# International Conference

# "Legal Pluralist Perspectives on Development and Cultural Diversity"

**August 31 - September 3, 2009**

**Zurich, Switzerland**

## Program and Conference Papers

## Letter of Welcome

**Shalini Randeria and Markus Weilenmann**
University of Zurich and Commission on Legal Pluralis

We would like to extend a very warm welcome to all participants of the Commission on Legal Pluralism's 16th conference organised jointly with the Department of Social and Cultural Anthropology in Zurich. We are very pleased that there has been such a surge of interest in the conference resulting in the largest ever number of workshops and participants at a CLP conference. This reflects the increasing relevance of issues on legal pluralism and cultural diversity as well as our organisation's growing strength in various parts of the world. It is a welcome development indeed at a time when our disciplines, social anthropology as well as the interdisciplinary study of legal institutions and processes too, are undergoing a transformation in the wake of major changes in the academic land-scape in universities across the world. The conference will give us an opportunity to discuss our ongoing research but equally to deliberate on the disciplinary and institutional challenges facing us in our diverse academic settings.

After the unfortunate decision by the Chinese authorities to postpone the IUAES conference to be held in Kunming (China) in July 2008, we decided to hold the CLP's conference in Zurich at rather short notice. We would like to thank all the members of the local organising committee for the tremendous amount of work they have put in to ensure all arrangements for the conference. We appreciate the support of the Executive Body of the Commission on Legal Pluralism, the University of Zurich and the Department of Social and Cultural Anthropology not only in hosting our conference but also for their efforts in raising additional funds from various Swiss national institutions for this event. This has fortunately allowed us to ensure the participations of several speakers from non-Western countries.

As members of the local organising committee we look forward to your queries and suggestions on all matters concerning the conference and the Commission on Legal Pluralism. Please do not hesitate to contact us during this week.

We hope you enjoy the conference in Zurich!

**Conference Committee**

Dr. Markus Weilenmann (Executive Secretary, Commission on Legal Pluralism)
Prof. Dr. Shalini Randeria (Department of Social and Cultural Anthropology, University of Zurich)
Miriam Wohlgemuth (Department of Social and Cultural Anthropology, University of Zurich)
lic. rer. soc. Rohit Jain (Department of Social and Cultural Anthropology, University of Zurich)
lic. phil. Ciara Grunder (Department of Social and Cultural Anthropology, University of Zurich)

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## GENERAL INFORMATION

### Conference Venue

**August 31, 2009**
University of Zurich, Zentrum
Rämistrasse 71

8006 Zurich

Tel. +41 (0) 44 634 11 11
www.uzh.ch

**September 1-3, 2009**
Department of Social and
Cultural Anthropology
Andreasstrasse 15

8050 Zurich-Oerlikon
Tel. +41 (0) 44 635 21 05
Tel. +41 (0) 44 635 22 11
fachreferent@ethno.uzh.ch
www.ethno.uzh.ch

**Registration opening hours**
Please register at the registration desk, where you will receive the conference material and a badge to be worn during the conference. If you wish a vegetarian menu at the conference dinner on September 2 inform the staff at the registration desk. And also, if you wish to attend the optional lake cruise on September 1 (see below), make your reservation at the information desk.
Registration opening hours:

- Monday, August 31 from 1-5 pm (University of Zurich, Zentrum, in front of Room KOL-G-201, 1st floor)
- Tuesday, September 1 from 8.30 am-1 pm (Department of Social and Cultural Anthropology, back office, room 2.48, 2nd floor).

**Back office and bookstall, September, 1-3, 8.30 am-6 pm**
Information about the conference may be obtained in Room 2.48 (2nd floor) in the building of the Department of Social and Cultural Anthropology. Books and Journals published by the Commission on Legal Pluralism and the Department of Social and Cultural Anthropology can be purchased at the bookstall there. Publications by the International Working Group for Indigenous Affairs (IWGIA) and Swiss Federal Network for International Affairs (SNIS) will also be available. Office hours are from Tuesday to Thursday, 8.30 am-6 pm.

**Computing and working space, September, 1-3, 8.30 am-6 pm**
Computing facilities (Windows/Mac) are available at the Department of Social and Cultural Anthropology, Room 5.12, 5th floor. There is also a working space with WLAN in Room 2.46, 2nd floor. Office hours are from Tuesday to Thursday, 8.30 am-6 pm.

**Opening Sessions and Welcome Reception on August 31, 2-7 pm**
The Opening Session, the introductory Plenary Session and the welcome reception take place in the University of Zurich at Rämistrasse 71. The Sessions will be held in room KOL G-201, 1st floor, and the welcome reception at 6 pm will be held in the atrium of the same building.

**Panel Sessions on September, 1-3, 9 am-5.30 pm**
Panel Sessions will take place in the building of the Department of Social and Cultural Anthropology in Zurich-Oerlikon at Andreasstrasse 15. See the map of the building showing all the rooms where the Panel Sessions are held in the section "Access and Locations" below.

