Oromia came into being, albeit yet without a formal constitutional arrangement.[31] During this period, ethnic militias outside the orbit of EPRDF found themselves increasingly marginalised; some were even outlawed. While this applies to a number of ethnic militias, but for the purposes of this LLD research project we should highlight the fate of two main militias representing the Oromo. Many of the members of OLF went into exile, while OPDO became part of the governing coalition of the new federal regime. In the eyes of many Oromo activists however, the party was subservient to new Prime Minister Meles Zenawi and TPLF leadership which dominated EPRDF.

2.4.2. Federalism and the First Oromo (Regional) State in History

The federal constitution of 1995, in principle, undid the constitutional centralism marking the preceding one hundred years. The new constitution rested on the *raison d'être* of recognising and empowering ethnicity.[32] And this was not only in terms of establishing ethnically based Regional States but also creating the possibility for ethnic local government zones within these new regions. Nine new regional-states and two chartered federal cities were set up (one of these federal cities, Dire Dawa, was in fact created subsequent to the 1995 constitution).[33] Oromia became the largest and most populous constituent state of the Ethiopian federation. The constitution laid out the path for creating new Regional States in the future as well as the right to secession.**[34]** The federal constitution also contained clauses for carving out so-called 'nationality zones' within the Regional States. Considering the fact that the country has 76 officially-recognised ethnic groups – some of them living side by side in geographically heterogeneous terms – this was the only workable arrangement which could provide some sort of territorial autonomy to the 'nations, nationalities, and peoples' making up the Ethiopian mosaic.[35]

[29] For an in-depth and even-handed account of the various ethnic militias coming to power, see Terrence Lyons (2019), *Puzzle of Ethiopian Politics*, US: Lynne Reiner, p. 118-9.

[30] For a study of the reformist spirit of the time, see Keller, Edmond (1995), "Revolutionary Ethiopia", *The Journal of Modern Africa Studies*, Vol. 33, No. 4, pp. 621-34. For a more critical interpretation, see Chanie, Paul (2007), "Clientelism and Ethiopia's Post-1991 Decentralisation", *The Journal of Modern African Studies*, Vol. 45, No. 3, pp. 355-84.

[31] For the excitement and fears defining the transitional period after Derg but before the federal constitution, see Assefa Jalata, (1993), *Oromia and Ethiopia: State Formation and Ethno-national Conflict*. Boulder and London: Lynne Rienner Publishers, Chapter 8.

[32] Article 8 (1) of the 1995 Ethiopian Constitution declares that "All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia."

[33] One of the most insightful studies of federal dynamics in newer Regional States on the western fringes outside the traditional Abyssinian region, see Kefale, Asnake (2013), *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study*, London: Routledge.

[34] Habtu, Alem (2005), "Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution", *Publius: The Journal of Federalism*, Vol. 35, No. 2, pp. 313-35.

[35] The direct references to Ethiopia's constituent 'Nations, Nationalities and Peoples' as the country's constitutional *pouvoir constituant* exist both in the Preamble to the 1995 Constitution as well as Article 8 (1) and Article 49.

Oromia Regional State is where the Oromo were the titular ethnic group and the majority, but Oromo communities also exist in Addis Ababa, Dire Dawa, Harar, Afar, Tigray, Amhara, and the Somali Regional States. As it is the case for many different smaller communities within the new Regional States, there are variations of recognised group rights for these smaller Oromo communities – some of it territorially-defined within sub-state nationality zones, some of it non-territorial collective representation in regional cabinets through the practice of reserved seats. But it is the Regional State of Oromia that matters most of course. For the first time in history, Oromia was recognised as a constitutional entity with its own borders, government, bureaucracy, flag, and education. Now, some of this might have been an outer shell justifying ethnic federalism and EPRDF rule; national politics had remained centralised; and the TPLF leadership networks had dominated decision-making, yet the symbolic importance of creating history's first modern Oromo (regional) state has had irreversible impact.

In the meantime, the 1998-2000 border war with Eritrea strengthened the hand of EPRDF as the regime was able to create a 'rally around the flag' effect for the various ethnic groups making Ethiopia. Along with Tigrayans, Eritreans had in fact been at the forefront of the armed insurgency against the Derg from the get-go. But when the Eritrean People's Liberation Front (EPLF) declared their desire to form an independent Eritrea, the result was a bloody border conflict which cost tens of thousands of lives on both sides. Without Eritrea, Ethiopia's access to Red Sea was severed. What would have amounted to dismembering a vital organ of the economy did end not up isolating and insulating Ethiopia however. During the two decades that followed the adoption of federalism, Ethiopia became one of the international success stories symbolising the Africa's economic growth while Eritrea retreated into inward looking isolation. We should not overlook the fact Ethiopia's economic growth and development co-existed with a semi-authoritarian political system – especially following the 2005 elections when the opposition emerged as a challenge to EPRDF's hold on power.

It is imperative that we summarise the main message that comes out of the analysis above. The formal constitution might have created the outward appearance of a federal union between the country's dozens of constituent ethno-linguistic communities, but it was a system strictly managed by the leadership cadres of EPRDF. When it comes to the rights of ethno-linguistic communities, the application of the principles of Ethiopian federalism has often deviated from its promises enshrined in the 1995 constitution. The record is thus a mixed one. Nonetheless, the creation of the first Oromo (regional) state in history and constitutionally legitimising the quest of ethno-linguistic minorities for self-rule under the overarching framework of federalism – even if it remains imperfect in its application – has exposed and recognised, and in turn, revived traditional Oromo culture.

2.4.3. Reforms, Liberalisation, Uncertainty

Section 1.1. had concluded with a note on the on-going large-scale political changes. What started off as liberal reforms in 2018 seem to have stalled and taken a reverse turn, but as this chapter goes to submission, it is impossible to tell whether reforms might resume. It is clear that TPLF/EPRDF rule has been replaced by another political coalition which has emerged from within, but which way thigs will go remains to be seen. There is little doubt that we are in the midst of the beginnings of a new phase for the country, but the dust has not yet settled to provide a reliable analysis of the fate of indigenous systems of law and governance under Dr. Abiy's Prosperity Party. Changes are accompanied by

uncertainty and new tensions. For this reason, we will leave the most recent phase in the history of the politics of law in Ethiopia. Instead, the main analytical focus of the Chapter 12 will rest on four historical phases of constitutionalism: a) the long history of pre-modern imperial constitutionalism, b) modernist legal unitarism and single hierarchy of laws; c) socialist centralism; and the federal Ethiopia of EPRDF.

While this chapter maps out the general contours of Ethiopia's constitutional history, it is the analysis in Chapter 12 that traces the fate of Oromo law and governance more specifically. Since indigenous forms of Oromo law and governance had long remained outside formal institutions and laws of the Ethiopian state, we have to first examine Oromo constitutionalism in more detail. This is covered in the next chapter. Before we proceed further however, it is imperative to note two comparative investigative challenges that sets the Ethiopian case-study apart from the other two.

3. ETHIOPIA AND THE SCHOLARLY CHALLENGES

The South Africa and Botswana case-studies share a number of commonalities: their 19th century histories are interlinked; both countries were both part of the complex jurisdictional system of the British imperial constitutional order; both adopted the British Common Law system – combined with the Dutch/Roman law system that had in place in the Cape Colony before the arrival of the British; and both granted recognition to indigenous law and governance early in their constitutional histories (even if this were due to pragmatic reasons of political expediency rather than constitutional principles). All this is laid out in the case-studies. What needs to be noted here is that the early recognition and incorporation into imperial constitutionalism has created an abundance of official material to be examined in the course of investigation of the case-studies of South Africa and Botswana. Such abundance does not exist for Ethiopia.

3.1. Complexity and the Long Term

Earlier in sub-section 1.2. we highlighted the structural diversity Ethiopia shared with our preceding case-study of South Africa. Both countries are marked by their underlying ethnic, linguistic, economic, demographic, and geographic diversity. They both have complex histories where different ideals of constitutionalism had influenced the workings of law and governance. Throughout its history, South Africa's structural diversity was combined with successive state policies superimposed on each other to manage such diversity. Some policies replaced others, others revised existing ones, yet others were added on top, resulting in a jumble of legal and political mechanisms. What is more, there were also asymmetrical differences in laws and policies across the country's territorially constituent units. The result as we highlighted in sub-section of Chapter 7, is a unique mix of change and continuity. We see fewer instances of this Ethiopia.

As the various historical periods covered in section 2 show us that, in contrast to South Africa, there have been fewer instances of changes in the politics of law in Ethiopia. The successive phases of law and governance defining Ethiopian's constitutional history have been separated with clear breaks in-

between.[36] The existence of fewer instances of policies across the four constitutional phases of Ethiopia history means that there are fewer legal and political documents to be investigated. But especially during the modernist phase of imperial Ethiopia and the socialist Derg regime, almost all aspects of indigenous law and governance had been forced underground. This means that archival research on Ethiopian primary sources (i.e. official documents, legislation, court cases) has to take a secondary role to field research and secondary material (i.e. scholarly works) – thus presenting challenges in the opposite direction than what we encountered in South Africa.

In South Africa during the various constitutional phases the country has gone through (i.e. Dutch and British colonialism, the Union of South Africa, apartheid, and democratic), state authorities all kept extensive records. There are thus multiple primary sources to examine, including documents by imperial and South Africa bureaucracy, various branches of imperial and South African military, courts, various advisory bodies within the imperial constitutional order, reports by professional bodies, and documents of the British South Africa Company (BSAC). On top of these, contemporary analyses and opinion pieces by practising lawyers, reproductions of correspondence in history books also add to the list of primary sources. The scholarly challenge for South Africa is one of over-supply not shortage.

The over-supply of relevant material presents the scholarly challenge of putting together an historically accurate narrative from multiple and sometimes contradictory perspectives contained in the documents. For Ethiopia, in contrast, the challenge is the dearth of relevant written material and the subsequent scholarly challenge of incorporating uncodified, the unofficial, and the unwritten into constitutionalism research. The different scholarly challenges presented by both South Africa and Ethiopia underscore the appropriateness of the holistic research methodology we had discussed in Chapter 3, section 3.

That discussion on methodology had followed the literature review in Chapter 2, where notwithstanding the different labels and designation used to describe them, we looked at all the various theoretical approaches which call for holistic approaches which conceptualise the law beyond the narrow and rigid focus on black-letter laws prioritised by Legal Positivism. Instead we looked at various different scholarly literatures – namely Law and Society, Law in Context, Legal Realism, Socio-Legal Studies, and Sociology of Law – which share the same expansive conceptualisation of the law covering both the formal and the uncodified, and where the law is situated within the broad historical, social, and political context. This flexible path allows us to combine research on primary and secondary sources with field-research.

The dearth of primary sources on the relationship between the Ethiopia state and Oromo laws and governance in itself is a significant scholarly challenge; what adds to this is the current political upheaval the country is currently undergoing. To use the mirror corollary of the common phrase, the dust is still up in the air and we do not know where things will end. What is more, most of the big changes happen behind closed lines. We looked at these current dynamics in the introduction to this Chapter. Section 1.1. had concluded with an overview of the unprecedented political changes

[36] The first case-study on Botswana covered in Chapters 4, 5, and 6 – despite sharing the same imperial jurisdictional system with South Africa – shows a different pattern defined by historical continuity in terms of the measures targeting the recognition and application of indigenous forms of Tswana law and governance. Compared to both South Africa and Ethiopia, Botswana is marked by policy continuity.

currently underway in Ethiopia, and the attending uncertainties and unknowns. When the tectonic plates are moving, it is futile to seek predictions about the future of the Ethiopian state and indigenous constitutionalism.

To ensure the reliability and validity of the findings, we have to take a historical cut-off date. As we had done for South Africa in the previous case-study, March 2020 is the chosen end-date for the investigation. That is not only when the global Covid-19 pandemic led to lockdowns throughout the world, it is also when the Ethiopian government cancelled the upcoming 2020 national elections. Two related scholarly challenge remain however: studying the uncodified, unofficial and unwritten through multiple layers of (intended and concealed) statements.

3.2. Researching the Uncodified, the Unofficial, and the Unwritten

One of the unique challenges of scholarly research into Ethiopia's legal systems – both official and unofficial – is the elaborate and multi-layered way opinions on delicate issues are put. Political dissent and social criticism tend to be expressed in a more coded and ambiguous manner. Donald N. Levine's insightful and timeless classic on Ethiopian society and culture is in fact named *Wax and Gold: Tradition and Innovation in Ethiopian Culture* after this very practice.[37] 'Wax and gold' (*sam-enna warq)* is a traditional form of Abyssinian poetry composed of two semantic layers: the immediately apparent and the ambiguously concealed.[38] This allows for a variety of nuances, complexities, and hidden meanings to coexist. Historically, this was also a way to add humour and wit or inject insults and criticism to dealings with authority. The surrounding wax part concealed the gold part of risqué opinions and thus shielded the owner from retribution. We should note that this form of poetry was not within the monopoly of highlanders speaking Semitic languages. Like many peoples who historically lived side-by-side the Abyssinia Empire, the Oromo also adopted this art, calling it *Saadoommii* in Afaan Oromo, meaning 'word-play'.

In a piece he wrote in 1988, Donald N. Levine called wax and gold "a way of life" for Ethiopians.[39] His observation has echoes of what another Western observer had remarked 200 years before Levine. One of the oldest English language documents on Ethiopia contains references to the very Abyssinian art of casing gold in wax. James Bruce's late 18th century book on his search for the source of Nile had been one of the most popular books at the time in England. Most of the book accounts Bruce's travels up the Nile through Egypt and Sudan, but the section on Abyssinia contains an observation which seems to show how closely linked our past and the present can sometimes be: "dissimulation and ambiguity are as natural; as breathing among all ranks of people in Ethiopia" notes Bruce in 1790.[40]

Combined with the relative dearth of primary sources, Ethiopian tendency for coding politically sensitive opinions in seemingly mundane statements requires a lot of scholarly investment in the

[37] Levine, Donald N. (1965), *Wax and Gold: Tradition and Innovation in Ethiopian Culture*. Donald N. Levine. Chicago: University of Chicago Press.
[38] For more on Wax and Gold, see Girma, Mohammed (2011), "Whose meaning? The Wax and Gold Tradition as a Philosophical Foundation for an Ethiopian Hermeneutic", *Sophia: International Journal of Philosophy and Tradition*s, Vol. 50, No. 1, pp. 175-87.
[39] Levine, Donald N. (1988), "Wax and Gold is a Way of Life", in Levine (ed.), *Flight from Ambiguity: Essays in Social and Cultural Theory*, Chicago: University of Chicago Press, p. 28.
[40] James Bruce (1790) [1967], *Travels to Discover the Source of Nile*, Elibron Classics Reprint, p. 83.

history of the politics of law in Ethiopia. In order to ensure one gets reliable picture one needs: i) surefooted historical knowledge; ii) holistic perspective that incorporates social, historical, legal and political perspectives; and iii) and an even-handed view of all the competing political positions. Only that way can one decode the intended meanings or discard politically driven partisan interpretations. Social science methodology calls this practice 'triangulation'; that is, to increase the validity and reliability of the findings, one incorporates multiple streams of evidence. The next two chapters put this methodological choice into action as legal, political, historical, and cultural perspectives are combined to build a holistic picture and trace the fate of indigenous constitutionalism over the historical long term. This was the path we took for the previous South Africa and Botswana case-studies; and will indeed stay on the same course for our third case-study on Ethiopia.

Chapter 11:
The Indigenous System of Oromo Laws and Governance

---

1. THE OROMO

1.1. Oromo Thanksgiving, *Irreecha*

During early October, the ethnic Oromo of Ethiopia celebrate their Thanksgiving Day known as *Irreecha Malkaa* in Afaan Oromo language. The day also marks the beginning of the new year according to the traditional Oromo calendar. The exact day of the celebrations can vary from year to year based on the assessment of traditional leaders since the aim is to celebrate the end of the dark days of the rainy season and the coming of spring harvest. During this period following the annual floods, the Oromo gather in the town of Bishoftu about 35 kilometres from Addis Ababa, celebrate the arrival of the new year, and offer their thanks for the past year to their God, the creator *Waaqa*. Dressed in the traditional colours of the Oromo, black, red, and white, they chant *Waaqa koo, guurraachaa garaa garbaa* ('my creator, take me into your black ocean abdomen'). The Oromo flag, with the life-giving sycamore tree, the *Odaa*, superimposed onto three horizontal stripes of black, red, and white, adorns every corner. Many wear clothes decorated with the Odaa. Most men carry their traditional ceremonial sticks, the *haroreesaa*, some carry shields and spears, and women carry their traditional sticks, the *sinqee*. As the end of the rainy season also marks the coming of spring, many hold freshly cut sprigs of green grass in their hands symbolising the coming harvest, some carry flowers. In fact, in Afaan Oromo the word irreecha itself means 'fresh green grass'. The festivities are about celebrating life. The procession ends up gathering around Lake Harsadi. There are bands, dances, singing, traditional Oromo cavalry parades, traditional leaders decked in their traditional garbs lead the processions. It is a colourful, boisterous, joyous occasion.[1]

Tens of thousands across Oromia flock to attend the ceremony in Bishoftu. The Irreecha Malkaa celebrations are organised by the leaders of the traditional Oromo political/religious/cultural/legal

[1] During the 2016 Irreecha on October the 2nd, the celebrations ended up in a bloody stampede when crowds panicked following the explosion of tear-gas cannisters lobbed by the security forces in an attempt to disperse restive crowds chanting anti-regime slogans. The tragedy sparked riots across Oromia and the subsequent declaration of emergency rule.

system known as the *Gadaa*. In remote regions far from Bishoftu, smaller versions of Irreecha celebrations take place along riverbanks, lakes, or trees – all symbolising life. What is common to all celebrations is the centrality of traditional *Gaddaa* system and its political and religious leadership, both elected and hereditary. The elected political leader, the *Abbaagadaa* carrying his ceremonial mast, the *Bookuu*, together with the hereditary spiritual leader and his wife (the *Qallu* and the *Qaallitti*), and the hereditary rainmaker (the *Maaliimaa*) lead the celebrations. They are joined by the leader of the warriors (the *Qandaala*), traditional priests (the *Qaallicha*), elected political counsellors (the *Haayuu*), hereditary chiefs (*the Abbaa Malkaa*), and representatives of the various age-groups constituting the Oromo society. Historically, this was also the time to hold traditional courts after months of rains and floods.

For long, Oromo Thanksgiving had remained a somewhat opaque affair; sometimes public, sometimes secretive; sometimes tolerated by the state and sometimes celebrated subversively beyond the reach of the Ethiopian state. During imperial rule and the subsequent military/socialist regime, any expression of indigenous laws and governance was deemed unpatriotic – especially for the country's biggest minority who were not from the Semitic-speaking highlander ethnic groups, i.e. the Amhara and the Tigrayans. From being perceived threats to the unity of Ethiopia since their incorporation into the Abyssinian Empire in the late 19th century, the Oromo have now moved to centre of Ethiopian politics. They have the biggest Regional State of the federation territorially; with an estimated population of 35 million, the Oromo are the biggest ethno-linguistic of Ethiopia[2]; and since 2018, the country has an ethnic Oromo as Prime Minister. No wonder their Thanksgiving celebrations have acquired renewed vigour.

While adherence to their traditional culture and their language unites them, the Oromo are in fact dispersed over a wide swathe of territory w here they live side-by-side the other ethnic groups that make Ethiopia. The Oromo are also divided along religious lines. Those in the west of the Oromia region had converted to Protestantism a long while back, in central Oromia the Ethiopian Orthodox Church is dominant, while the east is predominantly Muslim; it is only in the remote southeast corner near the Kenyan and Somali borders where the traditional Oromo religion *Waaqeffataa*/*Waaqeffanna* is still practiced. Yet during Irreecha Malkaa, Muslims, Protestants, Orthodox, and indeed believers of *Waaqeffataa*/*Waaqeffanna* celebrate together and give their thanks to Waaqa.

The recent years had witnessed an increasing public embrace of traditional Oromo law and governance. What is remarkable is that the Irreecha had managed to survive under previous political regimes that had either banned the celebrations or belittled the occasion as a pagan ritual. Both the imperial system and the subsequent military regime viewed Oromo traditional institutions with disdain, not only because of a sense of cultural superiority over them, but also because of the fear that the traditional system could become a rallying point for the country's largest ethnic group and thus challenge the political establishment.[3]

[2] For Oromo demographics, see Bassi, Marco (2010), "The Politics of Space in Borana Oromo: Demographics, Elections, Identity, and Customary Institutions", *Journal of East African*, Vol.4, No. 2, pp. 221-46.

[3] As early as 1978, P.T.W. Baxter had been writing about the Ethiopian state fears of "any manifestation of Oromo consciousness", Baxter, PTW (1978), "Ethiopia's Unacknowledged Problem: The Oromos", *African Affairs*, Vol. 77, No. 308, p. 296.

1.2. Oromo Unity and Diversity

Throughout most of their history, the Oromo lived without much of a sense of political unity. Similar to the way Arabs and Germans had historically inhabited various different states, some Oromo lived in smaller polities to the south and south-east of the Abyssinian Empire, others lived across some of the constituent kingdoms of the empire. The same way the various German and Arab tribes were influenced by the culture of the people they lived next to – be it Latins, Slavs, Berbers, Persians, or Nubians – so were the different branches of the Oromo influenced by the cultures of their neighbours. The languages and religion of the Semitic highlanders of Abyssinia was the predominant influence in the west while Sunni Islam made inroads from the Muslim Emirates and Ottoman colonies along or close to the Red Sea. The mostly arid and remote southern flatlands had remained relatively isolated. This is where the traditional Oromo religion *Waaqa* had survived (more on this later in section 2). Despite the internal heterogeneity there was still a sense of cultural unity across the various component parts of Oromo society. Similar to the way the terms Arabia or Germania signified, a sense of peoplehood and a shared culture (especially visible to the outsiders living adjacent to them) brought in a sense of cultural unity despite lacking a formal polity named Oromia that united all.

As we had seen in the previous chapter, following an uneven and gradual historical process the remaining Oromo lands had been incorporated into the Ethiopia as part of the southern expansion under Abyssinian Emperor Menelik II. The Oromo had become one of the dozens of conquered people of the empire, albeit the largest in population terms. Lacking a centralised political authority, the Oromo were unable to resist as a unified force and fell under imperial control during successive waves of conquest. Despite having a long history of political existence in the areas straddling the southern highlands of present-day Ethiopia, the northern savannahs of present-day Kenya, and the western deserts of present-day Somalia, the Oromo were organised along confederal tribal lines without a strong central government and a standing army. The warriors of various Oromo regions, even their fierce cavalry, was no match to the joint force of the Abyssinian imperial army and the sundry feudal militias of imperial vassal states – some of them in fact ethnic Oromo.

We had ended Chapter 10 on a note about the need for combining a surefooted knowledge of Ethiopian history with an even-handed view of different perspectives on this very history. The incorporation of Oromo lands is surely an act of imperial expansion, but there is also a long history of Oromo military incursions into the Abyssinian lands from their strongholds as well as the presence of Oromo within imperial ranks. That is, the history of Ethiopia and the Oromo precede Menelik. To be fair to the complexities of history, since the 16th century bands of nomadic pastoralist Oromo had been conducted raids into imperial lands and were terrorising the inhabitants of the central Ethiopian highlands of the central Shewa (Shoa) province.[4] The Oromo were possibly one of the first people of the Horn of Africa who had bred and rode saddled horses.[5] Their cavalry had gained a fearsome reputation (who would eventually play a decisive role in the defeat of the Italian forces at the battle of Adwa). The Oromo had also freely mixed with the local populations in the places they settled and

[4] For a look into these border regions over the long history, see Pankhurst, Richard (1997), *The Ethiopian Borderlands: Essays in Regional History from Ancient Times to the End of the 18th Century*, Lawrenceville, NJ: The Red Sea Press.

[5] Baxter, PTW (1978), "Ethiopia's Unacknowledged Problem: The Oromos", *African Affairs*, Vol. 77, No. 308, p. 284.

lived. Some of the Abyssinian feudal nobility and military were indeed of Oromo extraction or had part Oromo lineage such as Ras Tafari Makonnen who was to be crowned as Emperor Haile Selassie.[6] Even the Amhara region at the heart of the imperial Abyssinia had a mostly Muslim ethnic Oromo community in its Wollo province. This was not a compact and homogenous people. Again, the history of Germans and Arabs – unified by language and culture but divided by separate histories, borders, and religions – gives us the closest comparative benchmarks.

