

SOME COMMENTS ON THE PROBLEMS OF COMPARING THE
RELATIONSHIP BETWEEN TRADITIONAL AND STATE
SYSTEMS OF ADMINISTRATION OF JUSTICE IN
AFRICA AND INDONESIA*

Franz von Benda-Beckmann

I

I have been asked to open our general discussion with a brief comment on the problems concerning the analysis of traditional and state-imposed systems of administration of justice in Africa and Indonesia. I understand that this comparative comment should, if possible, be based upon my research experiences in Malawi and West Sumatra, and that it in particular should provide a link between today's conference and the one held two years ago in Münster when aspects of traditional and state-imposed systems in Africa were discussed.¹

You will understand that in a brief contribution I cannot engage in a systematic comparison, let alone consider all relevant aspects of our field of study. What I shall do is to review some of the papers given in Münster and the ones we have heard today² in order to see whether they offer some elements for constructing hypotheses for more general comparative theory of pluralistic systems of dispute settlement and adjudication; in particular of those pluralistic systems in which indigenous, or traditional, and state-imposed institutions form the two major components. Here one of the main questions seems to concern the relationship between the traditional and state-imposed systems, and, in particular the fact that certain traditional systems have been more resistant to the imposition of state systems than have others.

Two years ago in Münster, Roberts concluded his paper on the relationship between the indigenous Kgatla system and the national legal system imposed by the protectorate government with the words:

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"If we look for a broader lesson in this case history it must be that any generalization as to the relationship between national legal systems and indigenous systems is likely to be problematic: much must depend on the nature of a particular indigenous system and how members of the society concerned exploit it" (1979:49).

This cautious conclusion should be the starting point for our discussion. Can we find correlations, or even causal connections, between degrees of resistance, types of indigenous political organization, and the use the members of these societies make of the systems?

Today I shall be mainly concerned with structural features of the indigenous political organization within colonial and national systems. This for two reasons: The first is that most attempts to generalize in this matter have been based upon analyses of social processes of decision making both in terms of the disputants' behaviour patterns and in terms of factors such as the accessibility of institutions, the time and expenses involved in those processes, and the social distance between the disputants and the institutions.³ While such factors undoubtedly are important for the understanding of any single system they do not lend themselves to comparative generalizations. The second and more prosaic reason is that the papers given in Münster and today simply offer more material for the approach I should like to open our discussion with.

II

When we try to make comparative generalizations by raising the question of why some traditional systems have been more resistant to the imposition of state systems than others, we soon discover we have opened a can of worms which, once set free, may be difficult to deal with, much less digest. But rather than explaining in an abstract manner why this should be so, let me demonstrate it by simply beginning with a comparison based upon the papers.

Let us first look at the African society of the Kgatla and the Indonesian Minangkabau society. According to Roberts, the Kgatla indigenous system has been resistant to the imposition of the Bechuanaland Protectorate system. The Minangkabau system has not, or to a much smaller degree, been

resistant... or has it? I think that the paper given by K. von Benda-Beckmann (1981) has shown us the necessity of making a distinction when we speak of "resistance": between the continuous use which the disputants make of the indigenous institutions, which I shall call the use aspect, and the institutions' ability to settle cases successfully, which I shall call the efficiency aspect. We have heard that the Minangkabau system has, when considered in its use aspect, also shown a remarkable resistance. In the efficiency aspect, however, we must conclude that this has not been the case. From Robert's account of the Kgatla we can gather that the Kgatla system was resistant in both aspects. So we can notice a difference between the two societies and we have to ask why this should be so. Roberts suggested that we look at the nature of the indigenous system, and he analysed three main factors which in his view had enabled the Kgatla to be strikingly resistant: 1. The Kgatla had a centralized state organization. 2. They had a well defined body of norms. 3. The Kgatla chiefs were able to adapt these norms to changing circumstances and keep them attractive for the population. (1979:47) If we look at Minangkabau society we realize that, as far as the two latter aspects are concerned, there does not seem to be a basic difference between the two societies. The Minangkabau also had in their adat a well defined body of norms, and adat could adapt to changing circumstances or could be changed by the nagari institutions.⁴ This gives us the hint that the decisive difference, and the one possibly accounting for the different reaction, might be found in the degree to which governmental and judicial functions were functionally and institutionally dispersed in the two societies. This would lead us to the preliminary hypothesis that as far as the efficiency aspect is concerned centralized political organizations are more likely to be resistant to the imposition of a colonial system than are societies where governmental functions are institutionally more dispersed. This hypothesis would be supported by the Kgatla and Minangkabau data.