**Closing Sessions on September 3, 11 am-4 pm**
The final Plenary Session and the Closing Session of the Commission on Legal Pluralism will be held in the building at Binzmühlestrasse 14, Zurich-Oerlikon, in Room 1.B.01. It is in the same building where the Mensa Binzmühle (University Canteen) is located (see map with lunch locations below in the section "Access and Locations"). Coffee and snacks will be available from 4-5 pm on September 3 in the Mensa Binzmühle.

**Coffee Breaks September 1-3, 10.30-11 am and 3.30-4 pm**
During the Panel Sessions from Tuesday to Thursday coffee and snacks will be served within the building at Andreasstrasse 15 on the ground floor from 10.30-11 am and from 3.30-4 pm. Please don't forget your conference badge.

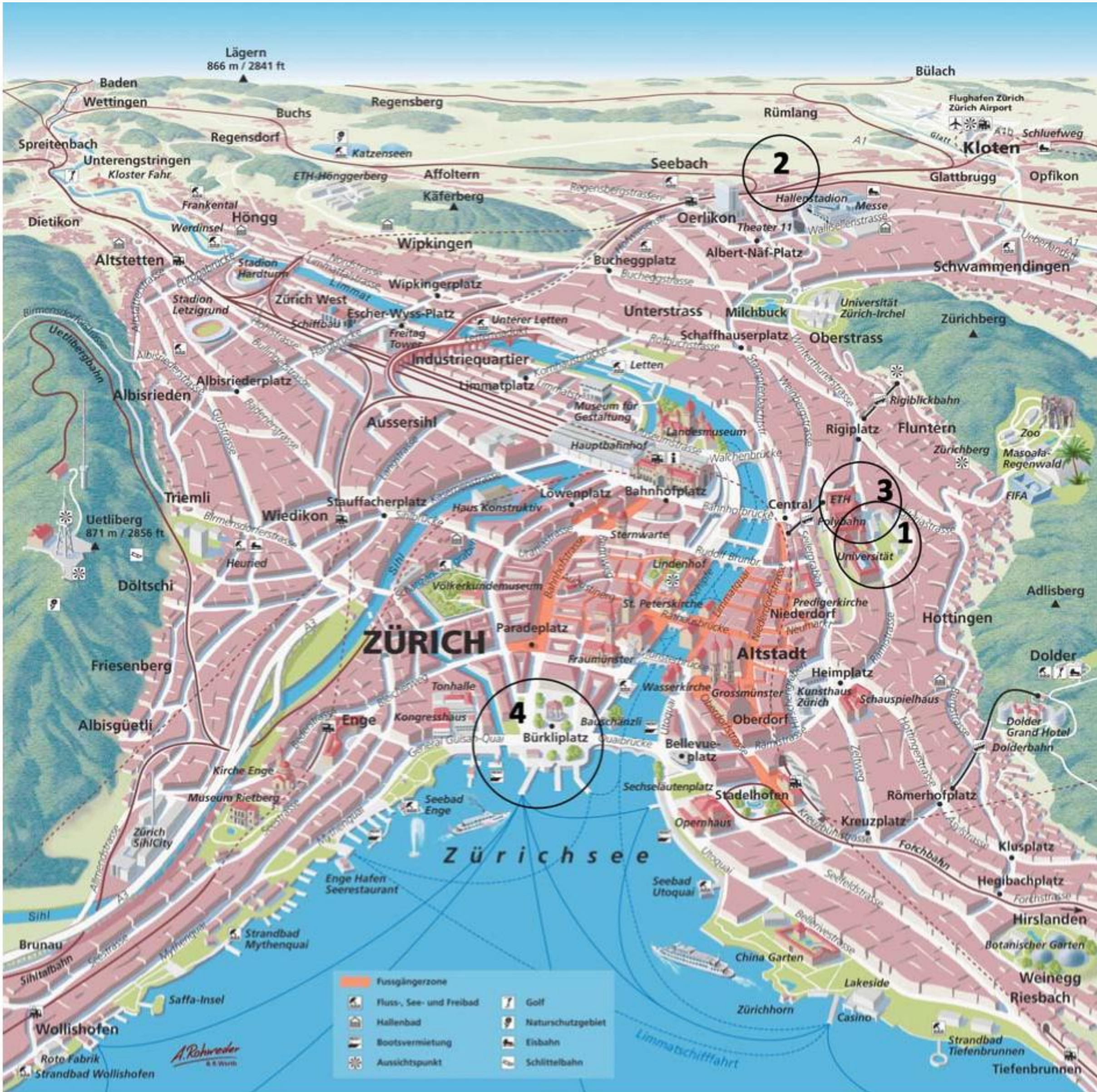
**Lunch Breaks September 1-3, 12.30-2pm**
You are requested to make your own arrangements for lunch. Suggestions for lunch places close-by are given in the section "Access and locations" below. 50 seats have been reserved every day at the University Canteen, at Binzmühlestrasse 14, Zurich-Oerlikon.

**Conference Dinner, September 2, 7 pm**
The conference dinner will be held in the Faculty Restaurant of the ETH, Swiss Federal Institute of Technology Zurich, with its spectacular view of the city of Zurich, the lake and the Alps. Vegetarian meals can be ordered at registration.