Across the various parts of Oromia, it is especially the remote southeast Guji-Borana region where indigenous Oromo constitutionalism had survived.[7] It is here where the appropriateness of the theoretical and methodological choices laid out in Chapter 3 are confirmed. The holistic theoretical approach guiding the research, the accompanying expansive conceptualisation of the law, and the attention to the broad historical, social, and political context all tell us that indigenous law is often more than just the law. The traditional Gadaa system indeed has many components that go beyond and above the narrow and rigid conceptualisation of the law preferred by Legal Positivism. The Oromo lands most recently incorporated happened to be where the Gadaa survived – which is part a political system of self-government, part a system of social organisation, part a religion, and part a system of law. And what is more to this indigenous constitutional order of the Oromo, the Gadaa system rested on a confederal union of self-governing territorial sub-sections – an understudied aspect of constitutionalism and territorial politics. Section 2 below covers all component parts of indigenous Oromo constitutionalism.

Our earlier South Africa case-study was the first encounter with terms used historically which have since become pejorative or offensive. Instead of erasing words from primary documents and substituting new ones, the path we have taken is to accurately quote and report historical material while acknowledging the current sensitivities. One such designation that is loaded with negative connotations today is the word 'Galla' which had widely been used in English-language source until mid-20th century.[8] Every English language source before this time, if it were to contain any reference to the Oromo people (old sources are more likely to inordinately focus on the Abyssinian imperial order itself), the label they would invariably use was 'Galla'.[9] The etymological origins of the word seem uncertain. Rowoldt Shell writes that the origin of the word Galla comes for Amharic language

[6] Commander Gobane Dacche who headed Menelik's armies invading the Oromo lands of Illubabor, Wollega, and Gibe was himself an Oromo. Shell, Sandra Rowoldt (2018), *Children of Hope: The Odyssey of the Oromo Slaves from Ethiopian to South Africa*, Cape Town: University of Cape Town Press, pp. 58-9.

[7] Although their research does not target the systems of law and governance indigenous, Donald Donham ad Wendy James' historical study of Abyssinian Empire's south-eastern fringes contain discussions of the Oromo system. Donald Donham and Wendy James (1986), *The Southern Marches of Imperial Ethiopia*, Cambridge University Press.

[8] As Mohamed Hassen notes, even at that time in history it was a term deemed derogative. Hassen, Mohamed (1990), *The Oromo of Ethiopia: A History 1570-1860*, Cambridge: Cambridge University Press, pp. 1-14.

[9] The earliest English-language reference the author has found is in a mid-19th century missionary document: Isenberg, Karl Wilhelm (1864), "The Gallas of Abyssinia" *Church of England Magazine*, p. 264. What is noteworthy is that French-language sources from the same time-period are likely to use the designation 'Oromo'. D'Abbadie, Antoine (1880), "Sur les Oromo: Grande Nation Africaine", *Annales de la Société Scientifique de Bruxelles*, pp. 167-192.

where it means 'uncultured immigrant'.[10] Others are less sure. Cornelius Jaenen traces the word Galla to an Afaan Oromo phrase which was originally supposed to mean 'free men'.[11] This account of the word's meaning seems closer to the historical context from which it originated. In his masterful *Layers of Time: A History of Ethiopia*, Paul Henze goes back five centuries and draws attention to the independent-minded reputation Oromo had back then:

> "The Oromo who began to move northward in the latter part of the 16th century were mostly nomadic pastoralists without a written language. They espoused neither Christianity nor Islam. They had a remarkably egalitarian culture with a complex age-class system, through which all men rotated in their lifetime".[12]

2. OROMO CONSTITUTIONALISM

We had looked at how the traditional Gadaa system was part a political system of self-government, part a system of social organisation, part a religion, part a system of law, and it came with its unique rituals and ceremonies. But there was a foundational building-block at the core of it all. The underlying organising structure that lies at the heart of the Oromo society is the age-group. Before we go into the details of traditional politics and law, it is therefore imperative that we start with the very foundations of the Oromo society.

2.1. The Age-Groups and the Five Pillars of the *Gadaa*

Age-groups, also known as age-cohorts, have historically played a central role in many traditional societies throughout the continent, especially in East Africa. People born within a cycle of a few successive years would bond as an age-group. Age-groups had clearly defined collective rights and responsibilities. Membership in an age-group would thus determine all the social, economic, cultural, and military roles of an individual during the different periods of one's life. One's entire life experience would be in the close company of the same group of men and women. With the progression of time, during intervals of a few years, different roles would transfer from one age-group to another. These cycles defined who were the shepherds, who were the warriors, who toiled the fields, who took care of the children, and so on. Eventually, every age-group would end up going through the same cycles of rights and responsibilities.

In most parts of Africa, the age-system has now lost its monopoly as the main organising principle of the society. It has lost its hold over society due to the combined effects of colonialism, the modern state, and the emergence of competing modern social structures – be it class or ideology. Cultural remnants of this once-dominant system partially survive in different forms however; the better-known example being the secretive circumcision rituals common to many parts of the continent which bond young-men around the same age together. Bernardi's work on East African age-groups shows how

[10] Shell, Sandra Rowoldt (2018), *Children of Hope: The Odyssey of the Oromo Slaves from Ethiopian to South Africa*, Cape Town: University of Cape Town Press, p. 18. It should however be noted that in today's Amharic language the word Galla is related to neither 'immigrant' nor 'uncultured'.

[11] Jaenen, Cornelius J. (1956), "The Galla or Oromo of East Africa", *Southwestern Journal of Anthropology*, Vol. 12, No. 2, p. 171.

[12] Henze, Paul B. (2000), *Layers of Time: A History of Ethiopia*: London: Hurst and Company, p. 91.

this system used to come with very clear divisions in terms of collective rights and responsibilities defining the entire social structure:

> The age-system provides class-members with a basic structural status. This is fundamentally equal for all, and is acknowledged and required for every type of social activity. The position of class-members in the structure of the age-system is defined with remarkable precision in relation to all other members of society. Every class member is aware of the functions he is entitled to perform, and of the power he can claim in public matters.... The stratification of classes and the differentiation of authority determine a typical differentiation of functions among all classes.[13]

The precise details of these rights and responsibilities of the age-groups differed across the different societies of the continent, but the underlying logic was the same. The remarkable element for the Oromo is that the age-group system has managed to survive and came back from near extinction. This is partly because of the history of official rejection and suppression which in due course turned traditional structures into modern symbols of cultural resistance. An analogy might be the Hebrew language which came back from near extinction as the archaic language of old religious texts was reborn as the language of a new nation. Of course, what makes the renaissance of traditional structures possible is the seeds of survival. For Israelis, it was the religious texts which preserved Hebrew language. For Oromos, it was a combination of the remoteness of the southeast Guji-Borana region which allowed all components of the traditional system – political, military, religious, cultural, spiritual, and legal – to survive and the demographic strength of approximately 35 million Oromo who made such survival practically possible. Not all communities in remote regions practising their traditional ways of life find large populations of ethnic kin receptive to re-embracing and sustaining tradition. Without such numbers, indigenous cultures which have managed to survive in remote regions face a steady process of erosion on the path to imminent extinction.

Based on the age-group system and eight-year intervals, the social structure of the Gadaa system rests on five permanent constituent pillars (*gogeessa Gadaa*). Every eight years these five pillars change their collective roles. In simple terms the system functions as such: little children of 0 to 8 years-olds are the first age-group with little responsibility and lots of play; the 8 to 16 years-olds start having small responsibilities like shepherding live-stock and learning to ride horses; the 16 to 24 years-olds are the young adults undergoing education, learning how to hunt, participating in cultural ceremonies and rituals, working in the fields, and acquiring more responsibilities in due course; the 24 to 32 years-old men become warriors and they start their training in the cultural roles eventually required for the self-governing political duties of the next cycle, women start assume their roles in family and society; the final age-group is the 32 to 40, they hold responsibilities in administration, politics, and the law. Different rights and responsibilities continue evolving with older age-groups, again according to eight-year intervals, but above 40 years of age, age cohorts no longer create new constituent groups but replicate the existing five. That is, the 40 to 48 years-olds who assume political leadership belong to the same constituent pillar as the 0 to 8 years-olds. Put differently, children born during the political leadership of one of the five constituent pillars of Oromo society become members of that very pillar. The 48 to 54 years-olds are part of the same permanent pillar as the 8 to 16 years-olds; 54 to 60 years-

[13] Bernardi, B. (1952), "The Age System of Nilo-Hamitic Peoples", *Africa: Journal of the International African Institute*, Vol. 22, p. 331.

olds belong to the same pillar with the 16 to 24 years-olds. There is thus a strong element of intergenerational bonding to the Oromo age-group system. The full cycle of transfer of rights and responsibilities takes 40 years. During this full cycle, each constituent pillar will have an eight-year term in political office. The once-every-eight-years occasion of transfer of political power from the outgoing 40 to 48 years-olds to the incoming one, is also one accompanied by deliberation of new laws and an election of new leaders.[14]

While being common to many traditional societies of East Africa, age-groups did not always have a political role in every society based on this system. Especially where hereditary chiefs and kings held political power, age-groups tended to have more economic, social, and cultural functions. While being inseparable from the social structure, the age-group system of the Oromo comes with pronounced political responsibilities we do not see amongst traditional societies with the more hierarchical political authority. We had earlier highlighted the holistic nature of the Gadaa system. It is thus not entirely amenable to being easily dissected into the western concepts of separate political, social, religious, cultural and legal components. While these parts are interlocked and often inseparable, the Oromo themselves have functionally specific responsibilities assigned to various different political offices; be it administrative, legal, financial, and military. Therefore, it is not cultural ethnocentrism to separate the social from the political, and the political from the legal – as long as we remember how closely interlinked all are. This little caveat marks the passage of our discussion from the social to the political.

2.2. The Indigenous *Multus Politica*

There are four component elements to the original political structure of the Gadaa system. One is related to the social structure of the age-group described above. It is the cohort of 40 to 48 years-olds who have political responsibilities. The second element is the elected political leadership who hold functionally specific responsibilities such as the first minister (*Abbaagadaa*), the leader of the warriors (*Qandaala*), and a number of political counsellors (*Haayuu*). Ranging from the treasury to public prosecution, there are also various other elected offices with clearly defined responsibilities.

When populations were much smaller, political responsibilities were shared on the basis of rotation. As communities grew, deliberation and consensus became the method of selection. Whenever the demographic scale allowed, tribes with smaller populations prefer deliberation and consensus. Candidates are selected before the transfer of power and they are groomed for office; that is, they accompany those who currently hold office in order to learn the ropes until formally it becomes their turn. Elsewhere demographic growth has brought in practices that resemble modern representative democracy; that is, candidates declare their interest in assuming office, alliances similar to political factions emerge among candidates to different offices, horse-trading – sometimes literally – takes place among factions, and eventually elections are held during the ceremonies marking the transfer of power. There is still an emphasis on seeking consensus through deliberation however.

[14] Legesse, Asmarom (1973), *Gadaa: Three Approaches to the Study of African Society*, New York: The Free Press, pp. 52-107.

The political leadership is elected by the people during the transfer of political office marking the arrival of the new cohort of 40 to 48 years-olds. Public deliberation by the people is this third component element. The most important occasion for deliberation was the people's assembly, *Gumi Gayoo*, which convenes once every eight years marking the cycle of transfer among the age-groups. This is when new laws are made, existing ones reviewed, the outgoing political leadership evaluated, new leaders elected, and expectations for the incoming leadership are laid out. Public deliberation on a smaller scale also takes place whenever new decisions are needed or when new issues arise during the eight-year tenure. Historically, all deliberation used to take place under the sycamore tree. Mohamed Hassen describes this as follows:

> "The assembly was held in the *chafe* (meadow) under the life giving shade of the *oda* (the holy sycamore tree) which traditionally was believed to be the 'most' respected and 'most' sacred of trees, the shade of which was the source of peace and the center of religion. The shade of the *oda* was not only the 'office of government', the meeting ground of the elders of the confederacy, but also the sacred place for religious duties".[15]

These three components elements of the political structure, i.e. the age-group of 40 to 48 years-olds, elected leadership, and public deliberation are within the paired-half of the five territorial branches of the Oromo people. There is also an external element to the political structure which brings the various tribes together in a confederal union. The principles, rituals, and symbols show similarities – such as the centrality of the Oda to the confederal union remarked by Hassen above – but this third component element to the political structure was a rarer occasion. Day-to-day politics remained mostly within the locality.

2.3. Tribal Moieties and Confederalism

During much of their premodern history, each constituent group of Oromo society was further subdivided into two tribal *moieties*. This is a label Anthropologists have given to the system of tribal organisation of paired halves. In addition to the paired halves of tribal moieties, population growth also necessitated a decentralised territorial element to social structure. This led to the emergence of five territorial units – separate from the age-groups – which exercised autonomous political control in areas under their control and shared political control in a looser union that resembles a confederation in modern terminology.

The traditional political system of the Oromo was akin to a confederal arrangement. There were originally two paired halves dividing the Oromo society, the Borana and the Barentu. The Borana moiety is situated in the remote border region that straddles Kenya, Ethiopia, and Somalia. The Borana itself is further subdivided into two moieties. The more populous Barentu moiety of Ethiopia is divided into four geographic regions, each one of them consisting of two paired halves. Western Oromia known as Wollega is one such constituent region. Its inhabitants are mostly Protestant. The south-eastern region of Arsi-Bale is mostly Muslim. The north-eastern region of Hararghe surrounds the city of Harar which was historically under the control of the ethnic Harari and borders ethnic Somali

[15] Hassen, Mohamed (1990), *The Oromo of Ethiopia: A History 1570-1860*, Cambridge: Cambridge University Press, p. 14.

communities. This is also a predominantly Muslim region. The Shewa region of central Oromia, with the Ethiopian capital Addis Ababa at its centre (*Finfinne* in Afaan Oromo) contains followers of various different religions. Historically, the four territorial regions of the Barentu moiety functioned in a confederal political system. The fifth region of Oromia in the far south-east, the Guji-Borana, historically belonged to the Borana moiety instead.[16] It is composed of two halves itself. There are thus in total five regions and ten moieties. Due to its remoteness, the Guji-Borana region in the mostly desert and savannah southwest had remained relatively immune to the spread of Abrahamic religions. The traditional Oromo religion, alternatively called Waaqefattaa or Waaqefannaa, has mostly remained in place here. Despite the region's economic backwardness, the Oromo tend hold the region's culture in high esteem as the protectors of traditional system of the Gadaa.[17]

The confederal arrangement brought these different territorial regions with their own Gadaa systems together in a political union. The day-to-day affairs of each region was undertaken by the elected and hereditary leaders of their own Gadaas. While the holistic Gadaa system contains political, social, religious, cultural, and legal elements, the offices of the leadership were functionally-specific based on the responsibility in question – be it political, military, spiritual, religious, or legal. Before we go into more details of the Gadaa system, it is worth noting that not everything is identical across the five Gadaas of Oromia, i.e. western Wollega, central Shewa, northern Hararghe, eastern Arsi, and south-eastern Guji-Borana.[18] Across the different regions, the titles, functions, ceremonies show some difference. Such variation is inevitable in what was historically a decentralised confederal system. Local circumstances differ and so do practices. Some regions are defined by sedentary agriculture, others by nomadic herding; some are densely populated and rich, others sparsely populated and poor; some regions contain other ethnic groups bringing cultural borrowing across communities, others are culturally isolated; some regions have been culturally influenced by the Abrahamic religion they have adopted – be it Christianity or Islam; others have tried to maintain the worship of Waaqefatta/Waaqefannaa; some regions have been exposed to the official nation-building policies of the Ethiopian states for longer, others have been able to retain more of the original indigenous culture due their remoteness. Our investigation focuses more on one region, the Guji-Borana – and in particular, its Borana moiety – where traditional structures have remained relatively unchanged in comparative terms.[19] But one should note that all traditional systems everywhere around the world evolve with time; the expectation of unearthing a pristine version of tradition untouched by historical experience is not realistic in any geographic context. All traditional forms of social stratification and

[16] For more on the Borana Oromo, see Asebe Regassa Demelo (2018), "Living with Conflict: Borana's Resilience in Southern Ethiopia", *African Conflict and Peacebuilding Review*, Vol. 9, No. 2, pp. 75-97.

[17] And in particular, despite the hardship they faced, it is the pastoralist Borana are generally credited with keeping Gadaa alive. Israel, Itansa (2011), "The Quest for the Survival of the Gadaa System's Role in Conflict Resolution", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds), *Customary Disupite Resolution Mechanisms in Ethiopia*, Addis Ababa: Ethiopian Arbitration and Conciliation Center, p. 300.

[18] A study of the Waliso-Liban sub-moiety of the Oromo, for instance, highlights how some of the indigenous structures have different names in this locality. Dejene, Gemechu (2011), "The Customary Courts of the Waliso Oromo", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds), *Customary Disupite Resolution Mechanisms in Ethiopia*, Addis Ababa: Ethiopian Arbitration and Conciliation Center, pp. 251-277.

[19] See for example, Bassi, Marco (2010), "The Politics of Space in Borana Oromo: Demographics, Elections, Identity, and Customary Institutions", *Journal of East African*, Vol.4, No. 2, pp. 221-46.

political order have changed; sometimes evolving with times, sometimes fragmenting and dissipating.[20]

The Guji-Borana region was historically a remote, inaccessible, and sparsely populated part of present-day Ethiopia and northern Kenya where the landscape alternates between desert and semi-arid savannahs. Nomadic herding used to be the main economic activity together with subsistence-farming and cultivation. On the eastern flank tense relations with ethnic Somalis left its mark on the region's history. Competition over grazing and water-resources was accentuated by the tradition of cattle-raiding practiced by both sides. Despite living in close proximity to Muslim Somalis, the Oromo of Guji-Borana retained much of their traditional indigenous culture. Notwithstanding our earlier caveat that no tradition remains unchanged, this region contains Oromo traditional structures least influenced by other cultures, religions, and official social engineering. While the Gadaa system comes with some variation across the five regions of Oromia, there are defining characteristics uniting the five.

The inter-regional confederal union among five regions used to be marked by annual meetings. Their representatives would regularly meet at the so-called *Madda Walabuu* to exchange information about the laws they passed, the issues they had to deal with, and to coordinate policies that required joint action. This was done, however, without a strong centralised permanent government. The Oromo confederal system remained in place until the late 19th century southward expansion of the Abyssinian Empire.

While our focus in this investigation is indigenous constitutionalism, it is impossible to understand the law without understanding the system of governance within which it functions. The scholarly literature from the disciplines of Political Science and Law are completely barren of any systematic study of traditional Oromo law and governance; and they hardly cover other African polities based on the confederacies of age-groups. Anthropology has looked into the political systems of traditional African societies, but this scholarly literature has mostly failed to capture the unique decentralised elements of confederacies of age-group based societies.

The Oromo are not the only ones who are not centralised under chieftaincies, elders, or kings. A number of ethno-linguistic communities in East Africa – especially but not exclusively those with pastoralist/nomadic life-styles – used to function in decentralised form.[21] Their social structure does not fit the influential classification system 'monarchies (chiefdoms)' and 'stateless societies' devised by the anthropologists Fortes and Evans-Pritchard based on considerations like territoriality, social functions, and political responsibilities akin to those in western societies.[22] The Fortes/Evans-Pritchard classification had no room for societies with a decentralised form of self-government – especially those that rest on age-groups instead of territorial units – and ended up designating them as stateless societies and thereby missing out a very elaborate and specialised but decentralised political order.

[20] A comparative look at East Africa is provided by Spencer, Paul (1998), *The Pastoral Continuum: The Marginalization of Tradition in East Africa*, Clarendon Press: Oxford.

[21] Bernardi, B. (1952), "The Age System of Nilo-Hamitic Peoples", *Africa: Journal of the International African Institute*, Vol. 22, p.323, Prins, A. H. J. (1953), *East Africa Age Class Systems: An Inquiry into the Social Order of Galla, Kipsigis, and Kikuyu*, J. B. Wolters: Groningen.

[22] Fortes, M. and E. E. Evans-Pritchard (1940), "Introduction", in Fortes and Evans-Pritchard (eds), *African Political Systems*, London: International African Institute, pp. 1-24.

Instead of having centralised hierarchical structures providing varieties of state-like functions, the Nandi, Masai, and Kipsigis of Kenya and the Karamojong of Uganda are examples of traditional societies in East Africa where social order, stratification, and functional division rest on a looser and more flexible form of age-groups and territorial decentralisation. Age-group based societies used to exist throughout most of Sub-Saharan Africa.[23] At one point, the Political Science literature showed some interest, but it did not extend beyond a chapter or two in edited books relying on a very superficial overview of what were called 'pre-industrial social stratification systems'.[24] It is imperative that we take it beyond that level. The quest to understand Oromo law cannot be divorced from an examination of traditional Oromo politics.

Deliberation was one of the hallmarks of traditional Oromo politics, it is also the defining feature of Oromo justice. Oromo customary law was originally based on sitting and deliberating under the life-giving shade of the sacred sycamore tree until all parties to the case – and the public at large – agreed to a common solution. It is telling that the holy sycamore tree under which political deliberation takes place, Odaa, is currently on the flag of the Oromia Regional State of Ethiopia. The collective quest to find compromise solutions still characterises the Gadaa. But otherwise, modernity and the traditional indigenous system of the Oromo have a unique relationship. When juxtaposed against Western concepts, Gadaa seems to be a system of representative politics without competitive elections, but it is a system of law without a professional lawyers and judges. Gadaa is also a social stratification system based on age-cohorts. While it does not have single written document that provides the text, Gadaa represents the indigenous Oromo constitution.

3. HISTORY, POLITICS, CULTURE, SOCIETY, AND THE LAW

> "If I tell you that a stranger I saw was wearing no hat, no jacket, no trousers, no underwear, no shoes, you might very well be inclined to think that he was stark naked. But you would be committing a grave error. He may in fact be fully clothed. He may be wearing an article of clothing you had never seen or imagined, something like the Ethiopian all purpose shamma, a warm, toga-like outfit that can cover the entire body from head to toe".[25]

[23] Gulliver, P.H. (1958), *East African Age-Group Systems: Some Preliminary Considerations*; Spencer, Paul (1998), *The Pastoral Continuum: The Marginalization of Tradition in East Africa*, Clarendon Press: Oxford; Baxter PTW and Almagor, Uri (1978), *Age, Generation, and Time*, London: Hurst.

[24] During the 1950s and 1960s, these age-based social groups had in fact attracted the interest of scholars beyond the small circle of anthropologists and Africanists. For their influential edited volume *Social Mobility and Economic Development*, Neil J. Smelser and Seymour Martin Lipset had commissioned chapters that examined, what was then called, 'pre-industrial stratification systems'. See, Smelser, Neil J. and Seymour Martin Lipset (eds) (1966), *Social Structure and Mobility in Economic Development*, Berkeley: University of California Berkeley and Smith, Michael G. (1966), "Pre-Industrial Stratification Systems", in Neil J. Smelser and Seymour Martin Lipset (eds) (1966), *Social Structure and Mobility in Economic Development*, Berkeley: University of California Berkeley, pp. 141-64. As newly independent African countries embarked on processes of modernist large-scale change, scholarly interest in age-groups and social stratification fizzled out.

[25] Legesse, Asmarom (2000), *Oromo Democracy: An Indigenous African Political System,* Lawrenceville, NJ and Asmara, Eritrea: The Red Sea Press, p.28.

The lines above belong to Asmarom Legesse, one of the main scholarly voices of the Oromo cause. While we are not dealing with the politics of Oromo activism in this LLD research project, there is an inextricable link between the history of Oromo activism and the indigenous Gadaa system around which all segments of the Oromo society rally. The imagery Asmarom Legesse uses suggest that what looks alien and exotic to outsiders could very well be a perfectly valid and functioning system of indigenous law and governance. Put differently, we have to look beyond and above formal black letter laws to understand the nature of indigenous constitutionalism.

The very need to document the workings of indigenous law and governance, especially when officially unrecognised by modern laws and constitutions, necessitates the use of a more holistic methodology that can capture things beyond formal laws and institutions – particularly what can sometimes be the somewhat opaque and sometimes secretive workings of traditional customary law as the Ethiopian constitutional history attests. After all, the entirety of Gadaa laws are still unwritten and uncodified.

The Gadaa system that had gone underground during imperial and socialist military impositions of legal unitarism re-emerged from near extinction in the recent past. It was the collapse of the centralist Ethiopian military regime in the 1990s and the creation of a new federal state that resuscitated the endangered Gadaa. Taking a long-term historical perspective, it seems demographic strength and geographic concentration were the factors that kept the Gadaa system alive during the 20th century and helped it eventually bounce back from the brink of constitutional irrelevance. Despite political centralisation and the intrusion of first the imperial state and then the military regime, the Oromo had the demographic power to retain most of its traditional institutions.

Chapter 10 provided the historical background to the discussion above but stopped short of entering into the details of the indigenous legal system of the Oromo and its relationship to modern statutory law. It is in Chapter 12 where we will trace the relationship between Oromo laws and the modern Ethiopian state across the four distinct phases of constitutionalism in Ethiopian history.