We would elaborate this hypothesis as follows: The efficiency of dispute-settlement decisions depends on the authority of the institution and its power to have its decisions accepted so that the disputants behave according to it. The power may be based on different bases-kinship, economic, religious, or purely political relationships which in traditional societies often are not, or at least not sharply, differentiated. In centralized political organizations the authority of a governmental institution tends to be exclusive. In societies where governmental functions are dispersed the authority of any institution is, inherently, relative, and this relativity is

perceived by society's members. This is even more so if the dispersion is pluralistic, that is, if for the same governmental function - e.g., the function of settling disputes - there exists a variety of duplicatory (or parallel) institutions. Such a state of affairs gives society's members choices. The possibility to choose will generally decrease their willingness to accept decisions disadvantageous to them, thereby decreasing the institutions' authority and the efficiency of their decisions. Through the actual choices made, the relativity of the individual institutions also becomes manifest in social process. If successful involvement in decision making in disputes is one manifestation of power desired by the institutions, there will be competition between the institutions. This competition will reinforce the dispersed structure and in general will lead to less efficient decisions being made.

If a new system of institutions, the colonial system, is added to the indigenous one, we may expect the effects to be different in centralized and dispersed political organizations. Of course, in the case of centralized political organizations the power of a governmental institution would also lose its exclusiveness. Choices would be opened for society's members and the indigenous institutions would be placed in competition with the new one. The same would happen in societies with a more dispersed political organization. Yet there remains an important difference. In centralized systems the internal cohesion of the indigenous political institution would not be affected, as there is only competition between the indigenous and the state institutions. In dispersed systems, this type of competition would also occur. But in addition there is the high probability that in the competition between the indigenous institutions non-indigenous power sources will be used, which will decrease the internal cohesion of the traditional political system (see Holleman 1979:16).

I certainly do not wish to argue that in centralized indigenous systems, after colonisation, no use was made of non-indigenous power sources, nor that this use did not affect decision making in the indigenous institutions. There is sufficient ethnographic evidence to the contrary. But this evidence concerns the relationship between the traditional institution and the population. The use of non-indigenous power sources corrupted the institution's decision making, but it did not decrease its efficiency. In dispersed systems, on the other hand, the relationships between indigenous institutions would be affected in addition.

The use aspects of resistance, on the other hand, seems to be largely independent of the degree to which governmental functions of indigenous political organizations were institutionally dispersed. The degree to which indigenous institutions were used after the introduction of the colonial institutions seems to depend primarily on the degree to which the power bases of the indigenous institutions were affected by the imposition of the colonial system. If, as for example through the introduction of a colonial court system, only one strand of the power relationship—the formal authority to decide or settle disputes—is duplicated or replaced, the kinship, economic, or religious strands may still be strong enough to prevent the society's members from disregarding their indigenous institutions, gladly or not, when it comes to the settlement of disputes. As has been shown by the Minangkabau example, this particularly so if these power relationships are involved in the disputes themselves. Up to now, I think, this elaborated hypothesis would be supported by the Kgatla and Minangkabau data.⁵

III

But, however attractive the hypothesis may seem, in the form in which I have presented it, it is useless. For it still rests upon the assumption that "the imposition of a colonial system of governmental and adjudicative institutions" is a single phenomenon. But this is of course not the case. We cannot consider our problem without considering the differences in the actual policies undertaken by the various colonial or state governments, for these policies directly impinged upon the indigenous political organizations. Without claiming to offer a comprehensive classification of such policies, we would at least have to distinguish between the following four categories:

1. Indigenous institutions were officially incorporated more or less wholesale into the colonial administrative and judicial system (through which act their functions and powers were, of course, transformed).
2. Indigenous institutions were only partially incorporated. Thus new so-called traditional institutions were created alongside the unrecognized indigenous institutions.