**Lake Cruise, September 1, 7 pm**
You can buy tickets for an evening boat cruise on Lake Zurich on September 1 either by sending an email to fachreferent@ethno.uzh.ch or at the latest at the registration desk on August 31. We have only a limited number of tickets, so it is advisable to book in advance by email. See information about the cruise in the section „Leisure Activities" below.

# ACCESS AND LOCATIONS

**Overview: Conference Venue**




Zurich Tourism

1. Conference Location August, 31 2009
2. Conference Location September, 1-3 2009
3. Conference Dinner September, 2 2009
4. Lake Cruise September, 1 2009

**1. Access to the conference location on August 31, 2009 to the main building of the University of Zurich, Zentrum, Rämistrasse 71**

From the airport: Take a train to Zurich main station (Hauptbahnhof). Duration 10 minutes, trains run every 10 minutes. From Zurich main station you can either take a tram or a cable car:

- Tram No. 10 (towards Oerlikon/Flughafen) and Tram No. 6 (towards Zoo) go directly to the University. Get off at the stop „ETH/Universitätsspital" (some 7 minutes later) and then walk on Rämistrasse for 5 minutes past the building of the ETH to Rämistrasse 71.
- If you want to take the cable car walk some 5 minutes across the bridge on the Limmat river to the tram station "Central" and take the red cable car (Polybahn next to Starbucks), which leads you directly to the University Campus. The first building to your right is the building of the ETH and the second one is the University of Zurich.

**2. Access to the conference location September 1-3, 2009 at the Department of Social and Cultural Anthropology in Zurich-Oerlikon, Andreasstrasse 15**

By train from Zurich main station — take a train which stops at „Zurich Oerlikon" (e.g. S2, S5, S6, S8, S14, S16). Many of these trains run at 5-7 minute intervals during the day from platform No. 21-22.

By tram from Zurich main station — take one of the following trams:

- Tram No. 10 (towards Oerlikon/Flughafen) to the stop „Bahnhof Oerlikon"
- Tram No. 14 (towards Seebach) to the stop „Bahnhof Oerlikon"
- Tram No. 11 (towards Auzelg) to the stop „Bahnhof Oerlikon"

From the train station Zurich-Oerlikon to the Department of Social and Cultural Anthropology is a 5 minute walk. The Department is located at Andreasstrasse 15. The easiest access is from a flight of stairs at the head of platform No. 2/3 leading directly into Andreasstrasse (see map below, AND).

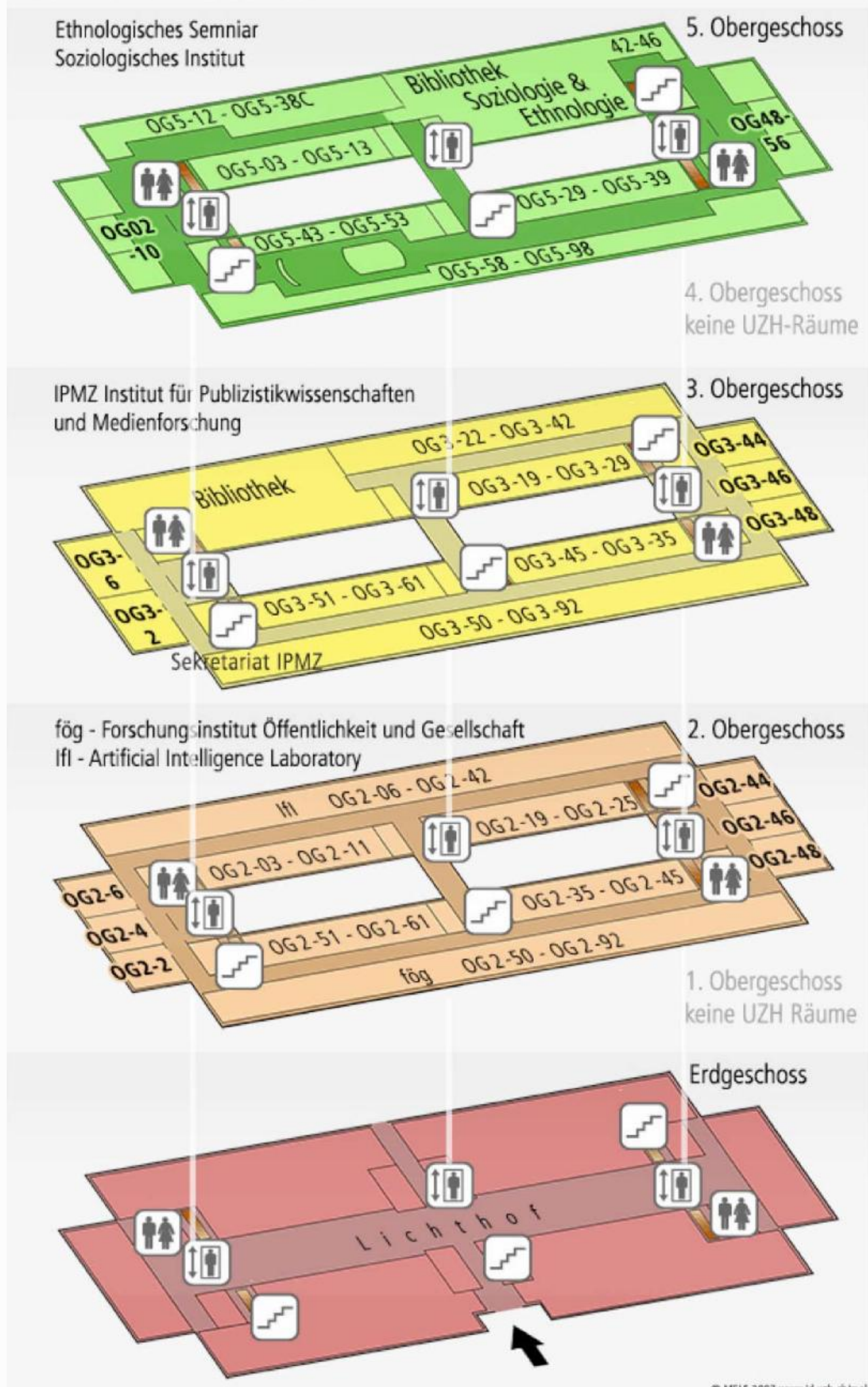
**3. Access to the conference dinner venue on September 2, 2009 at the Faculty Restaurant in the ETH, Swiss Federal Institute of Technology Zurich, Rämistrasse 101**