Chapter 12:
The *longue durée* Relationship between Oromo Laws and the Modern State

---

1. THE ETHIOPIAN STATE EVOLVES

1.1. Meskel Square as a Symbol

Addis Ababa's Meskel Square for long has been the heart of the city. The stadium in the middle of the square is the venue to various public celebrations and meetings. The square itself is surrounded by symbols of the country's history, new and old:[1]

The Red Terror Martyrs' Museum on the south-east corner of the square was built in to commemorate the thousands who lost their lives during the brutal Derg military rule which was established after the officers had toppled the imperial system. Perhaps a tad one-sided in its historical account of Derg Rule, the building nonetheless represents the moral authority that defined the EPRDF regime which had replaced the Derg. Meskel square used to be the place where the Derg would have their annual military parades. It is therefore not a coincidence that the museum was built here.

A little further, a few steps away from the bustle of the square lies the Ghion Hotel surrounded by beautifully lush botanical gardens, named after the Biblical Ghion which encircles the Garden of Eden. It was the first modern hotel in Addis Ababa built as a showcase of the new modern Ethiopia of Emperor Haile Selassie's reign. Ghion Hotel hosted the political leaders who had come for the Conference of Independent African States in 1960. This was the meeting that eventually led to the establishment of the Organisation of African Unity in 1963, the precursor to the African Union. The government-owned hotel has now lost most of its original shine, but even in its faded glory, the hotel is a monument to the hopes and aspirations of a free Africa which had thrown off the yoke colonialism. Not too far is the African Hall which was built as the headquarters for the new Organisation for African Unity (it is now home to the United Nations Economic commission for Africa).

[1] Just five days before the completion of this Chapter, on 26 September 2020 UNESCO declared that it was adding Meskel square to the list of world heritage sites.

Meskel Square itself is named after the Ethiopian Orthodox religious festival marking the discovery of the cross on which Jesus Christ was crucified. It is here at the square where the Feast of the Holy Cross is celebrated. Historically, the Emperor, the royal family, the patriarch of the Ethiopian Orthodox Church and high-ranking clergy, Abyssinian feudal nobility, together with the entire cast of the imperial establishment would attend the ceremonies here.

In the last couple of years, a new symbol has been added to the collection of monuments surrounding the square. It is at Meskel Square where the two lines of the new Addis Ababa Light Railway, contracted and built by the China Railway Group Limited, meet. The Light Railway is a symbol of the dizzying pace of economic progress marking Ethiopia's last two decades. On the elevated tracks on which the train runs, thousands of commuters pass through the square. As they do, they also pass along a shiny new imposing building on one side of the square. This is the Oromo Cultural Centre. Vast sculptures of historic Gaddaa leaders and the warriors protecting them have their gazes fixed on the daily commuters. Just a few hundred meters away, the square was also the scene of a deadly grenade attack in June 2018. The attack happened during a rally in support of the country's new reformist Prime Minister and the first Oromo in the country to hold national leadership, Abiy Ahmed.

Abiy's ascent to power came as a surprise to many observers and insiders, and there is no guarantee that the political reforms will continue apace; and indeed, most recent reports from Ethiopia suggest a great deal of uncertainty about the evolving political dynamics. The grenade attack suggests that deep within the secretive security apparatus there might be those who feel threatened by change. And this is beyond the Oromo question. After spending the last two decades in an official state of war, Ethiopia and Eritrea have signed a peace deal in July 2018. After the defeat of the Derg, Eritreans who were part of the coalition of ethnic militias fighting against the military regime had tried to secede from Ethiopia. And the new regime had gone to war trying to prevent this. The result was the bloody 1998-2000 border-war which claimed thousands of lives on both sides. Abiy's courtship of the embattled and isolated Eritrean regime delivered an unexpected end to the frozen war. There initially had been a parallel process of opening inside the country as scores of opposition figures and journalists have been freed from detention, political control over media had been relaxed, and economic reforms had targeted state-run industries. Abiy's popularity is especially high amongst the urban youth who represent an important section of this demographically young country. Yet Ethiopian history has also taught us to exercise caution. The most recent political developments in Ethiopia – coinciding with the global spread of the Corona virus, and the subsequent national lockdowns and restrictions – suggest recourse to older more autocratic ways.

But regardless of the fate of the new wave reforms, one thing is for sure: The Oromo are no longer a politically marginalised ethnic group. They had never been this close to the corridors of power in Ethiopian history – or more precisely, never had parts of Oromo leadership previously been a core component of national leadership of the centre. What this means for the future Oromo traditional law and governance is hard to predict; especially since a formerly marginalised ethno-linguistic community which rallied around its indigenous constitutionalism, i.e. the Gadaa, is now part of the national government ruling over a diverse society. The past is easier to understand and analyse, but there are new and changing political dynamics in Ethiopia we will unpack and examine in the next section. The holistic theoretical perspective guiding the research project imparts us to study the law within the

broad historical, social, and political context. One would miss the true workings of law in Ethiopia if one were to follow the teachings of Legal Positivism and focus on the *pro forma* black letter laws only. The legal fate of indigenous Oromo law and governance is inseparable from the ups and downs of Ethiopian politics. The application of whatever had been drafted into federal and regional legislation on indigenous law and governance is less of a technical matter but a political one.

In the course of successive political regimes, political repression of indigenous constitutionalism had resulted in the Gadaa system going underground. During this time, it became a symbol of cultural resistance as idealised versions of the law managed to survive (in somewhat enfeebled form) in various regions of Oromia, especially in the remote Guji-Borana region in the south-east. Federalism – first informally between 1991-1995 as a union of ethnic militias; then formally based on the 1995 constitution – brought these various regional versions of indigenous law and governance back from the brink of extinction and gave them official recognition.[2] Assuming that the current political dynamics do not result in a complete undoing of constitutional diversity and legal pluralism, official recognition and being brought into the fold of the modern Ethiopia state can be a mixed blessing for the autonomy and vibrancy of the Gadaa system.

The very nature of the traditional Gadaa system rests on decentralised foundations. Official political recognition and bringing them under one roof presents a challenge. This is where we have to revisit an observation we made earlier in Chapters 2 and 3 on how all traditional systems everywhere around the world always evolve with time. No system of traditional law exists in a pristine form untouched by historical experience. The question is what type of change is in stock for this new historic era of Oromo ascension to the corridors of power of the Ethiopian state.

1.2. The Oromo between Oromia and pan-Ethiopianism

The country's largest ethnic group – until recently relegated to a secondary role in national politics by the historic political, cultural, social and religious establishment composed of Semitic-language speakers from the country's northern highlands – is in the process of discovering its demographic might, political power, and relationship to the Ethiopian state. In fact, after decades of criticism of imperial, Derg, and EPRDF pan-Ethiopian policies, part of the Oromo leadership now leading the country seem to have begun to embrace the trappings of state power. Ethiopian past is now rewritten with the Oromo in it – be it the Oromo family lineage of Emperor Haile Selassie or the sizeable Oromo contingent in Emperor Menelik II's army. It does not really matter whether the new-found pan-Ethiopianism is feigned in order to soothe the fears of the non-Oromo in the rest of the country or whether it is genuine as a reflection of the homecoming of a previously neglected sibling. Besides, there is always the possibility that one wrong turn can throw things off-track. That does not change the fact that the traditional Gadaa system is now out in the open to an historically unprecedented extent – albeit, as we we will see in Section 2.4., formal legal measures still lag.

[2] The federal constitution had been adopted in 1994, but it came into effect in the following year. Tsegaye Regassa (2010), "The making and legitimacy of the Ethiopian constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice", *Afrika Focus*, Vol. 23, No. 1, p. 87.

At the same time, the mass movement of nationalist-minded Oromo activists who ensured Abiy's ascent two years ago seem to be now divided. As this chapter goes to submission, there are indications that Oromo political resurgence triggered by the appointment of Abiy Ahmed as the country's Prime Minister has splintered. Oromo nationalists on whose support Abiy part relied have now been mostly side-lined, and instead, it is the centrist Pan-Ethiopian dynamics on which the government relies on. While some Oromo continue to campaign for more powers for their Regional State, others are now closer to the political position of the Federal Government than Oromia. Will the Oromo who are now governing an ethno-linguistically diverse federal Ethiopia and the more nationalist-minded Oromo activists one day become political adversaries? How things will evolve is difficult to precisely predict, but it is certain that the Oromo are not going back to their political marginalised former selves. What we can do with more scholarly reliability is to look back at the various constitutional phases of Ethiopia and track the fate of indigenous Oromo law and governance.

2. ETHIOPIAN STATE AND INDIGENOUS LAW AND GOVERNANCE

2.1. Pragmatic Acceptance of Legal Pluralism under Pre-Modern Imperial Constitutionalism

The historical origins of Abyssinia's Solomonic dynasty formed by the union of King Solomon and Queen Sheba is shrouded in mysticism and religion. By all accounts, ancient Abyssinia was a much smaller polity, probably confined to the traditional highlands, and thus without much of an Oromo contingent. That ancient history is not part of our investigation.

Our research on indigenous constitutionalism starts with the Abyssinian Empire's territorial expansion during the course of the 19th century, which is when various Oromo communities started to fall under imperial jurisdiction, albeit there was Oromo expansion the other way before this. Once again, we should note that history always comes with more complexity. The Oromo connection to Ethiopia's Abyssinian past precedes this historical period we have chosen to start with. Even before the incorporation of remaining Oromo lands into the expanding empire there were existing imperial vassal states with sizeable Oromo populations where variations of Oromo laws coexisted with feudal and imperial laws. There were also various small Oromo states and tribal confederations bordering Abyssinia. Herbert S. Lewis' now mostly forgotten historical account of one such 19th century Oromo polity, the Jimma Monarchy, contains references to the multiple Oromo statelets, especially in the Gibe and Wollega regions.[3] In self-governing southern Oromo lands outside imperial jurisdiction, there was no uniform application of the law. As we had seen in the previous chapter, the confederal system linking up various Oromo regions was a loose political arrangement which inevitably came with a high dose of local diversity.

At this point it is also imperative that we highlight one important historical aspect of law and governance – be it written or uncodified, formal or unofficial, received or indigenous – which is inherently different from the world we inhabit now. These years before Menelik II's reign are pre-modern times; and by definition, neither law and nor governance could ever be perfectly uniform and standardised. One should thus temper the potential influences of *presentist* interpretation projected

[3] Lewis, Herbert S Lewis (1965), *A Galla Monarchy: Jimma Afar Jifar 1830-1932*, Madison: University of Wisconsin Press.

onto the past. An element of unevenness in policy across territory was the natural state of affairs back then.

Part of the reason behind the unevenness defining this historical period has to do with modernity. Before modern transportation and communication networks, all states were defined by local variation – in Africa and elsewhere. Distances took longer, times zones were local, languages were not standardised into national ones, print press was in its infancy, religious and cultural practices varied, political authority followed urban centres and accessible geographies leaving mountains, marshes and forests lawless for most of the year save for the occasional expedition by authorities, bureaucracy and military relied on local governors, lords, chieftains, and tribes. Even if one wanted and tried, it was impossible to uniform policies applying in identical terms to the entirety of the land and its inhabitants. Not only was this the case for multi-ethnic empires like the Ottomans, Romanows, and Habsburgs defined by jurisdictional heterogeneity, but even for theoretically single jurisdiction states like France. Not only did the infrastructural and personnel limitations made it impossible to impose legal uniformity to all corners of state, the weak reach and range of state structure also encouraged the emergence of local variation. As it was the case everywhere in the world, this was how things looked in the territories comprising Ethiopia before modern transportation and communication. Variations of Oromo law existed in self-governing regions, and variations of co-existence between imperial, feudal and Oromo law existed in the Empire.

We had seen in Chapter 10 that the supreme law of the Abyssinian Empire was the *Fetha Negast*, 'the Laws of the Kings'. Fetha Negast was the collection of imperial laws going back centuries; some of it the feudal laws between Abyssinian Kings and princes, some of the religious laws forming the foundations of the Ethiopian Orthodox Church.[4] This was not just due to deliberate constitutional design. Pre-modern politics was like this everywhere in the world. Imperial law was not uniform and the ability to impose the imperial faced the practical limitations of the pre-industrial world.

The supremacy of imperial law across Ethiopia was established in principle, but in many places, especially in more remote and underdeveloped regions away from urban centres, transportation networks, military garrisons and bureaucratic hubs, legal pluralism remained in practice. District governors (*Malkanya*) would often sanction and even invite local elders to settle local disputes through the use of indigenous customary law. This was particularly the case for the Guji-Borana region in the south-east reaches of the empire where traditional religion of the Oromo and the Gadaa survived.

Not unlike the British laws and constitution before the 1832 Reform Act, Fetha Negast represented a culmination of centuries of legislation, aristocratic prerogatives, provincial autonomy, and Church privileges. We should note that this pre-modern type of constitutional order was common throughout the world before the twinned impact of two modernist revolutions: i) the French Revolution ending royal and religious constitutional legitimacy in France and introducing ideas like the nation/the people as the basis of constitutional legitimacy, put differently, as the constitutional *pouvoir constituant*; and

[4] Not all was about the right and obligations of the constituent polities and groups residing in the different jurisdictions of the empire. Similar to its pre-modern counterparts in the Western world, the imperial constitution also contained regulations on slavery, notably a ban on the sale of Christians to non-believers, that is, Muslims.

ii) the Industrial Revolution which started off in England and introduced developments in production, transportation, and communication that made national unity and nation-wide standardisation achievable goals.

The goals of creating a modern nation-state, and the very capacity to carry out large-scale reforms to this end, did not always align perfectly of course. This was the case in various 19th century experiments towards a socially homogenous, politically centralised, and legally unified nation-states in the northern hemisphere; it was also the case for the project of creating a modern Ethiopian state partially started by Menelik II and comprehensively pursued by Haile Selassie afterwards. The goals and the results would often diverge.

Writing at the time of Menelik's modernist state- and nation-building reforms in 1906, Herbert Weld Blundell had highlighted how all Oromo traditional institutions were in the process of being put under imperial jurisdiction and that this would bring an end to what were perceived as traditions holding back progress.[5] The assumption was that modernity would erase the vestiges of indigenous pre-modern traditionalism. But despite almost a century of political centralisation that followed until the end of the Derg in 1991, traditional Oromo practices and customs have proven to be more resilient than anticipated by Weld Blundell at the turn of 19th century. Part of this is due to limitations in infrastructural and bureaucratic capacity. Put simply, the institutions and personnel of the Ethiopian state were thin on the ground in peripheral regions.

The mismatch between policy intentions and state capacity was particularly pronounced in parts of Oromia that were recently incorporated into the Empire. Conquered lands had officially lost their laws, but what replaced this was not always enforceable given the limitations in the reach and range of modern Ethiopian state. A uniform set of imperial laws formally imposing official centralisation coexisted with unofficial tolerance towards the practice of local laws in remote regions. It was a system of pragmatic legal pluralism – a practice borne out of the force of circumstances. This does not take away the fact that in terms of constitutional legitimacy, the supreme law of the land was imperial and the *pouvoir constituant* was still not the people (as it was the case in the constitutional monarchies of Western Europe) but still the royal legitimacy of the Solomonic dynasty.

To this pragmatic legal pluralism one should add a second variant of legal pluralism where some degree of local autonomy was granted to culturally/religiously distinct regions in a system that could be labelled as a version of an internal version of a vassal tributary state. That is, in some parts of the Abyssinian Empire limited local autonomy was granted to the rulers and the indigenous system of governance in return for loyalty to the empire. The city of Harar is one such example where the city's Muslim ruling family and Islamic Law enjoyed imperial recognition, even if this did not reach the level of full political and religious self-rule. While these tributary arrangements with traditional rulers in return for internal cultural/religious autonomy is a practice that almost all empires followed, our research interests are on the indigenous constitutionalism of a people, in this case, the Oromo. The legal pluralism that gave voice to indigenous forms of law and governance was not based on principled constitutionalism but reflected the practical limitations to the projection of state authority. It is thanks

[5] Weld Blundell, Herbert (1906), "Exploration in the Abai Basin, Abyssinia", *The Geographical Journal*, Vol. 27, No. 6, p. 549.

to this unintended by-product of remoteness that indigenous Oromo law (amongst other components of Oromo culture) was able to survive in the remote southeast to an extent higher than other Oromo regions.

2.2. Towards Legal Unitarism and a Single Hierarchy of National Laws

Modernist changes had partially started with Emperor Menelik II, but the scale and scope of reforms attained nation-wide comprehensiveness under Regent Tas Tafari Makonnen, subsequently crowned as Emperor Haile Selassie. These reforms were still far from creating elected representative institutions of a constitutional monarchy, but they aimed to rationalise and standardise administration, law, education, communication, and transport. For the purposes of this research, the reign of Haile Selassie is particularly relevant in terms of its comprehensive legal reforms towards nationwide unitarism. It was under his rule that the country imported modern statutory laws from abroad, bringing a *de facto* end to the local legal pluralism that had coexisted within the Abyssinian imperial framework. Not only did the local feudal lords and traditional rulers of vassal tributary states lose their historical prerogatives in overseeing the legal system in their respective jurisdictions, but various systems of indigenous law and governance outside the imperial framework were now officially replaced with standardised national laws. Until then, various local laws had been allowed to operate in running the internal affairs of the various non-Semitic ethno-linguistic communities incorporated into empire during the course of its 19th century expansion.

Chapter 10's section 2.2.2. had looked at the political tensions that had marked royal succession after Menelik's death. There we had discussed the way Ras Tafari Makonnen had first become the Regent during Empress Zewditu's formal ascent to the throne. Once formally crowned emperor, under his new name and title, Haile Selassie then further extended the modernist state reforms he had started while Regent. Menelik had of course started the historic process of political centralisation through weakening the power base of the provincial aristocracy, but what Haile Selassie intended was a complete overhaul.

The reforms stripped the remnants of power held by the aristocracy and the district governors of the provinces (*Malkanya*). In political, economic, military, and legal terms there were steps towards rationalising and centralising power. The ancient Fetha Negast, containing the medieval privileges enjoyed by the aristocracy and Church was replaced by modern laws modelled on European states. The first formal step towards nation-wide legal unitarism was the Criminal Code of 1930. The second important step was the Administration of Justice Proclamation Act of 1942. Courts of the central government were to replace the provincial courts of the district governors.[6] Until then it was in the ad hoc local courts sanctioned by the judicial authority of district governors that local indigenous law would be used to settle tribal disputes.[7] In these courts local customary law was the basis on which disputes were settled. This dualism was a reflection of the pragmatic legal pluralism of the imperial times.

[6] This reform process is covered in Shack, William A (1969), "Guilt and Innocence: Problem and Method in the Gurage Judicial System", in Max Gluckman (ed.), *Ideas and Procedures in African Customary Law*, Oxford University Press, p. 163.

[7] Pernham, M. (1947), *The Government of Ethiopia*, London: Faber and Faber, pp. 138-59.

The Criminal Code of 1930 and the 1942 Courts Proclamation both represent important reforms towards nation-wide legal unitarism, but in the words of Haile Selassie they were only the beginning of a more comprehensive process of importing modern laws from Western countries with Civil Law legal systems. Haile Selassie in the 1954 *Ethiopia Herald*:

> "We have never hesitated to adopt the best of what other system of law can offer to the extent that they respond and can be adapted the genius of our political institutions… To that end we have personally directed the search for the outstanding jurists of the continent of Europe to bring us the best of that centuries of development in allied and compatible systems of law have to offer".[8]

In 1957 there was a new Penal Code. However, the Emperor's call to Western jurists to was yet to deliver the biggest blow to indigenous customary law in Ethiopia: the 1960 Civil Code.

2.2.1. A New Received Nation-Wide Civil Code

Heeding the Emperor's call, a number of international legal scholars volunteered to lend a helping hand in the quest to impose legal unitarism on Ethiopia. It was the new Civil Code of 1960 which was to replace the multiplicity of customary practices governing family issues like marriage divorces, inheritance, and adoption.[9] For all of Ethiopia's indigenous systems of law and governance, the country's new Civil Code brought an official end to the pragmatic acceptance of indigenous law in family matters. Article 3347 (1) of the Civil Code laid out the ambitions behind the initiative: "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this code and are hereby repealed".[10] Writing a few years after the new Civil Code, G. Krzeczunwicz likened the sweeping repeal of all customary laws to the French revolution: "As it stands, this *tabula rasa* repeal of the legal past is without precedent in Africa".[11]

Unlike the rest of the continent, Ethiopia had not never been colonised. However, the coexistence of received laws from the West and laws indigenous to Ethiopia created a type of legal pluralism similar to the situation in colonies which had adopted the Civil Law systems of Belgium, France, and Portugal. Tshehai Wada's study into the coexistence of what he calls 'formal' and 'informal' justice systems shows comparable dynamics. As he puts it:

> "As far as legal pluralism is concerned, the Ethiopian situation is not different from that of many African countries. The major difference is that Ethiopia imported foreign

[8] Ethiopia Herald, March 27 1954, p.1, quoted in Ofusu-Amaah, W. Paattii (2000), *Reforming Business Related Laws to promote Private Sector Development: The World Bank Experience in Africa*, Washington DC: IMF/World Bank, p.16

[9] Civil Code Proclamation of 1960, Proclamation no 165, *Negarit Gazeta, Extraordinary Issue*, 2, 1960 Section V.

[10] The English language version provided in Assefa Fiseha, Gebre Yntise, and Fekada Azeze (2011), "The State of Knowledge on Customary Dispute Resolution in Ethiopia", Genre Yntiso, Fekade, Assefa Fiseha (eds), *Customary Dispute Resolution Mechanisms in Ethiopia*, Addis Ababa: The Ethiopian Arbitration and Conciliation Centre, p. 23.

[11] G. Krzeczunwicz (1963), "A New Legislative Approach to Customary Law: The 'Repeals' Provision of the Ethiopian Civil Code of 1960", *Journal of Ethiopian Studies*, Vol. 1, No. 1, p. 57.

> (European) laws voluntarily, while other states on the continent were coerced through colonization to adopt their colonizers' laws and legal systems".[12]

Amongst other international academics from Civil Law traditions, it was in particular the French Law Professor René David who helped write the new Civil Code for Ethiopia through merging parts of French, Italian and Swiss civil codes. In his account of the role he played in putting together the new civil code, Professor David wrote that the development and modernisation of Ethiopia necessitated the adoption of a such a 'ready-made' system.[13] The new Civil Code brought in the "almost total abolition of customary law".[14] There was some potential for flexibility and openness to indigenous law as locals were promised to be consulted but this step was skipped and the law rushed through. The law was to ostensibly incorporate local laws, but the time frame was short, and international experts who were responsible for drafting the details of new Civil Code knew close to nothing about the local laws and customary practices. According to Anthony N. Allott:

> "One of the most extreme examples of the modern transformation of African law is provided by the new Ethiopian Civil Code, 1960, which in theory abolishes all customary law, but preserves something of their spirit; e.g. in the machinery for dissolving statutory marriages and in the arrangements for recording community interests in land".[15]

As John Beckstrom points out, while lip-service was paid to flexibility and openness to indigenous customary laws, there was little substance to this commitment on paper. The Europeans who drafted the laws did not know Ethiopia and Ethiopians who sat on national Codification Commissions were urban elites with little knowledge of the country's variety of indigenous customary laws: "Explicit incorporation was of necessity minimal: since no systematic survey of customary law has even been attempted in Ethiopia, there was little for the draftsmen to draw upon except fragmentary and largely impressionistic reports".[16]

Instead of seeing the imposition of received laws from abroad as a liability, Professor David was proud of the *avant le lettre* versions of what we nowadays call 'best practices':

> "With conditions in the modern world, where highly developed states exist, it is inconceivable that one might build in a country such as Ethiopia the road which has been built in Western Europe in the course of centuries of groping. Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique in itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of

[12] Tshehai Wada Wourji (2012), "Coexistence Between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects", *African Journal of Legal Studies*, Vol. 5, No. 3, p. 269.
[13] David, René (1962), *La refonte du code civil dans les états africaines*, pp. 188-9.
[14] Bennett, T W and T Vermeulen (1980), "Codification of Customary Law", *Journal of African Law,* Vol. 24, No. 2, p. 207-8.
[15] Allott, A. N. (1968), "African Law", in Duncan M. Derrett (ed.), *An Introduction to Legal Systems*, London: Sweet and Maxwell, p. 156.
[16] Beckstrom, John H. (1973), "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia", *American Journal of Comparative Law*, Vol. 21, No. 3, p. 559.

> a 'ready-made' system; they enforce the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations."[17]

Between 1957 and 1965, Ethiopia promulgated various new laws, invariably picking existing codes from Europe. These years also happened to coincide with the heyday of the 'Law and Development' movement in academia.[18] It was not only Haile Selassie himself but a significant portion of the academic community also believed that the path to progress development was paved with modernist laws imposed top down. During the 1960s Addis Ababa University became home to a number of international scholars pursuing the Law and Development agenda.