3. Indigenous institutions were not officially recognized and no direct attempt was made to eliminate them.
4. Indigenous institutions were officially eliminated.

Colonial and state policies in varying degrees affected and changed the indigenous political organization (see, e.g., Holleman 1979:15 f.). Seen from this point of view, the "relative resistance" would also be a function of these policies.

Two important consequences follow from this, one affecting the object of our comparison, the other one our hypothesis. Let me deal with the first consequence first. We cannot go on speaking in terms of the simple dichotomy between "indigenous" or "traditional" and "state-imposed" institutions. We have to distinguish at least three categories of institutions and consider their inter-relationships: a) state-imposed institutions not based upon the indigenous political organization, b) state-imposed institutions based upon the indigenous political institutions, and c) indigenous institutions not officially incorporated into the colonial governmental system. Otherwise we shall not be speaking about the same things. When Roberts, for example, talked about the "indigenous" Kgatla system, he actually meant by "indigenous" the Kgatla chiefdom as it was incorporated into the Protectorate government system, and he opposed this indigenous system to the rest of governmental institutions. When K. von Benda-Beckmann on the other hand spoke about Minangkabau institutions, she opposed the non-incorporated adat institutions to the state-imposed village council, which in its composition was to a large extent based upon adat organization. Whatever labels we may find appropriate for these different categories, we must make the distinctions.

The second consequence of attending to distinctions in state policy concerns our hypothesis. Our original question was whether and how the nature of the indigenous political organization is an important variable for the degree of resistance of the organization to the imposition of the colonial system. Thus formulated the question refers to pre-colonial indigenous political organization. The question, however, can only be answered with reference to empirical data from the time after the imposition of the colonial system, when the indigenous organization has already been changed by government interference. So we must be careful in our analysis.

The paper given by Holleman in Münster (1979) has shown that colonial policy sometimes artificially created dispersed "neo-traditional" systems on the basis of an indigenous political organization which had been rather centralized in pre-colonial times. This state-imposed dispersion of the traditional system would be relevant for the question whether the "traditional" system was more, or less, resistant to colonial institutions not based upon indigenous institutions. An explanation for the particular relationship between these two systems could, however, of course not be found in features of the pre-colonial indigenous system.

So we must rephrase our original question and ask: Which features of a pre-colonial indigenous system coinfluence, together with a certain type of government interference, the nature of the "indigenous" system under colonial rule, so that in the colonial context and thus under changed conditions they are responsible for a greater degree of resistance?

We could then adapt our hypothesis as follows: The more functionally dispersed an indigenous power structure is, the greater the probability that it will be only partially incorporated into a colonial administrative system. This then has the consequence, that the competition among the indigenous institutions already inherent in the indigenous system would be increased and added to the competition between institutions recognized by the state and unrecognized institutions. This institutional pluralism in the "traditional field" would thus contribute to a weakening of the "traditional" system, as opposed to the system of governmental institutions not based upon indigenous institutions. This would then lead, according to our preliminary hypothesis, to a decrease in the efficiency of decision making in disputes. (See for the Shona, Holleman 1979:16.) Conversely, we could say that centralized indigenous systems are apt to be more resistant to the imposition of a colonial system because they are more likely to be incorporated wholesale-if at all and if not destroyed-into the colonial system. They therefore continue to represent the "traditional" system as a unity, albeit in a transformed manner. It follows that there will be less competition in the "traditional" field, less need to manipulate non-indigenous power sources in that competition, and, according to our hypothesis, relatively more efficient decisions as a result.