By tram — from conference venue at the Department of Social and Cultural Anthropology in Zurich-Oerlikon (AND):

- Tram No. 10 (towards Bahnhofplatz) to the stop "ETH/Universitätsspital"

The ETH main building is next to the University of Zurich, Zentrum. The restaurant is on the top floor.

**The panel sessions on September 1-3 take place in the building of the Department of Social and Cultural Anthropology at Andreasstrasse 15 (AND) in the rooms on the 2nd and 3rd floor.**



**Lunch opportunities close to the conference location September 1-3, 2009 in Zurich-Oerlikon:**

- Mensa Binzmühle, University Canteen at Binzmühlestrasse 14 (BIN): Pasta, vegetarian and non-vegetarian dishes and salad buffet at reasonable prices. 50 seats are reserved every day for participants of the conference.
- Sunrise Canteen at Hagenholzstrasse 20/22: Good variety of vegetarian and non-vegetarian dishes and salad buffet.
- Asian Take-Away at Binzmühlestrasse 104: Variety of Indian, Thai and Chinese dishes (take away and in house).
- Tschingg, Italian Take-Away at Schaffhauserstrasse 353: Homemade Pasta with a variety of sauces, salads and fruit drinks.
- Supermarket, Take-Away and self-service restaurant Migros at Neumarkt: Sandwiches, Pizza, salads etc. for take away on the ground floor, canteen with a variety of vegetarian and non-vegetarian dishes, salads and buffet on the top floor (with terrace).
- Madras Curry House at Franklinstrasse 6 near Hotel Sternen Oerlikon: The menu contains various preparations of chicken, lamb, fish and many vegetarian dishes.
- Restaurant Szenario at Swissötel at the Marketplace: A la carte restaurant with a variety of meat, pasta and vegetarian dishes and salad buffet.
- In the station area and the marketplace area there are many other restaurants and Take-Aways.

## PUBLIC TRANSPORTATION IN ZURICH

The most common mode of transportation in Zurich is by tram and bus. The same ticket is valid on trams, buses and for train travel from the main station to Zurich-Oerlikon (there is a surcharge to and from the airport!). Tickets can be bought at automatic ticket machines (these accept only coins but return change) or at ticket sales points (e.g. at the airport or in the main station). No ticket sale in buses, trains or trams. Once bought, tickets are valid on all public transportation services within the applicable zones.

**Tickets from the Airport to Zurich main station (zones 10, 21)**
Trains from the airport to Zurich main station (Hauptbahnhof) run every 10 minutes. A one way ticket into the city costs 6.20 Swiss Francs (2nd Class, Adult).

| **Tickets within the local network of Zurich (zone 10)** | | |
|---|---|---|
| **Type** | **Price** | **Validity** |
| **Einzelbillett**<br>(single-fare ticket)<br>> select blue button | 4.00 Swiss Francs<br>(2nd Class, Adult) | Single journey tickets are valid for 1 or 2 hours depending on the area of validity (local tariff, zones). You can break the journey within that time but cannot back track or use it for a return journey. |
| **Tageskarte**<br>(day pass)<br>> select green button | 8.00 Swiss Francs<br>(2nd Class, Adult) | A day pass is valid for 24 hours on all public transport from the time it has been validated. The last journey has to be completed before the period of validity expires. |
| **Mehrfahrtenkarte**<br>(multiple-journey ticket) | 21.60 Swiss Francs<br>(2nd Class, Adult) | The strip contains 6 single-fare tickets. Each is valid for a single journey on all public transportation services in the applicable zones during the period of validity (between 1-2 hours) after validating the ticket. |
| **Tageswahlkarte**<br>(multiple-day pass) | 43.20 Swiss Francs<br>(2nd Class, Adult) | The strip contains 6 day passes that are valid for unlimited travel on all public transportation services within the applicable zones. After validation each ticket is valid for 24 hours. |
| **Kurzstrecke**<br>(short distance)<br>> select yellow button | 2.50 Swiss Francs<br>(2nd Class, Adult) | The stops for which it is valid are specified in the little list at every ticket machine under the heading 'Kurzstrecke' (short distance). The ticket is valid for 30 minutes. |