The World Bank's Chief Counsel in African Legal Affairs, W. Paattii Ofosu-Amaah, highlights the modernist development goals that were behind the process of picking and choosing laws from abroad for Ethiopia:

> "In each case, a process was designed that was intended to use the law as a social engineering in order to improve the development prospects of the country. In so doing, it was intended that the best out of external systems of law and practices that appeared to have worked in those societies would be transplanted to Ethiopia".[19]

Yet, Professor René David is reported to have continued to object to even the remnants of legal diversity in civil law. According to Bennett and Vermeulen: "David, the drafter of the Ethiopian Civil Code decided that customary law varied too much from area to area, was unstable and often lacked true juridical characteristics".[20]

It appears that in the course of the process towards codification, the indispensable characteristic of customary law, i.e. its connection to a locality and people itself, came to be seen as a liability. This is not only valid for the Oromo Gadaa only but across the board for all of Ethiopia's indigenous laws. Yet no one seemed to acknowledge that the legitimacy of indigenous law and governance was based on the very fact that it is the law of the ethno-linguistic community in question. The quest to construct a nationally uniform and standardised version of customary law applicable to the various different communities violates the nature of indigenous law.

The process towards nation-wide legal unitarism marked all branches of the law. Courts of the central government which were first created in 1942 started to replace the remaining provincial courts where traditional indigenous law had unofficially co-existed with imperial law in a system of legal pluralism in practice. In most rural areas, customary laws remained in place to regulate everyday life. Formally excluding indigenous laws and practices from the courts of law did not immediately kill off all local laws but they did damage the lifeline for the customary laws of demographically vulnerable smaller ethno-linguistic communities. Not all had the population size of the Oromo that could help ensure the

[17] David, René (1963), "A Civil Code for Ethiopia: Consideration on the Codification of Civil Law in African Countries", *Tulane Law Review*, Vol.37, pp. 187-8.
[18] Snyder, Francis G. (1980), "Law and Development in the Light of Dependency Theory", *Law and Society Review*, Vol. 14, No. 3. Pp. 723-804.
[19] Ofusu-Amaah, W. Paattii (2000), *Reforming Business Related Laws to promote Private Sector Development: The World Bank Experience in Africa*, Washington DC: IMF/World Bank, p.15.
[20] Bennett, T W and T Vermeulen (1980), "Codification of Customary Law", *Journal of African Law,* Vol. 24, No. 2, p. 208.

survival of traditional laws and governance outside formal structures. Overall, however, during this quest to create a single hierarchy of national laws, all forms of indigenous constitutionalism in Ethiopia were weakened and quite a few of them ended up slowly disappearing.

2.2.2. Gadaa Goes Underground

Gadaa did not go extinct but it was a precarious survival marked by hardship. There were various regional uprisings against imperial authorities in Oromo lands, the Bale insurgency of 1960 in the southeast of the country being the biggest such rebellion – although this outbreak had initially little to do with the Gadaa system itself. The new province of Bale had been formed from the south-eastern territories of Hararghe with its traditional Muslim ruling family based in the city of Harar. Bale was majority Oromo and had two contested borders: In the north Oromo claimed the ethnically mixed and strategically located cities of Dire Dawa and Harar where ethnic Oromo constituted the majority; and in the southeast savannahs of the Ogaden where the Oromo competed with ethnic Somalis for grazing and water for livestock. But it was the conflict not with their neighbours but with the Ethiopian state that fuelled the Bale uprising.

Insurgents were able to hide in the forested highlands but failed to control much land and fell short of igniting a more popular pan-Oromo uprising. Lacking a strong central leadership and a united front, Bale insurgents failed to present a formidable challenge to the regime. But their decentralised social structure also ensured the survival of the Gadaa system which had gone underground. In the previous chapter we had seen how the tribal moieties and the confederal union led to autonomously functioning parts of the Oromo. At the end of the day, it was impossible to control singlehandedly what was essentially a decentralised.

2.3. Socialist Centralism and Legal Unitarism

The toppling of the Emperor and the imperial constitutional order was a traumatic experience that shook the foundations of a polity which used to trace its very origins to the Biblical times. For the peoples of traditional Abyssinia's non-Semitic peripheries, not much changed however. One centralist (conservative monarchist) regime was replaced by another (revolutionary socialist) one.

During Derg rule, The Oromo Liberation Front (OLF) emerged as the umbrella for various regional branches of armed Oromo insurgency.[21] Employing the anti-imperialist revolutionary discourse of Third World Liberation movements, OLF portrayed the Derg regime (and its imperial predecessor) as Abyssinian colonisers. It could not build a united front representing all the Oromo however. Deep divisions existed among Muslim and Christian wings in western Oromia, the more traditional Muslims from Haraghe region were uncomfortable with the revolutionary Marxist message of OLF, neither did the anti-traditional tones of OLF discourse find much reception in the south-east where the indigenous Waaqefatta/Waaqefenna religion was still practiced.

[21] For more on OLF activities against the Derg in the Borana, see Bassi, Marco (2010), "The Politics of Space in Borana Oromo: Demographics, Elections, Identity, and Customary Institutions", *Journal of East African*, Vol.4, No. 2, p. 222.

Despite the changes to the constitutional order of the country and the political ups-and-downs, 20th century history of the Oromo indicate one common constant element. Oromo identity and the traditional Gadaa system had become inseparable. The holy sycamore tree, i.e. the Oda, was at the centre of the OLF flag. Oromo of various religious backgrounds, i.e. Ethiopian Orthodox Church, Protestantism, and Sunni Islam, all shared an attachment to their pre-Abrahamic indigenous religion and the Gadaa as a source of unity. The period of Derg rule was an almost synonymous with civil war. Neither received modern laws nor indigenous traditional ones functioned during the 15 years of conflict, violence, displacement, and famine.

2.4. The New Federal System, Legal Pluralism, and a National Hierarchy of Laws

Chapter 10 had covered in detail the end of the Derg and the beginnings of federalism. It is in this context that we should place Oromo law and governance. It is impossible to separate the fate of indigenous constitutionalism from the federal system that changed the entire constitutional architecture of the country.

For the Oromo, one unanticipated benefit of the adoption of federalism in the 1990s has been a renewed lifeblood into the indigenous system of law and governance which had been steadily weakening under past centralist regimes. Perhaps somewhat unexpectedly, creating of a new regional level of government has ended up blowing new life into the traditional *Gadaa* system. Despite its imperfections and the politics behind it, what federalism has done is to bring the level of government down, thereby exposing the more traditional institutions at the local and regional level, and in many instances, reviving local practices and customs that had either weakened, or indeed gone dormant, during the successive phases of imperial and Derg centralisation. In addition to this resurgence at the local level that federalism brings, the new constitution also contained clauses dealing directly with indigenous customary law:

Article 34 (5) of the 1995 Constitution recognises the role of customary law in family and personal matters, as long as the parties to the dispute consent.[22] There is also constitutional bridgehead for expanding the courts of other systems of law that exist in the country. Articles Art 78 (5) and Article 34 (5) give the lower house of Parliament, that is, the House of Peoples' Representatives jointly with and Regional State Councils can establish or give official recognition to religious and customary courts that had been in place prior to the adoption of the Constitution. In Chapter 10's section 2.4. we had examined the political context that brought ethnic militias to power and the EPRDF-led federal system, and the political calculations which put limits on how much of what is in the constitution is put into

[22] One of the interesting developments accompanying the formal acceptance of legal pluralism in family law has been the notion of 'venue shopping' / 'forum shopping' between different courts systems. Dessalegn Amsalu's field-research shows how this dynamic plays out among the Amhara of Ankober in North Central Ethiopia. Both interviews with locals and review of relevant legislation and decisions indicate that no clear path to manage the conflict of laws has been established. Dessalegn sees views the strict separation between Sharia courts and secular state courts and the prohibition of venue shopping as the potential path for customary courts applying indigenous family law. Whether similar calculations also influence the choices of parties to family disputes in Oromia await investigation. Desalegn Amsalu (2018), *Use and abuse of 'the right to consent': Forum shopping between shimgilinna and state courts among the Amhara of Ankober, North Central Ethiopia*", Addis Ababa University.

effect. We have not yet seen the establishment of a network of indigenous courts along this constitutional path.

There have also been steps towards recognition at the Regional State level. Articles 50 (4) and 52 (2) of the federal constitution allows Regional States to draft, adopt, and amend their own constitutions. The Oromia Regional State has adopted three successive versions of a regional constitution in 1993, 1995, and 2001. Traditional structures, in particular the *Gadaa* system, does not figure in any of these in explicit terms. Instead, all regional constitutions seem to have closely followed the blueprint of the federal constitution and went parallel to the national cycles of revision when other regional constitutions were adopted. The preamble of the revised constitution of Oromia adopted in 2001 includes the statement that the Regional State government has the power to adopt its own constitution, but there have been no comprehensive steps in this direction. But there is some partial recognition of the indigenous law – without explicitly calling it Gadaa. Article 62 of the Oromia Regional Constitution reaffirms the validity of customary law in personal and family matters – as contained in Article 34 (5) of the Federal Constitution.

In formal terms, the constitution enumerates policy areas where Federal Government and Regional States have concurrent powers.[23] There is even the formal option for Regional States to secede from the federation.[24] But this is a federal system where the centre has explicit constitutional supremacy over the regions (and the political might to ensure this system). The constitutional clause allowing secession sits together with a political context (and a national security apparatus) that in practice temper real threats of separatism. Article 80 (1) underscores this legal hierarchy by stating that "The Federal Supreme Court shall have the highest and final judicial power over Federal matters." Partial recognition granted to indigenous customary laws – both at the federal and regional levels – co-exist with a clear declaration of legal hierarchy which places all other sources of law under the supremacy of the national constitution. Article 9 (1) states that "The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect."

What is remarkable however is the unofficial adoption of Gadaa and its symbols by the regional government. The vast Gadaa sculptures of the Oromo Cultural Centre in Addis Ababa overlooking Meskel Square is one example. The public celebration of Irreecha yet another. Both OPDO and OLF used symbols associated with indigenous Oromo law and governance. The traditional Oromo colours, black, red, and white are not in the OPDO banner, but the holy sycamore tree, the Odaa, figures prominently at the centre. The precise legal implications of this recent political embrace are yet to be seen.

3. THE COMPARATIVE LESSONS, INSIGHTS, AND OBSERVATIONS FROM ETHIOPIA

[23] Fiseha, Assefa and Zemelak Ayele (2017), "Concurrent Powers in the Ethiopian Federal System", in Nico Steytler (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Leiden: Brill/Nijhoff, pp. 241-60.

[24] Habtu, Alem (2005), "Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution", *Publius: The Journal of Federalism*, Vol. 35, No. 2, pp. 313-35.

In order to examine the relationship between Oromo law and modern statutory law, we had divided Ethiopian history into the four distinct periods: of a) pre-modern imperial constitutionalism; b) reformist imperial constitutionalism; c) the socialist military regime; and d) federalism and legal pluralism. With the benefit of macro-historical hindsight, we see that these four distinct periods contain distinct political patterns in terms of the recognition and application of traditional indigenous law. Future historians will be in a better position to evaluate the result of the current changes since they will know how the possible beginnings of new constitutional phase will conclude. We noted the uncertainty about the evolving political dynamics in section 1.2. and turned our gaze back to the long history of the politics of law in Ethiopia.

Looking back at history, there are of course critical turning-points we identify between distinct periods. That being said, there is also inevitable continuity across as well since the seeds of a new era tend to be sown in the previous one. The federal system which came to place after the toppling of the Derg was widely seen to be an inseparable part of the governing EPRDF political machinery, and the dominant role of TPLF within. It seems that, despite the semi-authoritarian leanings of the regime and their jealous hold on political power that lasted two decades, federalism was not only one of appearance. Even if there were initial political calculations intended to manipulate ethic federalism, the new national political discourse highlighting a federal Ethiopia made up of various nations, nationalities, and peoples started to take on real significance and slowly started to change the fabric of politics. Embracing one's particular ethnic identity no longer became synonymous with unpatriotic separatism.

With a history of mixing with the local population in places they inhabited, with diverse regional components, with a society composed of four religions (Ethiopian Orthodox, Protestant, Muslim, and Waaqeffanna/Waaqeffatta), and with a decentralised political culture, the Oromo in fact epitomise a federal society par excellence. Recent political developments suggest that the period of managed semi-authoritarian federalism is now replaced by a new one where the parts of Oromo political leadership walk the national corridors of power.

While Ethiopia itself is full of scholarly lessons, we are also interested in extracting comparative lessons and insights that would be of interest to the scholarly literature on comparative constitutions and constitutionalism. One key observation is that the particular history of conquest, suppression, and survival – even if some of it is romantically recreated afterwards – bestowed the traditional Gadaa system a national symbolism that would become a unifying cause throughout the 20th century for ethnic Oromo from all walks of life. One should also highlight demographic strength since other smaller ethnic groups who had to endure similar histories were not able to retain their traditional social structures. And yet another important factor that underlies the survival of the Gadaa system is the fact that its component parts were interlocked and inseparable. The holistic Gadaa system included elements that one would now classify as political, social, religious, cultural and legal under Western conceptualisation. They all cross-supported each other and ensured shared resilience to withstand various challenges.

This insight also has theoretical and methodological implications showing the benefit of holistic approaches. The state of affairs described above cannot be explained by looking at the black letter formal laws of the 1995 constitutional order. Instead it is the autonomous existence of the Gadaa

system, with all its religious, political, legal, social and cultural component parts which cross-support each other in the perpetuation of the indigenous constitution. Yet there is also caveat here for comparative insights. Not everywhere will formerly unrecognised indigenous forms of law and governance will flourish after formal constitutional recognition; nor does indigenous constitutionalism invariably provide a symbol around which all citizens can rally. What has made Oromo law and governance resilient can be traced to factors beyond law and governance only.

One factor which, perhaps counterintuitively, worked in favour of Gadaa's resilience is the decentralised nature of Oromo indigenous constitutionalism. In comparative terms, traditional structures defined by strongly centralised political hierarchies, in contrast, are more liable to succumb to the destructive forces of political manipulation and modernisation. Once the political authority of the king, paramount chief, emir, or sultan is removed or curtailed or controlled by state authorities, the component parts of the traditional structure tend to unravel. Without traditional leaders to preside over its functioning, or when strong leaders were replaced with handpicked docile ones, traditional law and governance starts to lose its legitimacy in the eyes of the locals.

Again, it is the holistic perspective which provides us with other secondary explanatory factors. Demographic strength is one we discussed earlier in section 2.3. and 2.4. Compared to indigenous communities which are territorially dispersed, cut off from one another, and demographically vulnerable, the Oromo were the majority in their ancestral lands and had a critical size that allowed the traditional culture to survive. There is also another explanation for the resilience of Gadaa; or more precisely, there is another explanation for the near universal embrace of the Gadaa by all segments of the Oromo society. Other than Afaan Oromo language – also universally embraced – Gadaa is a unifying force for a people divided over four religions, different geographies and economic activities, and long history of political divisions. If the political situation settles in Ethiopia and stability takes over, we are likely to see future constitutional reforms at the Regional State level towards matching Gadaa's social legitimacy with a formal one.

Chapter 13:
Lessons, Insights, Observations

For every problem there is an answer that is clear, simple, and wrong.
H.L Mencken[1]

Best is the enemy of good.
["Le meilleur est l'ennemi du bien"]
Voltaire[2]

1. INTRODUCTION

[1] The early 20th century American scholar of English language and author Henri Louis Mencken is credited with all the minor variations on this dictum which he used in his various writings. The first is found in his 1920 collection of essays *Prejudices: Second Series*, Chapter 3.

[2] Voltaire is the pen name of the French Enlightenment philosopher, historian, and author François-Marie Arouet. Various different citations of the dictum are attributed to him; the first one is traced to his 1770 *Dictionnaire Philosophique; Questions sur Encyclopédie*.

1.1. Overview

In this final chapter we take stock of both the scholarly and applied findings of the preceding twelve chapters. The investigation of the relationship between traditional laws and modern laws in three African countries has not only shed light on the details of the history of the politics of law in these case-studies, but it has also helped expose a number of relevant lessons, insights, and observations concerning the comparative study of constitutions and constitutionalism, especially concerning the recognition and application of indigenous forms of constitutionalism. We wanted to add non-Western experiences, ideas, practices with constitutionalism to the repertoire of comparative case-studies. In doing so, we opted for broader definition which. holds across time and geography. As such, in the course of the discussions in Chapter 1, we conceptualised constitutionalism as the foundational principle, where the prerogatives of the constituent bodies making up the polity are enumerated and guaranteed in order to ensure safeguards against arbitrary rule. The investigation shows that not all can be reduced to clear and simple formulas projecting certainty, but there are indeed various causal patterns which hold across time and place, and thus contain findings with comparative generalisability. These answers, however, are more likely to be qualified, nuanced, conditioned by the complex historical, political, legal, and social context.

The literature review in Chapter 2 brought together ten different strands of scholarly literature across two centuries to help build a theoretical framework appropriate for the comparative study traditional law and governance. It was in Chapter 3 where these were assembled into something more concrete and finetuned. The five defining components of this framework are that, it is **1)** holistic; **2)** historically grounded; and **3)** cross-disciplinary; **4)** it pursues a mix of the theoretical and applied scholarly goals; **5)** and does this by couching the investigation in the terms of the study of comparative constitutions and constitutionalism. The three case-studies were put through this macro perspective. Put simply, we looked at everything across time and place in these three case-studies and integrated the various angles and approaches into this frame. Subsequently, we were able to identify a number of complex, nuanced, multi-faceted, qualified probabilistic causal patterns but no clear and simple answer along Henri Louis Mencken's epigraph above, and no sweeping projections of certainty concerning the promise of new policies and reforms. Instead of one timeless, universal, single formula projecting scholarly certainty and applied promise, i.e. Voltaire's 'best', the investigation instead exposes a number of the 'good'. We cover the wide-ranging and multi-faceted scholarly and applied findings, and the bigger attending philosophical challenges, in this concluding chapter. The applied and the scholarly are divided into two separate sections:

In section 2 below, we distil and present the applied lessons, insights, and observations on the recognition and application of traditional law and governance. Some of these are specific, concrete, and precise; others require more open-ended reflections on non-Western constitutions and constitutionalism. Instead of the form, ours is an approach that emphasises the function of putting brakes on absolutisms and protecting the separation of powers, so we cast a wide new covering traditional form and governance.

For section 3 we turn our attention to the scholarly; in particular, what the thesis tells about the theories and methods of research on constitutionalism. It is here where we question the prevailing reductionist tendency in the social sciences methodology to project scholarly certainty within a narrow premise; and how this, in turn, feeds into the subsequent pursuit of the replication of such

perfectionism in applied terms. Following the footsteps of Voltaire, we reflect on the dichotomy between an attainable and workable holistic 'good' on the one hand and an idealised and reified cut-and-pasted 'best' from the West. We conclude the chapter, and indeed the thesis, with a short subsection which sums up the essence of the thirteen chapters: *Final Word: Looking Back to See Ahead.*

1.2. Studying Traditional Law and Governance under Comparative Constitutionalism

Part II of Chapter 1 was where we had outlined how the traditional systems of law and governance indigenous to Africa can be framed and studied within the field of comparative constitutions and constitutionalism – provided we expand the prevailing Western benchmarks to include non-Western experiences, ideas, and practices. This was followed by the literature review of Chapter 2, where we brought together the different strands of scholarly literature, and Chapter 3, we developed the theoretical framework and laid out the research methodology appropriate for this study. Let us now take a look back and see whether framing the study of traditional law and governance within the terms of comparative constitutions and constitutionalism has indeed worked.

The macro constitutional perspective, the cross-disciplinary focus, the *longue durée* look at the history of the politics of law, the acknowledgement of the underlying philosophical challenges, and the subsequent awareness of various explanatory factors that emanate from the various levels of analysis, have all joined forces towards a common goal. Instead of picking and choosing delimited areas to focus on – say – the current customary laws regulating family affairs in one local community or the past of traditional governance structures of another tribe in another jurisdiction, this macro perspective lead us towards bigger questions about law and governance and home-grown constitutionalism. The cross-disciplinary perspective combining political, legal, social, philosophical aspects of constitutions and constitutionalism gives the thesis a pronounced holistic outlook. Framing African indigenous law and governance in the context of comparative non-Western constitutionalism allows us to pursue such big questions, but it also means that we have to trek across the uneven grounds of different political and legal systems, covering both their present and past.

The research methodology employed for the case-studies is fine-tuned to correspond to the cross-disciplinary holistic theoretical foundations of the thesis. The archival investigation on primary sources itself is informed by the teachings of Legal History. The historical research combining findings from various secondary sources is informed by the Legal Realism theoretical school, and its close relations, the Law in Context and Socio-Legal Studies schools – all of which advocate holistic approaches to the study of law and governance. The methodological path the thesis pursues also plays a part in exposing the limitations of Legal Positivism as a theoretical school. Its tendency to ignore the unwritten, the unofficial, and the uncodified, makes Positivism the least inclusive scholarly approach towards the study of indigenous constitutional orders. In contrast, it is the holistic teachings of Legal Realism which renders it the best approach to set traditional laws and governance in the broader historical, legal, social, and political context.

1.3. Three Paths to Empowering African Constitutionalism

After the above overview of the contents of the twelve previous chapters, and how they fit into the field of comparative constitutions and constitutionalism, we now bring together the various comparative conclusions we had reached in the three case-studies and define these three paths embodied by these three ideal-cases. (The more specific conclusions from the case-studies are covered in more depth and detail in Chapters 6, 9, and 12).

1.3.1. Botswana: Early Recognition, Domestication, and Continuity

Our first case-study Botswana epitomises the *ideal-type* of early recognition granted to the traditional system of law and governance. Unlike many former colonies which had to dismantle colonial era laws and institutions and construct new ones for independence, the transition from Bechuanaland Protectorate as a part of the British Empire to independent Botswana has been remarkably frictionless. Most laws were revised only in terms of the names of the competent political entities. Despite minor distortions and deviations along the way, in comparative terms the country's constitutional order has been marked by relative continuity across pre-colonial, colonial, and post-colonial eras. As a result – notwithstanding occasional disagreements concerning the contents of traditional customary law and party politics competition between paramount chiefs of different Tswana tribes – the legitimacy of traditional law and governance is not contested.

1.3.2. South Africa: Colonial Manipulation, Historical Distortion, and Democratic Rebirth

The second case-study has a similar start but a very different ending. Just like Tswana, the traditional Xhosa system of law and governance also enjoyed early colonial recognition, but this was followed by successive phases of increasing political control and manipulation in line with the changing political and constitutional landscape of South Africa. The ancestral lands of the precolonial Xhosa kingdoms in the Eastern Cape had first fallen under British occupation and the attending system of indirect rule, which was later continued by the Union of South Africa. The Republic of South Africa which broke off from the British Commonwealth in 1961 used the outward appearance of autonomy in order to bring legitimacy to the apartheid system, leading to the creation of the nominally autonomous ethnic homelands of Transkei and Ciskei. What was restored with the introduction of democracy thus contains the marks of different phases of colonial intrusion, manipulation, and historical distortion. The grassroots acceptance of the national legitimacy of traditional law and governance we see in Botswana is thus more unevenly distributed across the society in South Africa, partly because of the traumas of history, partly because of increased chiefly powers during colonialism at the expense of indigenous checks-and-balances and divisions-of-power, and partly because of the way past policies have weakened the holistic nature of indigenous constitutionalism.

1.3.3. Ethiopia: From Near Extinction to Resurgence and Idealisation

The traditional system of law and governance of Ethiopia's Oromo represents the third *ideal model* where the indigenous constitutional order was completely unrecognised and thus insulated from politics until the recent federal constitution. Democratisation helped resuscitate traditional Oromo structures which were believed to have gone extinct under Abyssinian Empire's state-building modernist reforms. Traditional laws known as the *Gadaa* had been repealed and replaced by, first imperial, and later centralist-socialist military laws of the centre. But the indigenous Oromo system survived in rural areas beyond the reach of the state, and in semi-rural areas in secret as a sign of defiance of the modern centralist state. However, lacking a long history of formal incorporation into the country's successive constitutional orders, the traditional *Gadaa* acquired a somewhat more

idealistic image of what indigenous constitutionalism represents (or should represent). With the current political tensions and uncertainties in Ethiopia, *Gadaa* has emerged as the rallying point for the Oromo people otherwise divided along region and religion

2. LOOKING AHEAD: THE APPLIED LESSONS, INSIGHTS, OBSERVATIONS

The three paths to empowering African constitutionalism we summarise above are about the macro patterns defining their *longue durée* history. We report the causal patterns marking the last two hundred years seen through a bird's-eye-perspective. There are also sundry applied lessons, insights, and observations the case-studies concerning the very process of recognition and application of traditional law and governance. The case-studies form the bulk of the stock from which we distil these, but there are additional reservoirs we use for distilling these lessons, insights, and observations: we survey the first three chapters on the various strands of scholarly literature, the attending discussions on theory and methodology, and comparative experiences elsewhere. After all, policy complications concerning the constitutional recognition of what is indigenous and how to apply it in courts have afflicted other African countries as well – especially during decolonisation and the first decade of independence that followed. We group the various applied lessons, insights, and observations under seven distinct headings:

2.1. Internal Diversity as the Defining Characteristic

The defining characteristic of indigenous law is its internal diversity. This diversity is both across the different constituent ethnic communities of a country, but also within tribes and their branches. While this point might appear self-evident to those studying traditional law and governance, there is sometimes the tendency in some of the present political debates to lump the various national, ethnic, tribal, and sub-tribal into one 'traditional customary law' and then juxtapose this against the modern written laws. This not only goes against the key attribute of indigenous constitutionalism of internal diversity but and it also leads to the impression that one uncontested, timeless, and standard version of the law exists, and it is then, a question of official recognition and application. There are both scholarly and applied risks that result from the failure to acknowledge the diversity within.