IV

There is another relevant factor here, one which concerns the conditions under which competition between indigenous, officially incorporated "traditional," and purely state-imposed institutions would occur and be more or less intense—a factor which in our hypothesis would have direct consequences for the efficiency of decision making. Again, the papers of Holleman and K. von Benda-Beckmann offer data from which to make inferences. It would seem that the introduction of western style courts influenced effective decision making far less on the village-level than did the introduction there of recognized and incorporated institutions, whether they were invested with authority in dispute settlement or not. In Minangkabau, competition is most intense on the nagari (village) level between the old adat institutions and the newly introduced village council. Holleman reports that, similarly, in Shonaland "the situation at grassroot level was bedevilled by the tug of war between recognized and unrecognized tribal judicial authorities" (1979:5.), and attributed this situation largely to the presence of partly overlapping and rivalling institutions. If we try to elevate these analytical remarks to a hypothesis we might wish to say that competition is likely to be more intense if the institutions concerned operate on the same political level, in terms of territorially defined jurisdiction; conversely, that it is less intense if carried out between institutions on different levels. On the same political level there is generally a symmetrical competitive relationship: all institutions compete for the same things. Thus in Minangkabau and Shonaland, indigenous institutions unrecognized by the state compete with state-imposed "traditional" institutions for power on the village level. Competition between institutions on different levels, however, tends to be asymmetrical; village institutions, both recognized and unrecognized, have to compete with the state courts located at a higher level, because the state courts constitute another alternative offered to disputants through which they can avoid the village institutions. Courts, on the other hand, may compete with village institutions in terms of "better" or "more efficient" administration of justice, but, if located at a higher political level, they do not strive to gain political power on the village level through the handling of disputes.

V

To conclude: my brief comment has shown that it is probably of little value to compare the "African" with the

"Indonesian" situation. There are no such "African" or "Indonesian" situations. Both in Africa and Indonesia, the indigenous political organizations have been very heterogenous, and so have been the policies of the various colonial and state governments. But there is also, I hope, a positive result. I have indicated some problems with which we are confronted when we wish to make comparative generalizations about the relationships between "traditional" and "state-imposed" systems of administration of justice. I have offered some preliminary hypotheses with which one could analyse this relationship in different countries. Whatever the value of these hypotheses may be, I think it will have become clear that both the nature of the indigenous systems and of the kind of government interference are important variables in this relationship. As far as government interference is concerned, we cannot be content with general categories such as "indirect" or "direct rule." We must specify the exact kind and degree to which policies affected the indigenous political situation and on which political levels the new colonial and neo-traditional institutions were created. All this forces us to ask our questions with greater precision, indicating more clearly what we mean when we speak of "traditional" and "state-imposed" institutions or about "village justice" and "state court justice."

NOTES

- ¹Two of the papers given at the Münster conference have been published in African Law Studies, issue 17 (1979): J. F. Holleman, "Disparities and Uncertainties in African Law and Jurisdictions: A Rhodesian Case Study" (1-35) and S. Roberts, "Tradition and Change at Mochudi: Competing Jurisdictions in Botswana" (37-51).
- ²This discussion paper was read before the paper by Prof. Pospisil had been given.
- ³Compare Nader and Todd (eds.), 1978.
- ⁴For an account of the change in Minangkabau property and inheritance law, see F. V. Benda-Beckmann, 1979.
- ⁵The Kapauku example is very suggestive, too. The power and authority of the tonowi depended primarily on the economic (debt) relationships through which a tonowi could bind and control his followers. According to Pospisil (1981) the debts owed to tonowi had been reduced by 2/3 within only 7 years. The introduction of the colonial system offered employment possibilities to the young Kapaku. This undermined the economic basis of native social control and rendered the aboriginal political and legal structure obsolete.

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