**For further information about tickets and schedules of public transportation see:**

- www.vbz.ch (Zurich Public Transportation)
- www.sbb.ch (Swiss Federal Trains)

## LEISURE ACTIVITIES

**About Zurich**

Zurich Tourism

The city is situated at Lake Zurich, with a magnificent view of the snow-capped Alps on the horizon. It offers a unique mixture of attractions — over 50 museums (including the Ethnographic Museum) and more than 100 art galleries, bookshops, theatres, opera and classical as well as jazz music, street cafes and chocolate shops, exclusive designer labels and Zurich designers, and the most lively nightlife in Switzerland. Recreational activities range from a visit to the riverside and lakeside bathing areas in the very heart of the city, to a spectacular hike on the Uetliberg mountain. Close to the conference venue in Oerlikon on the market square is a lovely farmers' market on Saturday morning where you can buy loca l produce (cheese, sausages, honey etc.) The main shopping area is the streets around Bahnhofstrasse next to the main station with international labels and local shops. Niederdorf across the river, just below the main university building is the place for a relaxed stroll with little shops, cafes, restaurants and bars and a feel for the atmosphere of the old town (see picture above).

The Zurich Tourist Office provides information and advice on Zurich and the region, as well as a range of souvenirs and brochures. Their wide range of services include booking hotels and excursions, arranging tour guides, and group offers (see brochures in the conference map). For a list of current cultural events see: www.zuerich.com/en/event_calendar/index.cfm

For further information please contact: Zurich Tourism, Tourist service at the main station, 8021 Zurich, Tel. +41 (0) 44 215 40 00, information@zuerich.com, www.zuerich.com

**Lake Cruise on Tuesday, 1 September 2009**

Zurich Tourism

We have reserved a limited number of places on a boat for an evening lake cruise on Lake Zurich. The cruise takes you on a round trip of the lake. On a clear day, one has a spectacular view of the Alps from the upper deck. On the boat there is also a restaurant for refreshments. You can make reservations at the registration desk at the latest on August 31 or by email to:
fachreferent@ethno.uzh.ch

Date of lake cruise: September 1, 2009
Meeting point: Bürkliplatz, 7 pm

During the summer months, the Lake Zurich Navigation Company offers numerous short trips as well as longer trips every day. For individual inquiries please contact: Lake Zurich Navigation Company (ZSG), Mythenquai 33, 8038 Zürich, Tel. +41 (0) 44 487 13 33, ahoi@zsg.ch, www.zsg.ch

## CONTACT AND MISCELLANEOUS

The conference is organised jointly by the Commission on Legal Pluralism and the Department of Socia and Cultural Anthropology of the University of Zurich.

### Conference Committee


Markus Weilenmann drmweilenmann@sunrise.ch
Shalini Randeria randeria@access.uzh.ch
Miriam Wohlgemuth fachreferent@ethno.uzh.ch
Rohit Jain rohit.jain@access.uzh.ch
Ciara Grunder ciara.grunder@hotmail.com


Information about the program, registration, publication of abstracts and special events may be obtained from either the back office at Andreasstrasse 15, Room 2.48 (during the conference, Tel. +41 (0) 44 635 21 05) or from Dr. Markus Weilenmann (Executive Secretary of the Commission) to whom all correspondence should be addressed:


Dr. Markus Weilenmann
Alpenstrasse 25
8803 Rüschlikon
Tel. +41 (0) 44 724 39 39
Mob. M +41 (0) 79 772 91 84
Fax. +41 (0) 44 724 39 40
drmweilenmann@sunrise.ch


### Emergency Numbers

| | |
|---|---|
| Police | Tel. 117 |
| Ambulance | Tel. 144 |
| Fire brigade | Tel. 118 |
| Accident and emergency | Tel. +41 (0) 44 255 11 11 |
| Medical assistance | Tel. +41 (0) 44 360 44 44 |
| Breakdown assistance | Tel. 140 |

### Insurance and Vaccinations

The conference fee does not cover insurance for the delegates. The organisers recommend that participants get health insurance in their home country to cover any emergencies in Switzerland as medical services are very expensive. Arrangements for insurances in case of travel cancellation and loss of personal belongings, if necessary must be made in the home country too. No vaccinations are needed when visiting Switzerland.

## SPONSORS AND PARTNERS

The conference committee expresses its gratitude to the following sponsors, whose generous suppor has been invaluable for the organisation of the Conference "Legal Pluralist Perspectives on Developmen and Cultural Diversity".