The scholarly risk with this reductionism is the misleading conclusions an inappropriate analytical framework might engender. The applied risk is that under the label of indigenous law, either an artificial amalgamation of various traditional customary laws – and by definition, something no longer 'indigenous' in the true meaning of the word – is recognised as the law. Or alternatively, the better-known laws of demographically more powerful communities are recognised, and thus imposed on other smaller communities as their indigenous laws – which, again by definition, falls short of the meaning of indigeneity. The applied relevance of comparative constitutions and constitutionalism is thus closely related to the knowledge historians, political scientists, and anthropologists, and country specialists produce on the traditional laws and governance structures in different countries and ethnic communities, tribes, and sub-tribes. Such knowledge is critical to determining what is to be official recognised and applied as traditional law.

The legitimacy new policies and reforms recognising traditional laws and governance in the eyes of the locals (and thus, by extension their embrace, resilience, and longevity) rest on the acknowledgement of this basic defining characteristic. The need to incorporate works from other disciplines covering such internal diversity is not only an issue for scholarly debates but there are applied consequences both in terms of which customary laws to adopt but also in constitutional terms concerning local, regional, or nation-wide recognition and applicability. While discussing indigenous African law, it thus is imperative to establish the starting point that that across Africa's ethno-linguistic communities and tribes, and often also within, differences exist. Sometimes these differences reflect the minor deviations in some aspects of the local version of customary law. But sometimes the differences are more foundational and mirror broader the socio-cultural characteristics of different peoples.

Just as it is the case across the world, differences in gender roles, social hierarchy, deference to elders, individual versus collective (i.e. extended family or clan) responsibility, preferences for punitive or restorative justice can all come to define different ethnic communities. For example, while amongst South Africa's Nguni peoples (i.e. the southern branch of the Bantu composed of the Xhosa, Zulu, and Ndebele), more hierarchical social relationships exist, amongst the Swazi and the Venda peoples women culturally have a higher social standing. It is not uncommon for these communities to have female traditional leaders.[3] Differences in indigenous law reflect the differences in society and culture. And these differences reflect the small accumulation of different socio-cultural characteristics over time.

Internal diversity is not only relevant to traditional law and governance in southern tip of the continent, but it also holds for our third case-study from the Horn. Similar differences across Ethiopia's ethno-linguistic communities exist. Some – especially from the Semitic highlands – have historically had hierarchical social relations reflecting the martial history and feudalism of the region, while the social relations in some of the more isolated smaller communities in the south west are more egalitarian and grant women higher social standing.[4] All the three case-studies included instances where internal diversity across branches of a tribe. It is especially on family issues where this could present a real challenge due to the very fact that some tribal branches might have kept parts of the pre-colonial matrilineal lineage when it comes to things like marriage, divorce, adoption, and inheritance; while other might have adopted the patrilineal principles of the colonial legal system (in Botswana and South Africa) or the received Civil Laws imported from the West (in Ethiopia).

What should be injected into the discussion here is the terms of this internal diversity can slowly change over the long-term history. None of this is set in stone. Social roles – and the attending legal culture – can evolve over time along with changing economic, social, cultural, and demographic factors. And customary law will evolve in tandem. In Chapter 3 we had discussed in depth the futility of the expectation that one could find in pristine form of indigenous law untouched by changing times

[3] Vorster, LP (2002), "Institution of Traditional leadership", in JC Bekker, JMT Labuschagne, LP Vorster (eds) (2002), *Introduction to Legal Pluralism in South Africa*, *Part I: Customary Law*, Durban: Butterworths, pp. 127-38.

[4] See for example, Tolosa, Mamuye (2011), " The Siinqee – Women's Institution for Conflict Resolution in Arsii", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds), *Customary Dispute Resolution Mechanisms in Ethiopia*, Addis Ababa: The Ethiopian Arbitration and Conciliation Center, pp. 279-98.

and circumstances, and in turn, recognise and restore it into applicability. Historians, political scientists, and anthropologists are the natural allies of those who want to empower African constitutionalism in a way that has, and will continue to have, legitimacy in the eyes of the locals. The applied is thus inseparable from the scholarly, especially the cross-disciplinary variant.

2.2. Breaking Holistic Indigenous Law and Governance into Western Categories

One of the side-benefits of an expansive cross-disciplinary approach incorporating various strands of scholarly literature into the comparative study of indigenous law and governance is the discovery of relevant pieces of past scholarship which have been overlooked by current literature. In a remarkably comprehensive, original, and thoughtful piece of scholarship written during South Africa's transition to democracy, Gardiol van Niekerk shows that she had been reflecting on the challenges accompanying the processes of recognition and application. As we have done in this thesis, she also frames things in macro-constitutional terms juxtaposing Western and indigenous constitutions, and addresses questions of formalisation, codification, and enforcement. Van Niekerk sums up what is at the heart of the policy complications accompanying the processes of recognition and application of holistic traditional law and governance:

> "Strict adherents to the rule-centred approach to indigenous law often have a narrow, ethnocentric, Western view of law and procedure and misunderstand the non-specialised character of group-oriented indigenous cultures. The real danger of this approach lies in the fact that indigenous law does not easily fit into Western definitions of law and may thus be considered as custom and not law. Because of the close link between law, custom, religion, and other social norms in indigenous cultures, anthropologists and jurists alike have often felt compelled to believe that these societies are lawless societies governed by the power of custom alone. The absence of physical coercion and authorised institutions to enforce norms, as well as absence of the concept of state and formal legislators in a narrow Western sense, have been regarded as further indicators pointing to the absence of law in indigenous communities".[5]

Her conclusions show a number of parallels with what we have identified, but it is her big claim that indigenous law and governance do not fit Western definitions and categories which deserves more attention here. The other challenge for Western-derived notions of law and governance is to conceptualise compliance without the formal means of 'law enforcement'. We take up that challenge van Niekerk had spotted a little later under subsection 2.5. but first we turn to holism.

A big challenge is for modern legal systems is to identify, separate, recognise, and apply parts of what is essentially holistic. Traditional law and politics are inseparable from the broader social structure of the community in question, their culture and history. This means that it is difficult to fully isolate the legal sphere from the political, social, and cultural as well as categorise parts of indigenous law and governance into select categories of (Western) law without cutting the laws from the context they

[5] Van Niekerk, Gardiol Jeanne (1995), *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective*, Pretoria: University of South Africa, pp. 33-4.

belong and from links to each other. What is more, the issues/disputes that appear in traditional law often spill-over across the more specific categories that exist in Western law.

In Chapter 3 we looked at the way traditional law is broken down to fit these categories, but it was in the case-studies where more detailed instances of this relationship in Botswana, South Africa, and Ethiopia. Despite the differences in the relationship between traditional laws and modern law, and indeed, despite the internal diversity within traditional customary law across different ethnic communities or within tribal sub-branches, the issues/disputes they normally address are the categories below:
i) Family affairs (divorce/wedding, child custody/adoption, inheritance, and property).
ii) Economic/resource/livelihood matters (farmland, water, pasture, boundary, cattle raid, hunting);
iii) Crimes (assault, murder, theft).
iv) Inter- and intra-group disputes between (clans, tribes, extended families, villages, regions, ethnic communities).
v) Membership (differences in the rights of insiders/outsiders/settlers/commoners/nobility).
vi) Political matters (the rights and responsibilities of the chiefs and elders, elected versus hereditary leaders, the role of religious leaders in governance).
vii) Religious and ceremonial matters and rituals.

For many traditional systems of law and governance indigenous to Africa most of these categories derived from the West rarely come with a neat separation from one another in the abstract, and spilling-over in practice is often inevitable. For example, a land dispute might acquire different characteristics when it is either between individual family members, or between different clans, or when it involves those who are considered settlers and thus not native to the land. The solution to the land dispute might include both the involvement of traditional leaders as well as certain rituals.

There might not be an alternative to working with these now-universal legal categories and subcategories derived from Western law, but even an awareness of the interconnected nature of traditional law and governance and an official acknowledgement of its holistic nature can help establish constitutional bridgeheads for the future reforms. Where the inherent holism of indigenous law can be brought into modern legal systems is legal/constitutional interpretation by higher courts, but this required legal professionals with a general knowledge of how traditional law and governance works, as well as specific knowledge the indigenous laws of the locality in question; but most importantly, an acknowledgment that the select customary laws coded into official laws are inseparable from the community from which they have emerged. According to Bennet and Vermeulen:

> "Because of the characteristic flexibility and generality of rules of customary law, the drafter of the code will experience great difficulty in selecting the rules to be reproduced in the code and in expressing them with the sensitivity necessary to reflect accurately the manner in which they function. It is unhesitatingly accepted today that a thorough knowledge of the social milieu in which the law operates must precede any attempt to describe the rules of customary law".[6]

[6] Bennett, T W and T Vermeulen (1980), "Codification of Customary Law", Vol. 24, No. 2, *Journal of African Law*, pp. 217.

What Bennett and Vermeulen describe reflects the inevitable tension involved in formally recognising in the form of legal categories select parts of what is essentially an interconnected and evolving whole. There are promises and pitfalls involved, which call for a separate subsection where we can discuss and dissect these in more details.

2.3. The Paradox of Formal Recognition as Both a Promise and a Pitfall

What is both a promise and a pitfall is the very act of recognition itself. While recognition both substantively and symbolically can restore indigenous constitutionalism to the same level playing field with received constitutional models from the West, the very act of recognition also robs traditional customary law of its ability to evolve with changing circumstances. The holistic approach that characterises our theoretical framework and defines our methodological approach also helps us with the applied side of things here. Picking select customary laws from a locality and then formalising can end up narrowing and making rigid what was supposed to be bigger and evolving. As David Bederman puts it: "Custom can become hardened into formalism and ritual, empty of meaning and divorced from social context".[7]

The paradox of formal recognition as both a promise and a pitfall was noted even decades ago during the beginnings of what eventually was going to be decolonisation. At a 1955 colloquium on the future status of African law, Holleman noted the importance to conceptualise customary law as something that evolves with changing circumstances: "[N]o rule of customary law is ever established once and for all, but all customary law is constantly seized in a process of revision to keep it commensurate with the particular requirements, both local and of the period".[8] In Sub-Saharan Africa's French colonies, the process of formal recognition was simply a speedy codification. This was done through the so-called *coutumiers juridiques* in French West Africa.[9] As such, what used to be evolving and flexible laws indigenous to the land became a new set of fixed codes.

The restoration of traditional laws and governance to the same level of received models from the West require establishing certainty, but this comes with the loss of flexibility. According to A.N. Allott: "if one writes down customary law it will lose its flexibility – in the sense of its capacity to change to meet new circumstances – unless there exists some machinery by which to alter the law".[10] T.W. Bennett's reflections on the Restatement of African Law Project (RALP) of the 1950s (which was examined in more detail in Chapter 2) also deals with this:

> "At the 1959 London Conference on the Future of Law in Africa delegates showed their concern about achieving two conflicting aims: certainty and flexibility of customary law. There was general reluctance to codify customary law because it was believed that this would prematurely fossilize the system; the Natal Code of Zulu Law

[7] Bederman, David J. (2010), *Custom as a Source of Law*, Cambridge: Cambridge University Press, p. 4.
[8] Holleman, F. D. (1956), "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique : Symposium-Colloque Amsterdam 1955*, Leiden: Universitaire Pers Leiden, p. 249.
[9] Vanderlinden., Jacques (1957) "The recording of customary law in France during the fifteenth and sixteenth centuries and the recording of African customary law", *Journal of African Law*, Vol. 3, No. 3, pp. 165-175.
[10] Allott A.N. (1960), *The Future of Law in Africa*, London: Butterworth, p. 29

> has always served as a warning in this regard. On the other hand, it was felt that unwritten customary law was too vague and imprecise to permit consistent application by the courts. A compromise was found in the idea of 'restatement'. This would not have the binding legal force of a code but it would have the merit of providing a readily accessible guide to rules of customary law. This guide could, if necessary, be challenged by the courts or the parties".[11]

AJGM Sanders adopts a slightly different angle and argues that certainty is not only a question of coding indigenous customary law, but a bigger issue about the very nature of Western law and governance in general, and a more specific issue about maintaining political control over every potential direction such laws might take. Our cross-disciplinary approach guarantees that we do not ignore what are often the complex political choices behind the new policies and reforms towards recognising and applying traditional laws indigenous to the land:

> "It is characteristic of European-styled government – in its colonial as well as its post-colonial version – to seek certainty or predictability. Hence its fixation with written accounts of customary law, cast in the form of 'positive' rules. What escaped the official mind was the fact that to capture custom this way was to tear it from its folk roots".[12]

This paradox of formal recognition (as both a promise and a pitfall) in and of itself constitutes a big applied problem for traditional law and governance of course. But the very process of recording and recognising might present additional applied problems. One is the assumption that the uncodified laws were, collected, assembled, translated, recorded, and codified accurately. This sidesteps the issues of the reliability of the local knowledge available to those who are doing the recording and underplay the role of international geopolitics and national politics: "As it was translated into written form, customary law was transformed into a fixed code, more or less confirming to the preconceptions and biases of its translators'.[13] This problem of accuracy in translating uncodified customary law into statutory written laws is predicated on the assumption that there are indeed such laws awaiting such translation. There is another applied problem when such a standardised single set of customary laws might not exist – something we covered a little earlier in section 2.1. In addition to the biases of those who are recording indigenous customary law and the various political agendas that might infiltrate the process, there is an additional applied problem.

One of the main strengths behind the resilience traditional law is its uncodified nature, which allows it to evolve with changing circumstances. Codification risks not only undermining this characteristic of traditional law, but it can end up severing the bond between traditional governance and law. Formal recognition at the national level might bring in the modern state structures to replace the role local indigenous leadership plays in the administration of law. This would disenfranchise traditional elders from their roles as holders of tradition and gatekeepers of local law, and thus dilute the perception of the legitimacy of traditional law in the eyes of the locals. The benefit of framing things in comparative

[11] Bennett, T. W. (1985), *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta and Co, p. 36.
[12] Sanders, AJGM (1987), "How Customary is African Customary Law", *Comparative and International Law Journal of Southern Africa*, Vol. 20, No. 3, p. 406.
[13] Bennett, T W (1991), "The Compatibility of African Customary Law and Human Rights". *Acta Juridica* p. 19.

terms is that we see similar promises and pitfall afflicting the process of recognition throughout the world. Writing in reference to developments Canada, Sébastien Garamond captures a dynamic that applies to the entirety of Sub-Saharan Africa:

> "The process of reducing custom to writing may also disempower the traditional keepers of indigenous law… People will rely on a written document instead of consulting with elders. Moreover, non-indigenous officials may gain authority to interpret written indigenous laws, in which case the indigenous peoples will be divested of the capacity to control the evolution of their laws without outside interference".[14]

When new policies and reforms rob traditional leaders off their historic role in administering indigenous law, this in turn might start undermining the legitimacy of traditional governance structures in the eyes of the locals. It is, of course, possible to frame this dynamic in different terms and highlight its negative aspects.

> "[C]ustom can be used as a method of social control by elites. Since customary law in preliterate cultures is definitionally unwritten, it falls to 'keepers' of custom to maintain its integrity and substance – and to apply and enforce it. Whether these are aristocracies or sacerdotal colleges, as Sir Henry Maine described in his 1861 volume Ancient Law, they effectively exercise monopolies on legal knowledge and can be responsible for the maladministration of justice or even worse, corruption of the entire legal system". [15]

Both the Garamond's point lamenting the severing of the link between traditional law and governance and Bederman's criticism of the role traditional leaders in administering indigenous law share the same observation: (notwithstanding the attending pluses and minuses) traditional law and governance are inextricably interlinked. With official recognition moving up from a select locality, a region, a sub-jurisdiction to nation-wide terms, these applied challenges will only intensify. At the core are macro questions about the pragmatic or principled constitutionalisation of legal pluralism and the designation of a hierarchy (or the legal equality) between the multiple constitutional orders. Our three case-studies contain instances where recognition of traditional laws and governance structures indigenous to the land were recognised in holistic terms as reflection of political acceptance; there are also instances where recognition was *ad hoc*, the result of pragmatic decisions when the reach and range of policies, institutions, and bureaucrats fell short of establishing uncontested state authority

2.4. From Legal Pluralism to Monism, From Constitutional Equality to Hierarchy

In order to study whether the constitutionalisation of legal pluralism and the inclusion of indigenous constitutionalism within, follows principled or pragmatic lines we have to first outline the possible types of relationship between received and indigenous constitutionalism. In Chapter 3 we had examined these in the abstract, and in the case-studies more specifically. Let us quickly revisit the types of relationship between traditional laws indigenous to the land and received laws imported from the West and the attending complications and consequences.

[14] Grammond, Sébastien (2013), *Terms of Coexistence: Indigenous Peoples and Canadian Law*, Carlswell, p. 374.
[15] Bederman, David J. (2010), *Custom as a Source of Law*, Cambridge: Cambridge University Press, p. 4.

The *longue durée* history of our case-studies contain every type ranging from complete separation and parallel existence in a system to legal pluralism to integration into a single system of legal monism; from constitutional equality granted to indigenous laws and governance structures matching that of received ones to constitutional hierarchy places modern laws above indigenous ones in legal effect and applicability. And all these come with a different set of pluses and minuses.

a) Full formal recognition granted to traditional law and legal equality with modern statutory law under a dual legal system of customary courts and modern statutory courts (as it was the situation in Botswana until 1969 – dealt with in detail in Chapters 4 and 6). In this system of constitutional 'dualism', received and indigenous laws coexist in parallel spheres, there are separate courts and jurisdiction and applicability. Dualism was a common element of the reforms marking the closing decade of colonial times, but such principled constitutional recognition of constitutional pluralism were reversed in the post-colonial years almost everywhere with gravitating towards constitutional monism and nation-wide majoritarian politics.

b) Partial recognition granted to tradition in some fields of law only, and under the supremacy of the constitution (as is the case with Oromo traditional laws in family affairs according to the 1995 federal constitution of Ethiopia – dealt with in detail in Chapter 12; and Xhosa traditional laws on chieftaincy and cultural customs under South Africa's 1996 constitution – dealt with in detail in Chapter 9).

c) Formal integration of traditional laws into statutory law within the single hierarchy of a homogenous legal system thereby ending the separate existence of two systems of law (as it has been the case in Botswana since 1969 – dealt with in detail in Chapter 6). With independence, the courts were unified. Practice and procedure were standardised. Nation-wide majoritarian politics towards constitutional monism is a mostly post-colonial dynamic but there were also instances of this during the closing days of colonialism.[16]

d) The fourth category on the relationship between received and indigenous system of law and governance is one that is a pragmatic, rather than principled, recognition. The coexistence of modern law and traditional law through an informal acceptance granted to traditional law by state authorities and a tolerance for its practice (this is the current situation in most parts of rural Oromia in matters beyond family affairs where traditional law is constitutionally recognised – dealt with in detail in Chapter 12).

e) The defiant and secretive practice of traditional law as a rejection the modern statutory laws and the legitimacy of the state (historically this used to be the case in Oromia during imperial and military rule as modern law was deemed outsider-imposed and traditional laws were practiced in secret – dealt with in detail in Chapter 9). We do not see instances of this in our Botswana and South Africa case-studies – mostly due to the early colonial recognition traditional customary law even if the

[16] Anthony Allott mentions Tanganyika's (the colonial mainland half present-day Tanzania) of programme of unification of law. He also notes that it was not very successful. Allott, Anthony (1965), Hilda Kuper and Leo Kuper (eds) (1965), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press, p. 217.

process was for political expediency rather than a principled acceptance of legal equality of indigenous constitutionalism.

f) The final category is outward recognition without true political empowerment. The ethnic constituent republics of the Soviet Union were an example of this. In southern Africa we have seen softer variations of this under British colonialism's policy of 'indirect rule' and a harder more autocratic one under apartheid's ethnic homelands (dealt with in Chapters 7 and 9). What is common to all is the selective use, distortion, and manipulation of traditional laws as a way to bring a semblance of legitimacy to authoritarian rule.

In most types of relationship between the indigenous and the received laws listed above, formal constitutional recognition in nation-wide terms often brings in modern state structures replace the role local governance structures play in the administration of traditional law. What needs further attention in this context is the move up from local (voluntary) compliance to (nation-wide) law enforcement by the modern state – something that takes us back to some of the very first writings of Bronislaw Malinowski in the next sub-section.

2.5. From Social to Official Enforcement of Law under Modern Constitutionalism

Making the study of constitutions and constitutionalism truly comparative, with non-Western cases along Western ones, with traditional systems on par with modern ones, brings into fore the difficult question of enforcement. Without courts, magistrates, police, prisons, and other formal means of 'law enforcement', most observers from the West seem to be perplexed when they see people follow traditional laws and obey traditional leaders, in seemingly voluntary fashion. In fact, the very notion of 'law enforcement' is alien to the workings of traditional law and governance in almost every (small-scale) indigenous community. Instead of the law being enforced by professionals whose very responsibility is precisely that, in indigenous communities it is the social expectations that function as enforcement. Anthropologists have explained this by invoking various theoretical accounts ranging from the functional benefits of obeying laws for social peace to the importance of reciprocal social relations and obligations. It is apt that we go back to the very first person who wrote on this, Bronislaw Malinowski.

When studying uncodified indigenous law, it is imperative to highlight that, just as it is the case in the Western legal systems, individual transgressions of a law or evasion or elasticity in adherence do not equal the breakdown of law and order. Laws can be seen as legitimate by the members of a society and yet still be violated or ignored. Or one can express abstract adherence to the law in its ideal form and yet find ways to justify deviance or elasticity in practice. As Shakespeare had made Hamlet quip that customary laws sometimes only reveal themselves when violated: "*But to my mind, though I am native here / And to the manner born, it is a custom / More honor'd in the breach than the observance*".[17]

Just like the bard a few centuries earlier, Bronislaw Malinowski had spotted human-beings' tendency to behave in complex and seemingly contradictory ways. Private violations and evasions of law and

[17] Shakespeare, *Hamlet*, Act 1, Scene 4,

custom exist while publicly the laws remain unquestioned and uncontested. This tends to be particularly the case when morality issues are at play and an idealised version of right and wrong is often articulated in the abstract; but as long as not publicised, transgressions in practice tend to be tolerated:

> "This is the ideal of native law, and in moral matters it is easy and pleasant strictly to adhere to the tribal – when judging the conduct of others or expressing an opinion about conduct in general. When it comes to the application of morality and ideals to real life, however, things take on a different complexion… This could be called a well-established system of evasion… of one of the most fundamental laws of the tribe".[18]

Malinowski's time amongst Trobriand Islanders had convinced him that public opinion towards transgressions of moral customs on sexual intercourse and marriage can be lenient as long as there is an effort to keep the affair secret; "If, on the contrary, a scandal breaks out – everyone turns against the guilty pair and by ostracism and insults one or the other may be driven to suicide".[19] It seems evident that both industrialised modern societies and traditional societies alike contain equal amounts of human complexity (and hypocrisy) when dealing with moral issues.

It is here where we highlight something that should be common sense, but might need reiteration nonetheless. Just as formal laws, prisons, courts, and professionals of law enforcement do not guarantee that speeding limits will be kept, that all personal income declared, and applicable taxes paid, this does not mean that violations of laws do not happen in small scale indigenous communities as well. The following subsection takes on another applied challenge when the small scale is elevated to the national level.

2.6. Social Peace at the Local Level and Certainty at the National

One of the shared characteristics of traditional law throughout Sub-Saharan Africa is its pronounced pragmatic aim of seeking social peace at the local level rather than the abstract elaboration of legal principles. This characteristic was noted within the various strands of literature reviewed in Chapter 2 and incorporated into the theoretical framework developed in section 2.3. of Chapter 3 as a unique characteristic of African constitutionalism. When official recognition moves up from the local to the national level, this bring in strains on the ability of indigenous laws to provide their traditional function of ensuring social peace in small scale settings.

Writing in 1956 Olawale Elias had anticipated the coming political dynamics where the pragmatic quest for social peace at the local level might not easily translate into the national level:

> "The judges are more intent on the maintenance of the social equilibrium than on a strict declaration of legal rights and duties of the litigants without regard to the social consequences of their verdict. Instead of spinning out abstract theories of law, their aim is usually the pragmatic one of removing the causes of social tension, of binding, or rebinding the estranged parties in a give-and-take reciprocity, of the

[18] Malinowski, Bronislaw (1932) [1926], *Crime and Custom in Savage Society,* New York: Harcourt, Brace and Court, p.79-80.

[19] Malinowski, Bronislaw (1932) [1926], *Crime and Custom in Savage Society,* New York: Harcourt, Brace and Court, p. 80.

> reincorporation of an erring member in the social structure… [I]n the generality of cases tried under the customary process the conscious purpose is reconciliation of the parties by a fairly just apportionment of blame or deserts [*sic*.] ".[20]

In its original small scale setting, traditional law and governance operates in ways that would be difficult to replicate at the national level. The details of the issues that are deliberated and the cases that are discussed are widely known; and often, so are the arguments and concerns of the involved parties. This enables the discussions and deliberations to centre on finding a solution rather than presenting and pleading cases. Instead of applying formal and rigid laws to individual cases, this allows for the application of a broad set of traditional legal principles, values, and norms on a case-by-case basis, where there is a preference for consensus and an emphasis on social harmony (instead of applying law according to fixed abstract principles, and thereby creating winners and losers). The non-prescriptive, non-adversarial, and non-punitive character of traditional law and the preference for respect, restoration and consensus in small scale settings make its incorporation into national laws requires attention to ensure this unique characteristic of African constitutionalism at the local level is replicated at the national.

One way to acknowledge traditional law and governance's primary goal of keeping social peace would be through establishing general principles rather than enumerating precise and detailed legislation and constitutional clauses. It would be then for legal review and constitutional interpretation to reconcile general notions of law with the particular dictates of individual justice. Comparative constitutions and constitutionalism give us instances where are general principles for courts to follow are established without having to codify every possible scenario. An example is the way the principle of subsidiarity included in the Treaty on the European Union's Article 3(b) as a general principle. Instead of exhaustively listing all spheres of jurisdiction falling under supranational EU institutions, member states, and local/regional authorities, the treaty established a general principle which calls for decisions to be taken at the lowest level of government possible and only refer to the European level matters that cross interstate borders. Other examples come from federations where general principles are set up in the preambles to their constitutions. For the United States this is 'life, liberty, and pursuit of happiness', for Canada it is 'peace, order, and good government". Actions of both federal and provincial/state governments as well as court decisions from both levels should conform to these constitutional *raisons d'États* in the preambles. Similar general principles establishing the primary goal of social peace can be put to similar use on this front.

2.7. The Rights of Dissenters, Outsiders, and Women

Many of the preceding subsections on the applied lessons, insights, and observations take notice of the communitarian tendencies in traditional law and governance. From the quest to maintain peace at the local level to compliance through social pressures, group dynamics define how things work. The way society trumps the individual was a core angle of the theoretical framework we developed in Section 2. 3 of Chapter 3. Dissenters from within the tribe who challenge majority views, outsiders who live in the locality but are not deemed to be members of the indigenous community, members

[20] Elias, T. Olawale (1956), *The Nature of African Customary Law*, Manchester: Manchester University Press, p. 298

of sexual minorities, and those who campaign for women's rights can all experience hardship when going against the local community's cultural *status quo*. Any reform or new policy has to ensure individual human rights are enshrined and protected at the national level and thus cannot be rolled back through the recognition and application of traditional law at the local level. That being said, we should also temper the default assumption that by definition traditional law is patriarchal, regressive, and oppressive.

Any cursory glance over the current debates concerning traditional law and governance will show the prominence women's rights occupies in such debates – this is particularly pronounced in South Africa. From land claims to inheritance, the unequal treatment of men and women frequently comes under attack.[21] In the three case-studies of the thesis we did not have the chance to go in in-depth into the specific policies and issue areas; our focus was more on the macro constitutional dynamics over the historic *longue durée*. Insights from this comparative survey help us. We have no definitive answers, but knowledge on the dynamics and workings of traditional law in other areas provide us with insights to help us look ahead. There are three things to take into consideration when evaluating whether traditional law and governance are inherently oppressive.

i) The first one is the risk of generalising for the entire continent experience with the laws and culture of one ethnic community. It seems self-evident but we should nonetheless reiterate the point that there is no one single system of traditional law and governance indigenous to Africa. Not only across countries, but within countries across the different constituent ethnic communities, and within ethnic communities across tribal sub-branches customary law can show considerable differences. In South Africa for example the status of women differs across the countries and various ethnic communities, ranging from the more patriarchally-inclined Zulu laws to the higher status granted to women under Venda laws (see subsection 2.1. earlier).

ii) The second one is the *presentist* assumptions in comparing Western and non-Western systems of law and governance while ignoring the long history behind both. In all Western legal systems homosexuality was a criminal offence until a couple of decades ago; in many Western countries, women could not vote or get elected until the end of World War II; and in the century before that, slavery was not only socially and culturally condoned but politically and legally regulated. At the time when the American fathers of the constitution were putting together a new federal republic committed to *life, liberty and pursuit of happiness* and penning a preamble starting with the statement *we, the people*, half of the citizenry had no political rights because of their gender and another sizeable segment had no political rights because they were owned by the citizens of the new republic.

Before one criticises non-Western legal cultures on account of the patriarchal elements contained within, even-handedness calls for a reflection on the way Western history evolved. It should be self-evident that it is the very same Western legal systems regulating slave-ownership which have evolved

[21] See for example, Tripp, Aili Marie (2004), "Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda", *African Studies Quarterly*, Vol 7, No. 4, pp. 1-19 ; Banda, Fareda (2006), "Women, Law and Human Rights in Southern Africa", *Journal of Southern African Studies*, Vol. 32, No. 1, pp. 13-27; Mwenda, K.K., M. Mumba, J.M. Mvula-Mwenda (2005), "Property Grabbing Under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience", *George Washington International Law Review*, Vol. 37, No. 5, pp. 949-67.

into what we see now. There has been no similar process of change and revision for most indigenous systems of law mostly because they had not been in effect at the national level, and thus not subject to the same social and cultural pressures of modern state governance marking the last century of political history.

iii) The third point to reflect on is how in many countries the pragmatic and flexible laws indigenous to the land became a new set of fixed laws during codification, and thus, have been unable to evolve in tandem with changing circumstance since. It is not because traditional law and governance is inherently patriarchal, regressive, and oppressive do we encounter problems with the rights of dissenters, outsiders, and women; it is because the laws were frozen at a time before such modern rights were part of international legal repertoire and enshrined in laws.

As a thought experiment, imagine that during the time Africa was being colonised so was the US being occupied by outside forces. If the occupiers recognised American local laws by freezing them, then slavery would have been seen as an integral part of (southern) American law and governance today. Similarly, if Europe had been parcelled among African colonial powers some of which would recognise the existing laws through indirect rule, then the subservient position of women, criminalisation of abortion, and homophobia would have been seen as part of various indigenous European cultures. It is thus important for those devising new policies and reform initiatives on traditional law and governance to have historical knowledge and reflect on comparative experiences across time and place.

2.8. Prevailing Constitutional Discourse

As we come to the end of the section on the various lessons, insights and observations, it might also be necessary to take a look at how the relationship between traditional laws and modern laws is framed and discussed in the current 'constitutional discourse' in the three countries covered in this thesis. The formulation of the idea of constitutional discourse lies in the scholarly debates in Europe and North America of the 1990s, but its intellectual origins go back to continental philosophy and the post-structuralist approaches developed and promoted by the French philosopher Michel Foucault and his colleagues.[22] Foucault had theorised that it was the discursive formation of knowledge and meaning which really empowered the existing political and economic order. Hence, political opposition and emancipation would have to take the form of different discourses if they were to successfully challenge the existing order. It is an approach which puts the importance of subjective meaning and discourse over the wording of the legal, political, and economic texts. Others see the impact of the German school of 'hermeneutic sociology of knowledge' in the idea of constitutional discourse.[23] What is common to both Foucault and the hermeneutics school is the interpretative epistemological paradigm which rests on the assumed power of discursive practices and the attending social constructions.

[22] The most comprehensive formulation of his poststructuralist approach on the power of discursive politics is found in, Foucault, Michel (1972), *The Archaeology of Knowledge*, New York and London: Pantheon.
[23] Keller, Rainer (2006), "Analysing Discourse. An Approach from the Sociology of Knowledge", *Historical Social Research*, Vol. 31, No. 2, p. 223.

During the European constitutional debates of the late 1990s which culminated in the Treaty on the European Constitution (and the subsequent failed ratification in 2005), constitutional discourse emerged as a concept to highlight the process of ongoing deliberation in contrast to the more common notion of conceptualising constitutions as a fixed contract.[24] Some of the intellectual precedents of this idea of constitutional discourse can be traced to philosophers from diverse federal systems. In Canada in particular, the coexistence of diverse subjective interpretations of Canada's constitutional order, and the contestation of the official one, had marked the country's constitutional odyssey starting with the repatriation of the constitution in the 1980s and the subsequent failed attempts to revise the constitution to the satisfaction of all contending parties. Following the wake of Canada's constitutional impasse of the mid-1990s – sparked by Québec separatism and indigenous demands for constitutional recognition – some Canadian scholars of constitutionalism had supported a scholarly perspective which highlighted the ongoing discourse rather than the fixity of a legal document.[25] Yet not all legal scholars, especially those from Canada's neighbour to the south, saw merit in a discourse-based approach to constitutionalism. Some believed that an emphasis on discourse led to the emergence of 'sharp dichotomies' in constitutional debates because abstract debates had a tendency to reify both sides of the opposing views.[26] Others had stronger criticisms and felt that, once removed from the details of constitutional texts, the discourse-based approach to constitutionalism in the abstract had a tendency to become "unusually deceptive and confusing".[27] Regardless of one's scholarly views on the relative merits, what Europeans and North Americans shared of course was a liberal democratic framework within which such discourses could be freely articulated by the public (and then investigated and observed by scholars).

The idea of constitutional discourse soon found its way into constitutional debates taking place in South Africa around the same time. Similar to the proponents of the approach in Europe, there was a belief that this would expose the political power of subjective meaning associated with legal documents. By challenging the discursive formation of knowledge promoted by officialdom, it was hoped that the new discourse would increase public participation in constitutional debates during South Africa's democratic transition.

During the continent's constitutional reforms of the mid-1990s, the notion of constitutional discourse found new adherents across the rest of Africa.[28] However, the approach has since lost the pre-

[24] For an optimistic interpretation of the potential benefits of such an approach, see Shaw, Jo (2000), "Process and Constitutional Discourse in the European Union", *Journal of Law and Society*, Vol. No. pp. 4-37. A few years after the high hopes put in the notion of constitutional discourse however, French and Dutch voters were to reject the proposed constitution in 2005.

[25] Two particularly influential pieces making this argument were Chambers, Simone (1998), "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis", *Politics and Society*, Vol. 26, p. 143; and Tully, James (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, p. 44.

[26] Greenewalt, Kent (1998), "Constitutional Discourse and the Deceptive Attractiveness of Sharp Dichotomies", *Integrity and Conscience*, Vol. 40, pp. 255-69.

[27] Smith, Rogers M. (1998), "The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription", *Nomos*, Vol. 40, pp. 218-54, esp. p. 219.

[28] One attempt to merge the fluid logic of discursive politics with the stable institutional structures in the service of guiding African constitutionalism is made by John Mukum Mbkau. What he ends up developing is less of an analytical perspective and more of an action plan of popular involvement for the future, however. In line with his views on seeing constitutional discourse as a path to people power, Mbakau's overview of what has

dominance it had briefly enjoyed during the whirlwind of political change marking the 1990s. One of its adherents admits to the idea's limitations outside Europe and North America: "Western-liberal discourses of power and the social practices associated with them are proving inadequate to the task of creating a peaceful, just, and sustainable social order".[29]

Perhaps reflecting the early constitutional recognition granted to the traditional system of law and governance, the legitimacy of the country's constitutional order and the place of tribal leadership and laws within has not been contested in macro-constitutional terms in Botswana. But the topic of gender politics and equality, due to its close links to traditionalism, has emerged as a related theme in the country's constitutional discourse.[30] Others have invoked minority rights as a topic which should be part of the country's constitutional discourse.[31] Neither of these have acquired the national prominence theorised by the above cited scholars in the North American and European context.

Compared to the late 1990s and 2000s in South Africa, neither has traditional law and governance occupied a central place in Ethiopia's national constitutional discourse. The notion of constitutional discourse did make a brief appearance among scholars studying Ethiopia however. Coinciding with the death of the country's long-term leader and founder of the governing party the EPRDF (and the TPLF in its inner core), Meles Zenawi in 2012, we have seen the idea appear in scholarly debates on Ethiopia's post-Meles constitutional future. Some theorised about the role of media in ensuring public participation in the constitutional discourse concerning the future of the country.[32] Others theorised about how popular involvement in constitutional discourses would engender 'a new social contract' and form the basis of a new constitution. There was little about where indigenous constitutionalism fitted into the discourse. In any case, it was the intra-party politics within the EPRDF where the future course for the country was set. There was no national constitutional discourse along the lines of what scholars had theorised for North America and Europe. More optimistic expectations of increasing public participation in the country's constitutional discourse during Abiy Ahmed's ascent to national leadership has also been quashed by recent developments. As we had discussed at the end to the Ethiopian case-study in Chapter 12, the political situation is currently in flux rendering it difficult to predict whether demands for the further constitutionalisation of traditional law and governance will reappear.

As stated earlier in the individual case-studies, we had to pick March 2020 as the historic cut-off mark for practical reasons (already completed field-research and the outbreak of the pandemic). But what

happened so far is not very positive: "Constitutional discourse… should not be undertaken as it has been done in the past. It must be people-driven.". Mbkau, John Mukum (1998), "Constitutions and Constitutional Discourse in Africa: Developing Institutional Structures for Coexistence", *Civilisations*, Vol. 45, No 1/2, p. 269.

[29] Karlberg, Michael (2005), "The Power of Discourse and a Discourse of Power", *International Journal of Peace Studies*, Vol. 10, No. 1, p. 1. Karlberg's article also contains numerous thoughtful and nuanced reflections on the idea's patchy track-record in the various conflicts around the world. For those who want to explore the notion of constitutional discourse further, the piece also includes a very helpful literature review of the key texts in the field.

[30] See for example, Mafela, Lily (2007), "Batswana Women and Law", *Cahiers d'études africaines*, Vol. 47, Nos 187 &188, pp. 523-66.

[31] Solway, Jacqueline S. (2002), "Navigating the Neutral State: Minority Rights in Botswana", *Journal of Southern African Studies*, Vol. 28, No. 4, pp. 711-29.

[32] Stremlau, Nicole (2014), "Media, Participation, and Constitution-Making in Ethiopia", *Journal of African Law*, Vol. 58, No. 2, pp. 231-49.

has happened – and is happening – in Ethiopia since then has arguably been the most important political development in the country since the fall of the Derg regime and the adoption of a new federal system in 1995. What is more, even if a constitutional discourse envisaged by theorists of discursive politics were to come into being in Ethiopia now, following the war in Tigray, renewed autocratic attempts to control and influence opposition views and media would prevent reliable scholarly analyses of the discourses in the country. As the revised thesis goes to submission, the internal politics of the Oromo show divisions between supporter of Abiy and nation-wide politics versus the varied voices within the opposition. What is more, the Ethiopian government has just recently admitted that Eritrean troops wearing Ethiopian military uniforms participated in the war against Tigray. Deep-seated political tension and uncertainty has become a constant feature of Ethiopian domestic and regional politics. This means that the coming years are unlikely to witness a type of constitutional discourse the adherents of this idea observed in North America and Europe.

At this moment in time, a look at constitutional discourse across the three case-studies gives us an uneven picture. As covered in Chapter 7's Section 2.10, the current constitutional discourse in South Africa does not centre on the politics of traditional law and governance. As that section mentions, it was the late Zulu King Zwelithini's opposition to government plans to nationalise the *ingoyama* trust lands briefly put traditional law and governance back on the national agenda. But in the midst of the pandemic and Zondo Commission inquiry into state capture and corruption, the recent constitutional debates in the country are not driven by the place of indigenous constitutionalism in the country's legal order.[33]

Notwithstanding its relative low profile marking our times, once the pandemic and its subsequent political, social and economic effects subside, it is possible that the notion of constitutional discourse theorised with the Western world in mind can find an outlet within the future debates on African constitutional identity once it is revised to incorporate non-Western examples of discursive politics and socially constructed power relations. As Charles Fombad puts in a forthcoming piece, throughout the continent "the feeling that present constitutions are an inauthentic expression of African values has grown stronger".[34] The coming years will see whether ideas about incorporating African identity into constitutions will acquire the characteristics of a constitutional discourse in line with the original writings of the idea's founders. There is a potential to frame challenges to the existing constitutional order within the ideas about the discursive formation of knowledge and meaning theorised by Michel Foucault and the German hermeneutics school. At this very moment in time however, in none of the three case-studies examined in the thesis do we see evidence of such a discourse becoming prominent in national politics.

3. LOOKING BACK AND TAKING STOCK

[33] In his work on constitutionalism in South Africa, Nico Steytler refers to Ricardo Hausmann's observations on both the scale of corruption and the equally strong public opposition to this in South Africa and argues that this indeed has become the prevailing constitutional discourse in the country. Steytler, Nico (2019), "the Dynamic Relationship Between Devolution and Constitutionalism in South Africa", in Charles M. Fombad and Nico Steytler (eds), *Decentralisation and Constitutionalism in Africa*, Oxford: Oxford University Press, p. 158.

[34] Fombad, Charles (forthcoming 2022), "Constitutional Identity and Constitutionalism in Africa: Concepts and Key Issues", in Fombad, Charles and Nico Steytler (eds), *Constitutional Identity and Constitutionalism in Africa*, Oxford University Press, p. 21.

3.1. Reflections on Theory and Methodology

3.1.1. No Simple Answers Across Levels of Analysis

The biggest scholarly lesson which comes out of the preceding investigation on three case-studies spanning across two centuries of their histories, steered by a holistic theoretical framework constructed on cross-disciplinary foundations, and conducted along multiple methodological lines, is that there are no simple answers. Even when a clear nation-wide political will to recognise and empower indigenous forms of law and governance exists (and it rarely has been that straightforward), how this translates into reality often lies beyond the confines of a two-dimensional cause-and-effect perspective limited to the precise details of the policy reform in that very jurisdiction itself. It is only through casting an analytical net as widely as possible do we get closer to identifying timeless and generalisable casual patterns – even if such patterns do not always lend themselves to simple reductionist formulas and the projection of causal certainty in the form of *if-a-then-b*. Our three case-studies demonstrate that at all levels of abstraction do we find factors that are relevant to the study of constitutionalism. In the course of the investigation, we have indeed found quite a few answers, but these paint a picture of various interacting causal patterns across levels of analysis rather than a rigid formula with iron-cage determinism.

Geopolitical factors from the international and regional levels provided the first phase of analysis as we moved down to political and constitutional factors at the national level, followed by the local level of analysis. Instead of plucking select variables from one level of analysis only, we instead look at the multiple and cross-connected dynamics of causality linking the various levels of analysis.

3.1.2. Cutting and Removing Select Variables vs. Holistic Analysis

The variable-based approach to the social sciences seeks to increase the validity of the casual purported relationship by increasing the so-called *N*, that is, the number of instances where a similar relationship between the same select variables exists.[35] When a large number of cases (often called a large-*N* study by the practitioners of this methodological approach) corroborate the same causal relationship, then the purported if-a-then-b is deemed tested and confirmed. While various research techniques are designed to improve the reliability of how these variables are calculated, what is sidestepped is whether the very practice of selecting and isolating parts of the whole provides the most appropriate methodology to the study of constitutions and constitutionalism – especially when accompanied by the reification of stylised reductionist formulas of causality based on these select variables. While we share the same basic scholarly goals of identifying explanatory variables in the course of investigation, holism sits on the opposite side of approaches to research methodology.

Identifying explanatory factors within a complex whole is not the same as removing those very factors from the picture and expecting them to retain their explanatory power when cut off from their respective backgrounds. No part of a complex whole incised and removed from the rest (and pooled together with comparable factors similarly cut and lifted off from their backgrounds into a decontextualised data-set can) give us an accurate and reliable picture of how causality works in real-

[35] Section 3 of Chapter 3 was where such methodological questions were discussed in detail; in particular, the contrast between the case-study and variable-based approaches to research methodology.

life. Large-*N* studies are indispensable to establishing general benchmarks for comparison across wide swathes of human experience, but by definition, they only contain a few select variables plucked from the big picture of only one of the case-studies listed in their *N*.

One of the main unintended side-effects of the methodological preference for breaking up reality into separate explanatory variables for research, and then examining the purported causal relations between the select variables in isolation from other parts of the whole, is precisely this. That is, the main casualty of the variable-based approach to causality is the loss of the big picture. The loss of the bird's-eye-view means that the researcher wearing the two dimensional *if-a-then-b* blinkers will be blind to the changes that might have been triggered in parts of the whole outside the select variables.

3.1.3. Projecting Certainty, the Pursuit of Perfectionism, and Interconnectedness

The loss of the big picture (the accompanying awareness of how interconnected explanatory variables are and the knowledge of the different causal dynamics existing in other parts of the whole) weakens the potential for scholarly self-reflection. Reductionism, and the attending theoretical and methodological demarcations, shield the very purported causal relationship from comments and criticism from those who approach the same questions using other theories and methods or from those who have broader concerns beyond disciplinary demarcations. For students starting their academic careers, the consequences of encountering such certainty could be more direct. The less one knows, the easier it is to be in awe of the artificial sense of certainty that comes with causal reductionism. And herein lies the big risk of turning scholarly certainty into applied certainty.

The stylised formula of a purported causal relationship between select variables is first reified in theoretical terms where the qualifications, nuances, conditions, complexities are airbrushed out. The reductionist if-a-then-b certainty originally cast within narrow premises is then turned into a bigger blueprint for legal and political reform. This is a recipe to disappoint both those who prescribe such reforms and those who are subjected to such social engineering. The preceding twelve chapters show us that there are no magic formulas or best practices to transform things overnight. The two centuries under investigation contained instances of every reform fad, yet none seemed to deliver on their promises.

The pursuit of an idealised form of perfectionism divorced from the complexities of the historical, political, legal, and social context of the country in question, by definition, can only deliver constitutional solutions that look perfect on paper. What is durable is rarely that neat and rarely divorced from the national context. It seems human affairs has changed little since Voltaire's times when he had written about the risks of pursuing perfectionism at the expense of what is attainable.

The two opening epigraphs by Voltaire and H.L. Mencken remind us that this awareness of the interconnectedness of reality had been with us for long. It might be now time to rediscover the lived-in erudition of centuries of human existence and subsequently tone down the imagined certainty following the wake of the end of the Cold War. Legal Positivism's tendency to study written formal laws only and the subsequent reification of legislation and constitutional texts has fuelled this imagined certainty on the promise of new policies and reforms and the pursuit of an idealised form of formal perfectionism. What the past twelve chapters show is that formal design is but one aspect of

constitutionalism. Longevity, resilience, and the ability to continue functioning even in the absence of the international aid agencies and constitutional experts is another.

3.1.4. Historical Knowledge and Scholarly Humility

The obvious path to break free of the artificial sense of certainty that comes with causal reductionism we outline above is to attain wide-ranging, multi-faceted, and cross-disciplinary knowledge of course. This is not only a good in and of itself, but such knowledge is likely to expose how interconnected the various explanatory variables are. Surefooted awareness of the complexities of the historical, political, legal, and social context of the country in question will expose the shortcomings of an insulated pursuit of perfectionism. The near-evangelical zeal of political, legal, and social engineering that left its mark on West's approach to constitutionalism in since the end of the Cold War will be tempered when we know more about constitutions and constitutionalism around the world.

Coming to terms with complexity and interconnectedness, especially in the non-Western context, requires more historical knowledge (on topics that have been written on) and historical research (on topics that have not yet been written on). A few paragraphs earlier we wrote that the main casualty of the variable-based approach to causality was the loss of the big picture. The second casualty of the preference for reductionist causality is the loss of a sense of humility which is an inevitable part of wide-ranging, multi-faceted, and cross-disciplinary knowledge. Answers that accrue from the complex interaction of various causal factors from multiple levels of analysis – and where both the past and present, the West and the rest of the world form the pool of comparative case-studies – are destined to contain humbler projections of certainty.