University of Zurich
Department of Social and Cultural Anthropology

Universität Zürich
Hochschulstiftung

Büro für Konfliktforschung in Entwicklungsländern
Office for Conflict Research in Developing Countries

Commission
on Legal
Pluralism

University of Zurich
Competence Center for Human Rights (UZHR)

University of Zurich

We also want to thank all those who have contributed to the conference with their services:

- University Canteen for coffee and snacks
- Faculty Restaurant ETH for the conference dinner
- Leonard Cecil, Head of IT-Services at department for the computing facilities
- Students volunteers at the department who have helped with the conference organisation

## LIST OF PANELS AND PAPERS

**Theme of the Conference**

In dealing with the impact of globalisation and transnational forms of law, the attention of a growing number of state institutions, policy makers, scholars and international organizations has focused on how law operates in a variety of settings. For current social, economic and political changes across the globe are manifested in vastly increased flows of commodities, people, capital, technologies, images and knowledge across local, regional and national frontiers. Attempts to monitor and regulate these changes make it necessary to reappraise the ways in which legal pluralism works and the forms that it adopts. In its conference the Commission will explore this issue from the perspective of studies of non-state and state laws and of the relationships which are possible between different laws in circumstances of legal pluralism. It will also focus on the many different ways in which laws operate and are utilised by social actors in these new circumstances. It will address the different ways in which discourses about rights and obligations are adopted by different constituencies and how local concerns shape the ways in which universal legal categories of rights are being implemented, resisted and transformed as well as reformulated in these processes. In examining these issues the Commission's Session will highlight 1) the operation and effects of legal pluralism at a variety of levels; 2) the ways in which states regulate and respond to pluralism and its impact on communities and social actors; and 3) how other normative orders are invoked in response to processes of globalisation by various bodies such as indigenous people, minorities, non-governmental organisations and individuals. Topics for discussion may comprise, but need not be limited to, the role of international law, (including human rights) as well as the management of natural resources, gender issues, law, governance and legal pluralism, law, theory and justice, and the legal regulation of biogenetics.

## Opening Session

Prof. Dr. **Anne Griffiths**, President of the Commission on Legal Pluralism,
School of Law, University of Edinburgh

## Introductory Plenary Session

## Reconfiguring governance

Prof. Dr. **Shalini Randeria**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

*Introduction and moderation*

Governance has proven to be a useful concept for investigating complex patterns of ordering and power relations. In socio-cultural anthropology the term is primarily used descriptively and denotes the exercise of power both in formal settings, such as bureaucracies, and informal settings, such as social networks. Anthropologists study the actual practices of governing, i.e. ruling, controlling and socialising individuals and collectives, with the aim to contribute to a better understanding of the dynamics of social order.

In this plenary a number of young scholars affiliated to the Institute of Social and Cultural Anthropology at the University of Zurich from medical anthropology, political anthropology and legal anthropology will present studies of governance in situations of legal pluralism. In particular they will explore the ways patterns of governance and legal pluralism are currently reconfigured under the influence of globalisation.

### Abstracts

**Gerhard Anders**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

### Global governance, war crimes tribunals and discrepant concepts of justice

The international criminal tribunals are part of an emerging regime of global governance. They are rooted in universalistic, essentially Western ideas about retributive and transitional justice. They are informed by a humanitarian zeal to end impunity and to extend Western-style rule of law to regions where warlords and political leaders consider themselves above the law. However, many people in these regions are highly critical of the international criminal tribunals and perceive them as mainly driven by outsiders' interests and oblivious to local concerns. Their criticisms also raise questions about justice, which the Western proponents of international order find difficult to answer. By drawing on ethnographic evidence from Sierra Leone and Liberia my presentation shows that ordinary people not only have a keen eye for the flaws of transitional justice but that they also challenge the retributive ideas underlying the international war crimes trials with concepts of social justice.

**Roger Begrich**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

**Conundrums of governing inebriety and indigeneity. Adivasi and alcohol in Jharkhand, India**

In the Indian state of Jharkhand, excise laws - which regulate amongst other things the prohibition or the licensing and taxation of alcoholic beverages - create a separate sphere of illegality for customary forms of alcohol consumed by the local indigenous peoples. While the state uses economistic justifications for the prohibition of indigenous forms of alcohol (these traditional beverages are too cheap to be efficiently taxed), it can be argued that it is ultimately not forms of alcohol that are governed by the law but particular forms of sociality; that it is not the danger derived from inebriety which is the target of prohibition, but the danger to the moral integrity of a population in need for special protection. Ethnographic research indicates, however, that the prohibition against customary forms of alcohol is enforced intermittently at best. While the state appears to tolerate widespread production and sale of illegal alcohol, the private police of liquor license holders and the ad-hoc courts of Maoist insurgents enforce the prohibition. This paper will discuss the paradoxical nature of liquor laws, and the manner in which both excise laws and their intermittent enforcement in Jharkhand reify the difference of the tribal subject in India.

**Carlo Caduff**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

**Participative Forms of Governance: A Case Stud**

In this paper, I explore contemporary discussions among American public health professionals over how to protect the health of the nation in a state of emergency. I focus on questions of preventative strategy and population management, examining critical debates around the prioritization of protective vaccine for pandemic influenza. As I show in this paper, the mode of circulation, distribution, and allocation of pandemic vaccine was fundamentally refashioned in the United States over the past two years. When government officials reformulated in ethical terms the crucial question of how to dispense a scarce pharmaceutical resource in a public health emergency, a distinctive set of priorities emerged. My aim in this paper is to examine this ethical refashioning of a key biomedical intervention and to interrogate the curious logics of public-ness that are increasingly embedded in a growing number of approaches of public health specialists in the United States. This work thus hopes to provide a timely contribution to critical investigations of participative forms of governance more generally.