Part of this humility comes from the awareness that no past scholarly projection of certainty has been validated by history. Neither did the collapse of capitalism predictions of historical materialism (based on the supposed in-built conflict between the bourgeoisie who own the means production and the proletariat who sell their labour), nor did the end of history predictions based on a liberal-capitalist interpretation of the way the world works ended up as envisaged. Socialist and liberal worldviews had both scholarly and political components, so falling short on their predictions might reflect the partisan blinkers they had on and the subsequent tendency to underplay alternative scholarly approaches associated with the opposing political ideology, but this holds for politically-neutral approaches as well. Projections of certainty from apolitical scholarly approaches have also fallen short. Neither were the post-World War II structural functionalists correct in their sweeping predictions, nor were theorists of rational choice who challenged them, and neither were the constructivists who more recently joined in.

3.1.5. Holism, Complexity, and Applied Constitutionalism

The various comparative causal patterns over time and place identified by holistic analysis provides us with a key lesson concerning the applied side of constitutionalism. Moving one piece somewhere in the whole can trigger consequences elsewhere. Every solution designed to address one problem creates a new set of problems itself. Laws are not made in vacuum; constitutions are not painted onto blank canvasses; and policy reforms are no magic formulas. Every policy choice made to serve recognition and empowerment comes with its own set of complications. As a part of the natural course of how human affairs work, past policies inevitably leave behind legal and political legacies.

Failure to acknowledge this can end up with importing 'best practice' laws and policies which will fail to deliver on the certainty of their promises and come to disappoint their champions.

Without the *longue durée* history of the politics of law in the picture, a reductionist examination of the formal laws along the teachings of Legal Positivism will fail to illuminate bigger comparative patterns. This has been the case in the past; and naturally, it applies to the present. Human reality is a lot more complex than the wording of black-letter laws. And it is only when we adopt a holistic perspective, can we spot effects, influences, consequences beyond the rigid and narrow confines of one jurisdiction, one time-period, and one policy area. As we argued earlier, this does not mean there are no answers and generalisable comparative patterns; it just means they are more nuanced, complex and probabilistic, preventing things reduced to simple formulas of timeless decontextualised causality of *if-a-then-b*.

3.1.6. Final Word: Looking Back to see Ahead

The macro-historical approach to comparative constitutions and constitutionalism defining this research calls for a more learned and prudent approach to prescribing new policies and reforms to the non-Western world. The good intentions of those who design policies or import legal 'best practices' or look for 'magic formulas' are not questioned here, but at the same time, history provides us the context to evaluate the consequences of past constitutional initiatives. Looking back at the two hundred years of legal and political experimentation we see that good intentions alone do not guarantee good outcomes. The way to avoid the disappointing social and political consequences of doling out legal and political reforms disconnected from the local context is to ensure homegrown forms of constitutionalism with deep local roots are also part of any future discussion.

As we arrive at the end of the LLD thesis, we turn to an intellectual giant, the German thinker Johann Wolfgang von Goethe, who imparts us with his erudition on scholarly wisdom and humility:

Work can never be fully complete.
One has to take it for complete
When one has done the most
in terms of time and circumstances.
Goethe [36]

[36] Author's translation. [*Eine Arbeit wird nie eigentlich nie fertig. Man muß Sie für fertig halten wenn man nach Zeit und Umständen das Möglichste getan hat.*]

BIBLIOGRAPHY

1. GENERAL AND COMPARATIVE

1.1. Books

Allott, A. N. (ed.) (1971), *Integration of Customary and Modern Legal Systems in Africa: A Conference held in Ibadan on 24-29th August 1964*, Ile-Ife: University of Ife Press.

Allott A.N. (ed.) (1960), *The Future of Law in Africa*, London: Butterworth.

Ayittey, George B. N. (1991), *Indigenous African Institutions*, New York: Transnational Publishers.

Baxter PTW and Almagor, Uri (1978), *Age, Generation, and Time*, London: Hurst.

Bederman, David J. (2010), *Custom as a Source of Law*, Cambridge: Cambridge University Press

Bell, Duncan (2007), *The Idea of Greater Britain: Empire and the Future of the World*, Cambridge: Cambridge University Press.

Bennett, T. W. (1985), *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta and Co.

Benton, Lauren (2010) *A Search for Sovereignty: Law and Geography in European Empires 1400–1900*. Cambridge: Cambridge University Press.

Bohannan, P. (1957), *Justice and Justice Amongst the Tiv*, Oxford: Oxford University Press.

Borrows, John (2002) *Recovering Canada: The Resurgence of Indigenous Law*, Toronto: University of Toronto Press.

Cardozo, Benjamin N. (2009) [1921], T*he Nature of the Judicial Process*, New York: Cosimo Classics Reprint.

Chanock, Martin (1985), *Law, Custom and Social Order: The Colonial Experience in Malawi and Tanzania*, Cambridge University Press.

Comaroff, John L. and Simon Roberts (1981), *Rules and processes: The Cultural Logic of Dispute in An African Context*, Chicago and London: University of Chicago.

Comaroff, John L., Jean Comaroff and Deborah James (eds) (2007), *The African Photographs of Isaac Schapera*, Chicago: University of Chicago Press.

Crowder, Michael (1968), *West Africa under Colonial Rule,* London:

Darwin, John (2012), *Unfinished Empire: The Global Expansion of Britain*, London: Penguin.

Dicey, Albert Venn (1885), *Introduction to the Study of the Law of the Constitution*, London: Macmillan.

Dicey, Albert Venn (1896), *Conflict of Laws*, London.

Ehrlich, Eugen (1913), *Grundlegung der Soziologie des Rechts*, Munich and Leipzig: Duncker and Humblot.

Ehrlich, Eugene (1903), *Freie Rechtsfindung und freie Rechtswissenschaft*, Leipzig: Verlag von C. L. Hirschfeld.

Ehrlich, Eugene (1918), *Die juristische Logik*, 2nd edn. Tübingen: Mohr Siebeck.

Elias, T. Olawale (1956), *The Nature of African Customary Law*, Manchester: Manchester University Press

Epstein, A. L. (1953), *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, Lusaka: The Rhodes-Livingstone Institute.

Fallers, Lloyd A. (1969), *Law without Precedent: Legal Ideas in Action in the Courts Colonial Busoga*, Chicago and London: The University of Chicago Press

Foucault, Michel (1972), *The Archaeology of Knowledge*, New York and London: Pantheon.

Fukuyama, Francis (1992), *The End of History and the Last Man*, New York: The Free Press.

Gluckman, Max (1963), *Order and Rebellion in Tribal Africa: Collected Essays with an Autobiographical Introduction*, London: Cohen and West.

Gluckman, Max (1965), *Politics, Law and Ritual in Tribal Society*, London.

Gluckman, Max (ed.) (1969), *Ideas and Procedures in African Customary Law*, Oxford University Press.

Gluckman, M. (1974), *African Traditional Law in Historical Perspective*, Oxford University Press.

Gower, L.C.B. (1967), *Independent Africa: The Challenge to the Legal Profession*, Cambridge, MA: Harvard University Press.

Grammond, Sébastien (2013), *Terms of Coexistence: Indigenous Peoples and Canadian Law*, Ottawa: Carslwell.

Gulliver, P.H. (1958), *East African Age-Group Systems: Some Preliminary Considerations*.

Gulliver, PH (1978) *Cross Examinations: Essays in Memory of Max Gluckman*, Leiden: Brill.

Hailey, Lord (1951), *Native Administration in the British African Territories*, London: HMSO.

Hertogh, Marc (ed) (2009), *Living Law, Reconsidering Eugen Ehrlich*, Oxford and Portland: Hart.

Hoebel, E. Adamson (1954), *The Law of the Primitive Man*, Cambridge MA: Harvard University Press.

Iliffe, John (1969), *Tanganyika under German Rule 1905-1912*, Cambridge: Cambridge University Press.

Iliffe, John (2007) [1995], *Africans: The History of a Continent*, Second Edition, Cambridge: Cambridge University Press,

Kuper, Hilda and Leo Kuper (eds) (1965), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press.

Lugard, Frederick (1922), *The Dual Mandate: British in Tropical Africa*, Edinburgh: W Blackwood.

Llewellyn, K. N. and E. Adamson Hoebel (1941), *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman: University of Oklahoma Press.

Madden, Frederick (ed.) (2000), *The End of Empire: Dependencies since 1948. Part I: The West Indies, British Honduras, Hong Kong, Fiji, Cyprus, Gibraltar and the Falklands, Select Documents on the Constitutional History of the British Empire and the Commonwealth*, Volume VIII, Westport, Connecticut: Greenwood Press.

Maine, Henry James Sumner (1861) *Ancient Law, Its Connection with the Early History of Society and its Relation to Modern Ideas*, London: John Murray.

Maitland, F. W. (1948), *The Constitutional History of England*, Cambridge: Cambridge University Press.

Malinowski, Bronislaw (1932) [1926], *Crime and Custom in Savage Society,* New York: Harcourt, Brace and Court.

Mamdani, Mahmood (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton: Princeton University Press.

Nader Laura and Harry F. Todd (eds) (1978), *The Disputing Process. Law in Ten Societies*, New York: Columbia University Press.

Nader, Laura (ed.) (1969) *Law in Culture and Society*, Aldine.

Ofusu-Amaah, W. Paattii (2000), *Reforming Business Related Laws to promote Private Sector Development: The World Bank Experience in Africa*, Washington DC: IMF/World Bank, p.15.

Prins, A. H. J. (1953), *East Africa Age Class Systems: An Inquiry into the Social Order of Galla, Kipsigis, and Kikuyu*, J. B. Wolters: Groningen.

Rattray, R. S. (1929), *Ashanti Law and Custom,* London.

Roberts, SA (1979), *An Introduction to Legal Anthropology*, London: Penguin.

Savigny von, Carl Friedrich (1814), *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.*

Scott, James C. (2009), *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, New Haven: Yale University Press.

Scott, James C. (2017), *Against the Grain: A Deep History of the Earliest States*, New Haven: Yale University Press.

Smelser, Neil J. and Seymour Martin Lipset (eds) (1966), *Social Structure and Mobility in Economic Development*, Berkeley: University of California Berkeley.

Spencer, Paul (1998), *The Pastoral Continuum: The Marginalization of Tradition in East Africa*, Clarendon Press: Oxford.

Tully, James (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press.

Turner, Victor W. (1957), *Schism and Continuity in An African Society: A Study of Ndembu Village Life*, Lusaka: University of Zambia and Manchester: Manchester University Press.

Twinning, William **(**1997), *Law in Context: Enlarging a Discipline*, Oxford: Clarendon.

Twinning, William (2000), *Globalisation and Legal Theory*, Butterworths.

Van Niekerk, GJ and LP Vorster (1991), *Field Research in Indigenous Law*, Pretoria: University of South Africa.

Van Warmelo, N.J. (1948), *Venda Law*, Pretoria: Department of Native Affairs.

1.2. Articles

Banda, Fareda (2006), "Women, Law and Human Rights in Southern Africa", *Journal of Southern African Studies*, Vol. 32, No. 1, pp. 13-27.

Beckstrom, John H. (1973), "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia", *American Journal of Comparative Law*, Vol. 21, No. 3, p. 559.

Benda-Beckmann, F. von (1984), "Law out of Context: A comment on the Creation of Traditional Law Discussion", *Journal of African Law*, 28 (1-2), PP. 28-33.

Benda-Beckmann, F. von (2000), "Who's Afraid of Legal Pluralism?", *The Journal of Legal Pluralism and Unofficial Law*, Vol. 34, No 47, pp. 37-82.

Bennett, T W and T Vermeulen (1980), "Codification of Customary Law", *Journal of African Law,* Vol. 24, No. 2.

Bennett, T W (1991), "The Compatibility of African Customary Law and Human Rights". *Acta Juridica* 19.

Bernardi, B. (1952), "The Age System of Nilo-Hamitic Peoples", *Africa: Journal of the International African Institute*, Vol. 22.

Borrows, John (2016) "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61/4 *McGill Law Journal* Vol. 61, No. 4.

Borrows, John, "Indigenous Legal Traditions in Canada" 19/1 *Washington University Journal of Law and Policy* Vol. 19, No. 1.

Braudel, Fernand (1958), "Histoire et sciences sociales : La longue durée", *Annales, Économies, Sociétés, Civilisations*, Vol. 13, No. 4, pp. 725–53.

Burroughs, Peter (2002), "The Imperial Gospel According to Madden", *Journal of Imperial and Commonwealth History*, Vol.30, No. 3 pp. 110-34.

Chambers, Simone (1998), "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis", *Politics and Society*, Vol. 26, p. 143.

Chanock, Martin (1985), "A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Africa", *Journal of African History* Vol. 32, No. 1.

Chanock, Martin (983) "Signposts or Tombstones? Reflections on recent works on the Anthropology of Law", 1 *Law in Context*, Vol.1.

Conley, John M. and William M. O'Barr (2002), "Back to the Trobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society", *Law and Social Inquiry*, Vol. 27, No. 4.

Connolly, James, Peggy Pschirrer, and Robert Whitman (1998), "Alcoholism and Angst I the Life and Work of Karl Llewellyn", *Ohio Northern University Law Review*, Vol. 24.

Cotran, Eugene (1966), "The Place and Future of Customary Law in East Africa", *International and Comparative Law Quarterly*, Vol. 72.

Crowder, Michael (1964), "Indirect Rule: French and British Style", *Africa: Journal of the International African Institute*, Vol. 34, No.3, pp.197-205

Fukuyama, Francis (1989), "The End of History", *The National Interest*, No. 16.

Fuller, Chris (1994), "Legal Anthropology, Legal Pluralism and Legal Thought", *Anthropology Today*. Vol. 10, No. 3.

Fullerton Joireman, Sandra (2001), "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy", *Journal of Modern African Studies*, Vol. 39, No. 4, pp. 571–596.

Gordon, Robert (1989), The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa", *Journal of Historical Sociology*, Vol. 2, No. 1, pp. 41-65.

Green, Elliott (2012), "Explaining African Ethnic Diversity", *International Political Science Review*, Vol. 34, No. 3, pp. 245-6.

Greenewalt, Kent (1998), "Constitutional Discourse and the Deceptive Attractiveness of Sharp Dichotomies", *Integrity and Conscience*, Vol. 40, pp. 255-69.

Harris, D. (1983) "The Development of Socio-Legal Studies in the United Kingdom", *Legal Studies*, Vol. 2.

Hoebel. E. Adamson (1956), Review of Max Gluckman (1955) 'The Judicial Process among the Barotse of Northern Rhodesia', *The University of Chicago Law Review*, Vol. 23, pp. 546-49.

Jewsiewicki, Bogumil (1999), **"**Afrique centrale francophone entre au XXIe siècle: Citoyens et États, nations, régions face au monde**"**, *Canadian Journal of African Studies*, Vol. 33, No. 2-3, pp. 221-30.

Karlberg, Michael (2005), "The Power of Discourse and a Discourse of Power", *International Journal of Peace Studies*, Vol. 10, No. 1, pp. 1-25.

Keller, Rainer (2006), "Analysing Discourse. An Approach from the Sociology of Knowledge", *Historical Social Research*, Vol. 31, No. 2, pp. 223-42.

Kirkby, Coel (2012), "Henry Maine and the Re-Constitutions of the British Empire: Review of Karuna Mantana, 2010, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton University Press", *Modern Law Review*, Vol 75, No. 4, p. 656.

Malinowski, Bronislaw (1942), "A New Instrument for the Interpretation of Law – especially primitive", *Yale Law Journal*, Vol. 51, No. 8.

Merry, S.E. (1988), "Legal Pluralism", *Law and Society Review*, Vol. 22, No. 5, pp. 869-96.

Mbkau, John Mukum (1998), "Constitutions and Constitutional Discourse in Africa: Developing Institutional Structures for Coexistence", *Civilisations*, Vol. 45, No 1/2, pp. 229-69.

Moore, Sally Falk (1973), "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law and Society Review*, Vol.7, No.4.

Mwenda, K.K., M. Mumba, J.M. Mvula-Mwenda (2005), "Property Grabbing Under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience", *George Washington International Law Review*, Vol. 37, No. 5, pp. 949-67.

Napoleon, V. and H Friedland (2016), "And Inside Job: Engaging with Indigenous Legal Traditions through Stories", *McGill Law Journal* Vol. 6, No. 4.

Nkrumah, S.A. (2000), "Decentralisation for Good Governance and Development: The Ghanaian Experience", *Regional Development Dialogue*, Vol. 21, no. 1, pp. 53–67.

Peires, Jeff B. (2009), "Nostalgia and the Native Commissioners: A Hundred Years in the Old Transkei", *Kronos*, Vol.35, No.1.

Sanders, AJGM (1987), "How Customary is African Customary Law", *Comparative and International Law Journal of Southern Africa*, Vol. 20, No. 3, p. 406.

Shaw, Jo (2000), "Process and Constitutional Discourse in the European Union", *Journal of Law and Society*, Vol. No. pp. 4-37.

Smith, Rogers M. (1998), "The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription", *Nomos*, Vol. 40, pp. 218-54.

Snyder, Francis G. (1980), "Law and Development in the Light of Dependency Theory", *Law and Society Review*, Vol. 14, No. 3. Pp. 723-804.

Tripp, Aili Marie (2004), "Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda", *African Studies Quarterly*, Vol 7, No. 4, pp. 1-19.

Twinning, William (1985), "Talk about Realism", *New York University Law Review*, Vol. 60, No. 3,

Van Binsbergen, W. (1987) "Chiefs and the State in Independent Zambia", *Journal of Legal Pluralism*, Vol. 25 & 26.

Vanderlinden., Jacques (1957) "The recording of customary law in France during the fifteenth and sixteenth centuries and the recording of African customary law", *Journal of African Law*, Vol. 3, No. 3, pp. 165-175.

Zimmermann, Reinhard (1996), "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science", *Law Quarterly Review*, Vol. 112.

1.3. Book Chapters

Bates, Margaret (1962), "Tanganyika", in Gwendolen M. Carter (ed.) (1962), *African One-Party States*, Ithaca: Cornell University Press, pp. 395-483.

Diamond, Stanley (1967), "The Anaguta of Nigeria: Suburban Primitives", in Julian H. Steward (ed.), *Contemporary Change in Traditional Societies, Vol. I, Introduction and African Tribes*, Urbana, Chicago, and London: University of Illinois Press, pp. 361-505.

Fombad, Charles (forthcoming 2022), "Constitutional Identity and Constitutionalism in Africa: Concepts and Key Issues", in Fombad, Charles and Nico Steytler (eds), *Constitutional Identity and Constitutionalism in Africa*, Oxford University Press.

Fortes, M. and E. E. Evans-Pritchard (1940), "Introduction", in Fortes and Evans-Pritchard (eds), *African Political Systems*, London: International African Institute, pp. 1-24.

Gulliver, P. H. (1969), "Dispute Settlements without Courts: The Ndendeuli of Southern Tanzania", in Laura Nader (ed.), *Law in Culture and Society*, Chicago: Aldine Publishing Company.

Holleman, F. D. (1956), "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique : Symposium-Colloque Amsterdam 1955*, Leiden: Universitaire Pers Leiden, p. 249.

Hilda Kuper and Leo Kuper (1965), "Introduction", in Hilda Kuper and Leo Kuper (eds) (1965), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press.

Malinowski, Bronislaw (1934), "Introduction", H. I. Hogbin, *Law and Order in Polynesia*, NY: Harcourt and Brace.

Manners, Robert a. (1967), "The Kipsigis of Kenya: Culture Change in a 'Model' East Africa Tribe", in Julian H. Steward (ed.), *Contemporary Change in Traditional Societies, Vol I: Introduction and African Tribes,* Urbana, Chicago and London: University of Illinois Press.

Moffat, R. L. (1952), "Native Authorities and the Law" in HCF Cox (ed.) *Justice and the Law*, Oxford University Press.

Moore, Sally Falk (1969), "Introduction" [to the Comparative Studies Section], in Laura Nader (ed.), *Law in Culture and Society*, Chicago: Aldine, pp. 337-348.

Napoleon, V. and H Friedland H. (2014), "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law*, Oxford University Press.

Smith, Michael G. (1966), "Pre-Industrial Stratification Systems", in Neil J. Smelser and Seymour Martin Lipset (eds) (1966), *Social Structure and Mobility in Economic Development*, Berkeley: University of California Berkeley, pp. 141-64.

Schiller, Arthur (1968), "Introduction" in Thomas Hutchison (ed), *Africa and Law: Developing Legal Systems in African Commonwealth Nations*, The University of Wisconsin Press.

Thomas, PA (1997), "Socio-Legal Studies: The Case of Disappearing Fleas and Bustards" in PA Thomas (ed.), *Socio-Legal Studies*, Dartmouth.

Tolosa, Mamuye (2011), "The Siinqee – Women's Institution for Conflict Resolution in Arsii", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds), *Customary Dispute Resolution Mechanisms in Ethiopia*, Addis Ababa: The Ethiopian Arbitration and Conciliation Center, pp. 279-98.

Yakubu, AM (1993), "The Demise of Indirect Rule in the Emirates of Northern Nigeria", in Terence Ranger and Olufemi Vaughan (eds), *Legitimacy and the State in Twentieth Century: Essays in Honour of A.H.M. Kirk Greene*, Basingstoke: Palgrave, pp. 162-190.

Weber, Max (1949) [1904], "Objectivity in Social Science and Social Policy" in E. A. Shils and H. A. Finch (ed. and trans.), *The Methodology of the Social Sciences*, New York: Free Press

2. BOTSWANA

2.1. Books

Crowder, Michael, *The Flogging of Phinehas McIntosh: A Tale of Colonial Folly and Injustice*, New Haven: Yale University Press.

Dale, Richard (1995), *Botswana's Search for Autonomy in Southern Africa*, Westport, CT: Greeenwood Publishers.

Edge, A. Wayne (1996), *Autobiography of Motsamai Mpho*, Gaborone: Lebopo publishers

Grant, Sandy (2012), *Botswana and Its National Heritage*, Ely, Cambridgeshire: Melrose.

Mackenzie, John (1887), *Austral Africa Losing It or Ruling It. Incidents and Experiences in Bechuanaland, Cape Colony and England*, London: Sampson Low, Marston, Searle and Rivington.

Main, Elisabeth (1996), *Man of Mafeking: The Bechuanaland Years of Sir Hamilton Gould-Adams 1884-1901*, Gaborone: The Botswana Society.

Makgala, Christian John (2006), *Elite Conflict in Botswana: A History*, Pretoria: African Century Publishing.

Maylam, Paul (1980), *Rhodes, the Tswana, and the British: Colonialism, Collaboration, and Conflict in the Bechuanaland Protectorate 1885-1899*, Westport, Connecticut: Greenwood Press.

Nserenko, D. D. Ntanda (2002), *Constitutional Law in Botswana*, Gaborone: Pula Press, p. 204

Parsons, Neil and Michael Crowder (eds) (1988), *Monarch of All I Survey: Bechuanaland Diaries 1929-37, by Sir Charles Rey*, Gaborone: The Botswana Society and London: James Curry.

Ramsay, Jeff, B. Morton, and T. Mgadla (1996), *Building a Nation: A History of Botswana from 1800 to 1910*, Gaborone: Longman Botswana.

Ramsay, Jeff, B. Morton, and T. Mgadla (1996), *Building a Nation: A History of Botswana from 1800 to 1910*, Gaborone: Longman Botswana.

Sanders, A.J.G.M. (1992), *Bechuanaland and the Law in Politicians' Hands*, Gaborone: The Botswana Society,

Schapera, Isaac (1940), *Married Life in an African Tribe*, London: Faber and Faber.

Schapera, Isaac (1942), *A Short History of the Bakgatla-bagaKgafela of the Bechuanaland Protectorate*, Cape Town: University of Cape Town, School of African Studies.

Schapera, Isaac (1970), *Tribal Innovators, Tswana Chiefs and Social Change, 1895-1940*, London: Athlone Press.

Schapera, Isaac (1971), *Rainmaking Rites of Tswana Tribes*, Cambridge: African Social Science Documents

Shillington, Kevin (1985), *The Colonisation of Southern Tswana 1870-1900*, Braamfontein: Raven Press

Sillery, Antony (1965), *Founding a Protectorate: History of Bechuanaland 1885-1895*, London and The Hague: Mouton and Co.

Sillery, Anthony (1971), *John Mackenzie of Bechuanaland / 1835-1899: A Study in Humanitarian Imperialism*, Cape Town: A. A. Balkema.

Tlou, Thomas and Alec Campbell (1984), *History of Botswana*, London: Macmillan.

Tlou, Thomas and Alec Cambell (1997), History of Botswana, Gabarone: Macmillan.

Vengroff, Richard (1977), *Botswana: Rural Development in the Shadow of Apartheid*, New Jersey: Associate University Press

2.2. Articles

Barei, Geoofrey (2000), "The Decline in the Role of Chieftainship Elections", Pula: Botswana Journal of African Studies, Vol. 14, No. 1, pp. 65-75.

Dachs, Anthony J. (1972), "Missionary Imperialism – The Case of Bechuanaland", *Journal of African History*, Vol. XIII, No. 4, pp. 653.

Fombad, Charles M. (2004), "Customary courts and traditional justice in Botswana: Present challenges and future perspectives", *Stellenbosch Law Review* Vol. 15, p. 174.

Mafela, Lily (2007), "Batswana Women and Law", *Cahiers d'études africaines*, Vol. 47, Nos 187 &188, pp. 523-66.

Manson, Andrew (1998), "Christopher Bethell and the Securing of the Bechuanaland Frontier, 1878-1884", *Journal of Southern African Studies*, Vol. 24, No.

Matemba, Yonah Hisbon (2003), "The Pre-Colonial History of Bakgatla ba ga Mmanaana of Botswana, c. 1600-1881", *Botswana Notes and Records*, Vol. 35, pp. 53-67.

Otlhogile, Bojosi (1997), "A History of Botswana Through Case Law", *Pula: Journal of African Studies*, Vol. II, No 1, p. 91.

Otlhogile, Bojosi (1993), "Tshekedi Khama and ANO vs. The High Commissioner: The Making of the Court", *Botswana Notes and Records*, Vol. 25, pp. 29-38.

Proctor, J. H. (1968), "The House of Chiefs and the Political Development of Botswana", *Journal of Modern African Studies*, 6, 1, pp. 59-79.

Samatar, A. (1997), "Leadership and Ethnicity in the Making of African State Models: Botswana and Somalia", *Thirds World Quarterly*, 18, 4, pp. 687-707.

Schapera, Isaac (1957), "The Sources of Law in Tswana Tribal Courts", *Journal of African Law*, Vol.1, No.23, pp. 150-62.

Solway, Jacqueline S. (2002), "Navigating the Neutral State: Minority Rights in Botswana", *Journal of Southern African Studies*, Vol. 28, No. 4, pp. 711-29.

Spence, J. E. (1964), "British Policy Towards the High Commission Territories", *Journal of Modern African Studies*, Vol. 2, 221-42.

2.3. Book Chapters

Hardie, G. J. (1982), "The Dynamics of Internal Organisation of the Traditional Capital Mochudi", in *Settlement in Botswana*, A Symposium, Gaborone: The Botswana Society, p. 205.

Maripe, B. (2007), "Land Administration, Politics, and Governance in Botswana", in Charles M. Fombad (ed.), *Essays on the Law of Botswana*, Cape Town: Juta, pp. 176-202

Mazonde, Isaac (2004), "Equality and Ethnicity: How Equal are the San in Botswana?", in Robert Hitchcock ad Diana Vinding (eds), *Indigenous Peoples' Rights in Southern Africa*, Copenhagen: International Work Group for Indigenous Affairs, pp. 134-51.

Mgadla, P. T. (1998), "The Kgosi in a Traditional Tswana Setting", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, pp.3-10.

Ng'ong'ola, Clement and S Morolong (2007), "Revisiting the Notion of Tribal Ownership of Land in Botswana", in Charles M. Fombad (ed.), *Essays on the Law of Botswana*, Cape Town: Juta, pp. 142-75.

Nyati-Ramahobo, Lydia (1998), "Ethnic Identity and Nationhood in Botswana", in. W. A. Edge and M. H. Lekorwe (eds), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, pp. 17-27.

Parsons, Q. N. (1985), "The Evolution of Modern Botswana" in Louis A. Picard (ed) *The Evolution of Modern Botswana*, Lincoln: University of Nebraska Press, pp. 28-34.

Picard, Louis A. (1985), "From Bechuanaland to Botswana: An Overview", in Louis A. Picard (ed) *The Evolution of Modern Botswana*, Lincoln: University of Nebraska Press, pp. 3-25.

Roberts, Simon (1970), "Botswana", in A. N. Allott (ed), *Judicial and Legal Systems in Africa*, 2nd edition, London: Butterworths, p. 267.

Schapera, Isaac (1956), "The Development of Customary Law in the Bechuanaland Protectorate", in The *Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique*, symposium / colloque 1955, Leiden: Universitaire Pers Leiden, p. 110.

Schapera, Isaac (1933), "Preliminary Report of Field Investigations", in John L. Comaroff, Jean Comaroff, Deborah Jones (eds) (2007), *The African Photography of Isaac Schapera*, Chicago: University of Chicago Press.

Tlou,Thomas (1998), "The Nature of Batswana States: Towards a Theory of Batswana Traditional Government – the Batawana case", in W. A. Edge and M. H. Lekorwe (eds) (1998), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik.

Somolekae, G. M. and M. H. Lekorwe (1998), "The Chieftaincy System and Politics in Botswana 1966-95", in W. A. Edge and M. H. Lekorwe (eds), *Botswana: Politics and Society*, Pretoria: J. L. van Schaik, pp. 186-98.

3. SOUTH AFRICA

3.1. Collections of Official Documents:

Bennett, T.W. (1991), *A Sourcebook of African Customary Law for Southern Africa*, Cape Town: Juta and Co.

Colonel Maclean (ed.) (1858) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers.

Colonel Maclean (ed.) (1859) [1866], *A Compendium of Kafir Laws and Customs including genealogical Tables of Kafir Chiefs and Various Trial Census Returns*, Cape Town: Saul Solomon and Co. Printers [latter edition with different page layout].

Olivier, N.J.J. (ed.) (1954), *Suid Afrikaanse Bantoereg*, *Regsversameling*, Stellenbosch University.

Report and Proceedings, with appendices, of the Government Commission on Native Laws and Customs, Cape of Good He Blue Book, presented to both Houses of Parliament by his excellency the Governor, January 1883, Cape Town: W.A. Richard and Sons.

Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds) (1985), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths.

3.2. Books and Journal Special Issues:

Bennett, T. W., D J Devine, D B Hutchison, I Leeman, C M Murray, D van Zijl Smit (eds) (1991), Special issue: African Customary Law, *Acta Juridica*.

Bennett, T.W. (2004), *Customary Law in South Africa*, Cape Town: Juta.

Bennett, T. W. (1991), *A Sourcebook of African Customary Law for Southern Africa*, Cape Town: Juta.

Bennett, T. W. (1985), *Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, Cape Town: Juta and Co.

Bekker, J.C. (1989) (ed.), *Seymour's Customary Law in Southern Africa*, Fifth Edition, Cape Town: Juta.

Bekker, J.C., J.M.T. Labuschagne, L.P. Vorster (eds) (2002), *Introduction to Legal Pluralism in South Africa, Part: Customary Law*, Durban: Butterworths.

Bekker, J.C., C. Rautenbach, N.M.I. Goolam (eds) (2006), *Introduction to Legal Pluralism in South Africa*, Second Edition, Durban: LexisNexis Butterworths.

Bouille, L. J. (1984), *South Africa and the Consociational Option – A Constitutional Analysis*, Cape Town: Juta.

Brookes, Edgar Harry (1924), *History of Native Policy in South Africa: From 1830 to the Present Day*, Nasionale Pers.

Carter, Gwendolen M., Thomas Karis, Newell M. Schultz (1967), *South Africa's Transkei: The Politics of Domestic Colonialism*, Evanston: Northwestern University Press.

Fallers, AL (1969), *Law without Precedent: Legal Ideas in Action in the Courts Colonial Busoga*, The University of Chicago Press.

Hammond-Tooke, W. D. (1980), *The Bantu-speaking Peoples of South Africa*, London: Routledge and K Paul.

Hammond-Tooke W. D. (1985), *Command or Consensus – The Development of Transkeian Local Government*,

Johnson, Shaun (2006), *The Native Commissioner*, Cape Town: Penguin

Koyana, Digby Sqelo (1980), *Customary Law in a Changing Society*, Cape Town: Juta.

Laband, John (2020), *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony*, Cape Town: Penguin.

Lewin, Julius (1944), *An Outline of Native Law*, Johannesburg: RL Esson and Co.

Lewin, Julius (1947), *Studies in African Native Law*, Cape Town: The African Bookman and Oxford: Blackwell.

Maithufi, IP, Sindiso Mnisi Weeks, Lesala Mofokeng, Chuma Himonga, and Thandabantu Nhlapo (2015), *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives: Private Law*, Oxford: Oxford University Press.

Mqeke, R.B. (2003), *Customary Law and the New Millennium*, Alice, Eastern Cape: Lovedale Press.

Myburgh, A.C. (1985), *Papers on Indigenous Law in Southern Africa*, Pretoria: J. L. van Shaik.

Myers, J.C. (2008), *Indirect Rule in South Africa: Tradition. Modernity, and Costuming of Political Power*, Rochester: Rochester University Press.

Olivier, Nicholaas Johannes Jacobus (1986), *Regpluralisme in Suider-Afrika*, Pretoria: Universiteit Pretoria.

Oomen, Barbara (2005), *Chiefs of South Africa: Law, Power, and Culture in the Post-Apartheid Era,* Oxford: James Curry.

Peires, Jeffrey B. (1989), *The Dead will Arise: Nongqawuse and the Great Xhosa Cattle Killing Movement 1856-7*, Bloomington: Indiana University Press.

Prinsloo, M. W. (1983), *Inheemse Publiekreg in Lebowa*, Northern Sotho

Sanders, AJGM (ed.) (1990), *The Internal Conflict of Laws in South Africa*, Durban: Butterworths.

Seymour, William Massingham (1911), *Native Law and Custom*, Juta: Cape Town.

Seymour, S. M. (1953), *Native Law in South Africa: A Comprehensive Treatise on the Principles of Uncodified native Civil Law as practiced in all the Provinces except Natal, and of the principles of the application of the Common Law of South Africa to Natives in Civil Matters*, Cape Town: Juta

Van Niekerk, Gardiol Jeanne (1995), *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective*, Pretoria: University of South Africa

3.3. Articles:

Bank, Leslie and Roger Southall (1996), "Traditional leaders in South Africa's New Democracy", *Journal of Legal Pluralism and Unofficial Law*, Vol. 28, No. 37-38, pp. 407-30.

Behrmann, P. (1948), "The Native Appeals Courts", *South African Law Journal*, Vol. 65, pp. 413-8.

Bekker, J.C. (1978), "The Judicial System of Transkei", *Comparative and International law Journal of Southern Africa*, Vol. 11, 27.

Benton, Lauren (2006), "Constitutions and Empires", *Law and Social Inquiry* Vol. 31, No. 1, pp. 177–198.

Costa, Anthony A. (2000), "Chieftaincy and Civilisation: African Structures of Government and Colonial Administration in South Africa", *African Studies*, Vol. 59, No.1, pp.13-43.

Erasmus, H.S. (2013), "Circuit Courts in the Cape Colony During the Nineteenth Century: Hazards and Achievements", *Fundamina*, Vol. 19, No.2, pp. 266-99.

Faris, John Andrew (2015), "African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems, *International Journal of African Renaissance Studies – Multi-, Inter- and Trannsdiscipinarity*, Vol. 10, No. 2, pp. 171-89.

Gordon, Robert (1989), The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa", *Journal of Historical Sociology*, Vol. 2, No. 1, pp. 41-65.

Harris, Bede (2006), "Legal Pluralism and a Bill of Rights – The South African Experience", *Australian Indigenous Law Reporter*, Vol. 10, No. 1, pp. 1-16.

Kerr, A. J. (1957), "The Application of Native Law in the Supreme Court", *South African law Journal*, Vol. 74, pp. 313-30.

Lewin, Julius (1939), "Tribal Tradition and Native Administration in South Africa", *Journal of the Royal African Society*, Vol. 30, No: CLI, pp. 289-99.

Mager, Anne (2013), "The Colonial Conquest and the Tambookie Frontier: The Story of Maphasa, *c.* 1830-1853", *Journal of South African Studies*, Vol. 39, No. 2, pp. 250-71.

Mehrotra, Ajay K. (2001), "Law and the 'Other': Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way", *Law and Social Inquiry*, Vol. 26, p. 748.

Ndima, Dial Dayana (2003), "The African Law of 21st Century in South Africa", *The Comparative and International Law Journal of Southern Africa*, Vo. 36, No. 3, pp. 325-45.

Ndima, Dial Dayana (2015), "Receiving African Jurisprudence in a Post-Imperial Society: The Role of Ubuntu in Constitutional Adjudication", *The Comparative and International Law Journal of Southern Africa*, Vol. 48, No. 3, pp. 359-80.

Ntseba, Lungusile (2004), "Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa", *European Journal of Development Research*, Vol. 16, pp. 71-89.

Osman, Fatima (2019), "The Third Time a Charm? Traditional Courts Bill of 2017", *SA Crime Quarterly*, No. 64, pp. 45-53.

Peires, Jeff B. (1992), "The Implosion of Transkei and Ciskei", *African Affairs*, Vol. 91, No., pp. 365-87.

Peires, Jeff B. (1996) "Nostalgia and Native Commissioners: A Hundred Years in the Old Transkei", *Kronos*, Vol. 35, No. 1, pp. 242-7.

Rubin, Neville (1963), "Transkei: Constitution Act", *Journal of African Law*, Vo. 7, No. 3, pp. 183-7.

Siyongwana, Pakama Queenscious (2009), "The Impact of Political Transformation on Employment in the Transkei Bureaucracy and Civil Service in Umtata, South Africa since 1994", *GeoJournal*, Vol. 74, No.4, pp. 293-310.

Van Niekerk, Gardiol (2007), "Manipulation of Traditional Leadership and Traditional Legal Institutions: Zululand during the 1880s", *Fundamina: A Journal of Legal History*, Vol. 15, No. 2, pp. 193-222.

Van Niekerk, GJ (2008), "Harmonisation of Indigenous Laws in Southern Africa", *Fundamina:* A *Journal of Legal History*, Vol.14, No. 2, pp. 155-67.

Williams, J. Michael (2004), "Leading from Behind: Democratic Consolidation and the Chieftaincy in South Africa", *Journal of Modern African Studies*, Vol. 41, No. 1, pp. 113-36.

3.4. Book chapters:

Bekker, J.C. (19?), "The Influence of Recent Legislation and Constitutional Changes on the Application of African Customary Law", in Sanders (ed.), p. 25-38.

Bekker, J.C. and C.C.Boonzaaier (2010), "Traditional Leadership and Governance", in C. Rautenbach, J.C. Bekker, N.M.I. Goolam (eds), *Introduction to Legal Pluralism*, 3rd edition, Durban: Lexis-Nexis, pp.145-70.

Holleman, F. D. (1956), "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa / L'Avenir du droit coutumier en Afrique : Symposium-Colloque Amsterdam 1955*, Leiden: Universitaie Pers Leiden, pp. 232-56.

Koyana D.S., J.C. Bekker, R.B. Mqeke (2006), "Traditional Authority Courts", in J.C. Bekker, C. Rautenbach, N.M.I. Goolam (eds), *Introduction to Legal Pluralism in South Africa*, Second Edition, Durban: LexisNexis Butterworths, pp.131-46.

Olivier, N.J.J. "The Judicial Application of African Customary Law, in Sanders (ed.), pp. 39-55.

Rubin, Leslie (1965), "The Adaptation of Customary Family Law in South Africa", in Hilda Kuper and Leo Kuper (eds), *African Law: Adaptation and Development*, Berkeley, CA: University of California Press, pp. 196-215.

Steytler, Nico (2019), "The Dynamic Relationship Between Devolution and Constitutionalism in South Africa", in Charles M. Fombad and Nico Steytler (eds), *Decentralisation and Constitutionalism in Africa*, Oxford: Oxford University Press, pp. 151-182.

Venter, Francois (1985), "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei", in Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, pp. 1-19.

Vorster, M.F. (1985), "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei", in Vorster, M.P., M Wiechers, D. J. Van Vuuren (eds), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban: Butterworths, pp. 21-81.

Vorster, L.P. (2002), "Institution of Traditional Leadership", in Bekker, J.C., J.M.T. Labuschagne, L.P. Vorster (eds) (2002), *Introduction to Legal Pluralism in South Africa, Part: Customary Law*, Durban: Butterworths, pp.127-38.

Zenker, Olaf (2018), "Bush-Level Bureaucrats in South African Land Restitution: Implementing State Law under chiefly Rule", in Zenker and Hoehne (ed.), *The State and the Paradox of Customary Law in Africa*, p. 41-63.

4. ETHIOPIA

4.1. Books

Abir, Mordechai (1968), *Ethiopia: The Era of the Princes; The Challenges of Islam and the Re-Unification of the Christian Empire, 1769-1855*, London: Longmans.

Asfa-Wossen Aserrate (2015), *King of Kings: The Triumph and Tragedy of Haile Selassie I*, translated by Peter Lewis, London: Haus.

Bruce, James (1790) [1967], *Travels to Discover the Source of Nile*, Elibron Classics Reprint.

David, René (1962), *La refonte du code civil dans les états africaines*.

Donham, Donald and Wendy James (1986), *The Southern Marches of Imperial Ethiopia*, Cambridge University Press.

Fessha, Yonatan T. (2010), *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*, Farnham, UK: Ashgate.

Hassen, Mohamed (1990), *The Oromo of Ethiopia: A History 1570-1860*, Cambridge: Cambridge University Press.

Henze, Paul B. (2000), *Layers of Time: A History of Ethiopia*: London: Hurst and Company.

Jalata, Assefa (1993), *Oromia and Ethiopia: State Formation and Ethno-national Conflict*. Boulder and London: Lynne Rienner Publishers.

Kaplan, Robert D. (1988), *Surrender or Starve: Travels in Ethiopia, Sudan, Somalia, and Eritrea*, New York: Vintage.

Kapuściński, Ryszard (1978) [2006], *Emperor: The Downfall of an Autocrat*, London: Penguin Classics.

Kefale, Asnake (2013), *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study*, London: Routledge.

Kefale, Asnake, Tomasz Kamusella, Christophe Van der Beken (2021), *Eurasaian Empires as Blueprints for Ethiopia: From Ethno-Linguistic Nation-State to Multinational Federation*, London: Routledge.

Legesse, Asmarom (2000), *Oromo Democracy: An Indigenous African Political System,* Lawrenceville, NJ and Asmara, Eritrea: The Red Sea Press.

Legesse, Asmarom (1973), *Gadaa: Three Approaches to the Study of African Society*, New York: The Free Press.

Levine, Donald N. (1965), *Wax and Gold: Tradition and Innovation in Ethiopian Culture*. Donald N. Levine. Chicago: University of Chicago Press.

Lewis, Herbert S (1965), *A Galla Monarchy: Jimma Afar Jifar 1830-1932*, Madison: University of Wisconsin Press

Lyons, Terrence (2019), *Puzzle of Ethiopian Politics*, US: Lynne Reiner.

Marcus, Harold (1975), *The Life and Times of Menelik II: Ethiopia 1844-1913*, Lawrence NJ: Red Sea Press, p. 73.

Marie, M. (1954), *The Ethiopian Empire Federation and Laws*, Rotterdam: Royal Netherlands Printing and Lithographing Company.

Markakis, John. (1974). *Anatomy of Traditional Polity.* Oxford: Clarendon press.

Nicholl, Charles (1997), Somebody Else: Arthur Rimbaud in Africa 1880-91, London: Jonathan Cape, footnote 183.

Pankhurst, Richard (1992), *A Social History of Ethiopia; The Northern and Central Highlands from Early Medieval Times to the Rise of Emperor Tewodros II*, Trenton, NJ: Red Sea Press.

Pankhurst, Richard (1997), *The Ethiopian Borderlands: Essays in Regional History from Ancient Times to the end of the 18th Century*, Lawrenceville NJ: The Red Sea Press.

Pernham, M. (1947), *The Government of Ethiopia*, London: Faber and Faber, pp. 138-59.

Shell, Sandra Rowoldt (2018), *Children of Hope: The Odyssey of the Oromo Slaves from Ethiopian to South Africa*, Cape Town: University of Cape Town Press.

Teshale Tibebu, (1995), *The Making of Modern Ethiopia, 1896-1974*. Lawrenceville, NJ: The Red Sea Press

Tekeste Negash, (1997), *Eritrea and Ethiopia: The Federal Experience*. Uppsala, Sweden: Nordiska Afrika Institutet.

Zewde, Bahru (1991), *A History of Modern Ethiopia, 1855-1974*. Athens, OH: Ohio University Press.

4.2. Articles

Asebe Regassa Demelo (2018), "Living with Conflict: Borana's Resilience in Southern Ethiopia", *African Conflict and Peacebuilding Review*, Vol. 9, No. 2, pp. 75-97.

Bassi, Marco (2010), "The Politics of Space in Borana Oromo: Demographics, Elections, Identity, and Customary Institutions", *Journal of East African*, Vol.4, No. 2, pp. 221-46.

Baxter, PTW (1978), "Ethiopia's Unacknowledged Problem: The Oromos", *African Affairs*, Vol. 77, No. 308, pp. 283-296.

Chanie, Paulos (2007), "Clientelism and Ethiopia's Post-1991 Decentralisation", *The Journal of Modern African Studies*, Vol. 45, No. 3, pp. 355-84.

D'Abbadie, Antoine (1880), "Sur les Oromo: Grande Nation Africaine", *Annales de la Société Scientifique de Bruxelles*, pp. 167-192.

David, René (1963), "A Civil Code for Ethiopia: Consideration on the Codification of Civil Law in African Countries", *Tulane Law Review*, Vol.37, pp. 187-8.

Desalegn Amsalu (2018), "*Use and abuse of 'the right to consent': Forum shopping between shimgilinna and state courts among the Amhara of Ankober, North Central Ethiopia*", Addis Ababa University.

Girma, Mohammed (2011), "Whose meaning? The Wax and Gold Tradition as a Philosophical Foundation for an Ethiopian Hermeneutic", *Sophia: International Journal of Philosophy and Tradition*s, Vol. 50, No. 1, pp. 175-87.

Habtu, Alem (2005), "Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution", *Publius: The Journal of Federalism*, Vol. 35, No. 2, pp. 313-35.

Isenberg, Karl Wilhelm (1864), "The Gallas of Abyssinia" *Church of England Magazine*, 264.

Jaenen, Cornelius J. (1956), "The Galla or Oromo of East Africa", *Southwestern Journal of Anthropology*, Vol. 12, No. 2, p. 171.

Keller, Edmond (1995), "Revolutionary Ethiopia", *The Journal of Modern Africa Studies*, Vol. 33, No. 4, pp. 621-34.

Krzeczunwicz, G (1963), "A New Legislative Approach to Customary Law: The 'Repeals' Provision of the Ethiopian Civil Code of 1960", *Journal of Ethiopian Studies*, Vol. 1, No. 1, p. 57.

Singer, Norman. J. (1970), "Modernization of Law in Ethiopia: A Study in Process and Personal Values", *Harvard International Law Journal*, Vol. 11, pp. 73

Stremlau, Nicole (2014), "Media, Participation, and Constitution-Making in Ethiopia", *Journal of African Law*, Vol. 58, No. 2, pp. 231-49.

Tsegaye Regassa (2010), "The making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice", *Afrika Focus*, Vol. 23, No. 1, pp. 85-118.

Tshehai Wada Wourji (2012), "Coexistence Between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects", *African Journal of Legal Studies*, Vol. 5, No. 3, p. 269.

Weld Blundell, Herbert (1906), "Exploration in the Abai Basin, Abyssinia", *The Geographical Journal*, Vol. 27, No. 6, p. 549.

4.3. Book Chapters

Adugna, Fekadu (2012), "How do the Borana Oromo and the Marhean Somali Resolve Conflicts", in Gbnre Yntiso, Fekade, Assefa Fiseha (eds), *Customary Dispute Resolution Mechanisms in Ethiopia*, Addis Ababa: The Ethiopian Arbitration and Conciliation Centre.

Dejene, Gemechu (2011), "The Customary Courts of the Waliso Oromo", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds), *Customary Disupite Resolution Mechanisms in Ethiopia*, Addis Ababa: Ethiopian Arbitration and Conciliation Center, pp. 251-277.

Fiseha, Assefa and Zemelak Ayele (2017), "Concurrent Powers in the Ethiopian Federal System", in Nico Steytler (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Leiden: Brill/Nijhoff, pp. 241-60.

Fiseha, Assefa, Gebre Yntise, and Fekada Azeze (2011), "The State of Knowledge on Customary Dispute Resolution in Ethiopia", Genre Yntiso, Fekade, Assefa Fiseha (eds), *Customary Dispute Resolution Mechanisms in Ethiopia*, Addis Ababa: The Ethiopian Arbitration and Conciliation Centre.

Israel, Itansa (2011), "The Quest for the Survival of the Gadaa System's Role in Conflict Resolution", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds), *Customary Disupite Resolution Mechanisms in Ethiopia*, Addis Ababa: Ethiopian Arbitration and Conciliation Center, p. 300.

Levine (1988), "Wax and Gold is a Way of Life", in Levine (ed.), *Flight from Ambiguity: Essays in Social and Cultural Theory*, Chicago: University of Chicago Press

Shack, William A (1969), "Guilt and Innocence: Problem and Method in the Gurage Judicial System", in Max Gluckman (ed.), *Ideas and Procedures in African Customary Law*, Oxford University Press.