## List of individual Panels

### Panel 2

### The challenges and prospects of intercultural approaches to governance and globalization

Prof. Dr. **Christoph Eberhard**, Facultäs universitaires Saint Louis, Brussels, Belgium

Much is being published and many conferences and seminars are held on Law, Governance and Sustainable Development. But the paradigmatic transition that these concepts reflect and contribute to shape is not sufficiently explored; neither are the stakes and the emerging challenges of a redefinition of the modalities of our living together where "state", "government", "development / growth" as central analytical tools start to be challenged. Especially what "globalization", "governance" and "development" may mean from different cultural perspectives, how this "global concepts" are translated into "local settings", what their hegemonic language and dynamics hide and suppress on the local planes are questions which remain not sufficiently explored. Nevertheless the contemporary discourses on "globalization", "governance" and "sustainable development" do permit to renew the ways we think about our living together.

"Globalization" stresses the awareness that we are all sharing the same planet and are thus bound to all participate in our "collective voyage" on "spaceship earth". "Governance" emancipates the shaping of our living together from the State monopoly and from the legal paradigm in its strict sense. Through its accent on responsibilization and participation of the actors in the elaboration and application of collective action, it points to a broadened, pluralist perspective of Law, which in an anthropological understanding can be seen as that which puts forms and puts into forms the reproduction of humanity and the resolution of conflicts in our societies. If the notion invites us to unveil its traps, especially under its form of "good governance", it is also an invitation to explore the potentialities which are inherent in the emerging forms of "living together". What are the contemporary stakes in rethinking the modalities of our "living together" and how to integrate realities which are largely ignored by mainstream modern legal, political and economic thought?

A purely Western approach, starting from the existing analytical tools, cannot suffice. If "governance" and "sustainable development" are "globalised realities" and may thus appear as new universals in the continuity of the "rule of law", "democracy", "human rights", "development", one should be aware that the institutional transfer of Western models to its former colonies has not ceased to be problematic. What do these concepts mean in very different cultural, economic, social and political contexts? Beyond their legality, are they legitimate and efficient? What are the stakes of their translation into idioms and world visions that do not share the Western cultural matrix? What are equivalents to these concepts in non-Western cultural settings? How are the questions put and approached? Could these other approaches not also be an enrichment to the "global", very "Western", way of putting questions and answers? What are the conditions and the stakes of genuine intercultural dialogue on the shaping of our living together? The requirement of intercultural dialogue is inevitable in order to complete the analysis of the current situation and in order to map out new horizons for action. This panel is an invitation to take up the challenge of this requirement.

**Contact**

**Christoph Eberhard**, Facultäs universitaires Saint Louis, Boulevard du Jardin Botanique, 43 B-1000 Bruxelles, Tel : 00 32 2 211 78 33. E-mail : c.eberhard@free.fr, Website : http://www.dhdi.org

## Abstracts

**Christoph Eberhard**, Facultäs universitaires Saint Louis, Belgium

### Governance and Globalization in an Intercultural Perspective. Challenges and Stakes

"Globalization" stresses the awareness that we are all sharing the same planet and are thus bound to all participate in our "collective voyage" on "spaceship earth". "Governance" emancipates the shaping of our living together from the State monopoly and from the legal paradigm in its strict sense. Through its accent on responsibilization and participation of the actors in the elaboration and application of collective action, it points to a broadened, pluralist perspective of Law, which in an anthropological understanding can be seen as that which puts forms and puts into forms the reproduction of humanity and the resolution of conflicts in our societies. If the notion invites us to unveil its traps, especially under its form of "good governance", it is also an invitation to explore the potentialities that are inherent in the emerging forms of "living together". This paper will explore the contemporary stakes in rethinking the modalities of our "living together" and the theoretical and practical challenges that arise when one attempts to take into account realities that remain largely ignored by mainstream modern legal, political and economic thought and opens up to intercultural dialogue.

Indeed, a purely Western approach, starting from the existing analytical tools, cannot suffice. If "governance" and "sustainable development" are "globalized realities" and may thus appear as new universals in the continuity of the "rule of law", "democracy", "human rights", "development", one should be aware that the institutional transfer of Western models to its former colonies has not ceased to be problematic and that nowadays no culture alone has THE solution for the organization of the "good life". This paper will draw on the teachings of anthropology of Law in order to propose paths to rethink globalization and governance within the frame of a "pluriverse" a world marked by pluralism, without falling into the traps of a steamrolling universalism or a ghettoizing relativism.

**Matthieu Galey**, University Paris 02 Panthäon—Assas, France

### Categorization of property regime as a problem: The search for new theoretical tools for the treatment of unprecedented practical problems

This communication stems from the noticing that no sustainable theoretical categorisation of property regimes (private, public or common) has been produced up to these days. It assumes that the only way to produce valid categorisations of legal property regimes, workable and sustainable through different concrete contexts of localised systems of property and social practices, is to take the analysis of existing positive legal regimes as a formal starting point. Its fundamental assertion is that the very project of producing a universally valid typology of property regime is misleading insofar as it tends to reify its object. Instead it proposes to substitute for it the project of a formalised process of categorizing property regime helping to cope with the peculiarities of each individual context from both a legal and an interpretational point of view. In this regard, it focuses on, on the one hand, some theories of comparative law epistemology (The "systemal analysis" theory of G. Timsit; the "components of legal rules" theory from R. Sacco; Institutionalist analysis of legal reasoning from N. McCormick and G. Samuels) and, on the other hand, on a recent development in the field of non classical intuitional logics, named *locology*. The point of the paper is to stress both the teleological convergence and the methodological connectedness of both streams of thought, and to show how fruitful their transdisciplinary combination can be in matter of categorizing property regimes.

**Jumhari**, Padang State University, Indonesia

**Women and Legal Pluralism in a Frontier Region: Case study of women's role in Nagari Tarung-Tarung Sub Regency Rao, Pasaman Regency, West Sumatra Province, Indonesia**

A frontier region is not simply the border between territories and administrative regions. The term also refers to the cross-culture areas between two different population entities. Nagari Tarung-Tarung geographically has a border with West Sumatra Province, Indonesia. But culturally it is also the intersection of two different cultures, between the Minangkabau ethnic group which has a matrilineal lineage system and the Batak Mandailing ethnic group which has a patrilineal system. Nevertheless, these different cultures are able to live peacefully together. There is even, in some kampoengs evidence of a new identity in the Rao culture, which is different from both the Batak and the Minangkabau cultures. It has been said that Islam has been a bonding factor behind this through the process of islamization by the Paderi Group. It led the Batak later to embrace this religion just like the Minangkabau.

It is interesting to see that the process later had an influence on the role of women and their position in the process of mixed weddings. In this respect the renowned Nagari Rao *sumando serikat* wedding developed as a cultural compromise to regulate mixed weddings among the Minangkabau and the Batak. However, a difficult problem arises if a divorce occurs in such cases, raising issues especially with regard to the position of women and their role within their culture system. Issues which arise are especially those regarding the assets of marriage, rights to child custody, and the right of women to decide their own future. The question is, how is adat law implemented to solve this problem? Is it possible for the positive law (the national law) to intervene with the possibility of its being accepted by both parties, especially by women?

This paper aims to consider how that combination of adat law, Batak law and Minangkabau law may function in relation to national law regarding women's role and position in Nagari Tarung-Tarung, from the perspective of social history and legal pluralism.

**Joris van de Sandt**, University of Amsterdam, The Netherlands

**Indigenous peoples challenging mining governance in Guatemala and Colombia**

Over the past decade, Guatemala and Colombia — both fragile (post-conflict) democracies — have seen a strong upsurge in foreign investment in the mining sector, principally as a result of increased demand for minerals from Asian growing economies. After reforming their mining codes and creating investment-friendly legislation, governments of both countries have issued hundreds of mining permits to large transnational mining companies. Many (in Guatemala: most) of these mining concessions are situated in the ancestral territories of indigenous peoples, for whom mining projects may have considerable negative environmental and social impacts. While both countries have recognized, to a more (Colombia) or lesser (Guatemala) degree, the rights of their indigenous populations ("collective land rights", "official indigenous languages", "customary law", and "traditional authorities"), in neither case have governments complied with their obligation to consult with potentially-affected indigenous communities and seek their free, prior, and informed consent before proceeding with mining projects on their lands. Conscious of — or having been made aware of — their rights, these communities have started to mobilize to counteract these developments, while mining companies and governments in turn have reacted to community responses with legalistic or authoritarian attitudes. In both countries (like elsewhere in latin America), the resulting mining conflicts have national reverberations and give renewed vigor to debates on issues of governance, multiculturalism and citizenship. In this paper, I will compare two cases of mining conflicts with indigenous peoples, one from each of both countries. I will highlight the ways in which mining-affected indigenous or ethnic communities and their allies (indigenous peo-

ples' organizations, development and human rights associations, environmental protection groups etc.) use law — stemming from state, international and indigenous legal orders — and existing (social/political) institutions to defend themselves against power imbalances and to gain more control over the natural resources on which they depend, as well as over the direction of development. Finally, I will hint at the outcomes of these mining conflicts with indigenous peoples in terms of (possible) new local and national regulatory frameworks for, and practices of resource governance in indigenous habitats/territories.

**Laura Rabot de la Fuente**, Universidad de Barcelona, Spain

**The Rights of Intellectual Property in China**

Nowadays China is a paradise for the pirates. The adhesion of China to the World Trade Organization (WTO) in December 2001 implies, among other derivative commitments, compliance with the International Agreements on Traded-Related Intellectual Property Rights (TRIPs). From the beginning of the '80s, when China started to work towards accession to the WTO, many laws have been promulgated for the protection of rights in intellectual property in order to comply with international requirements and standards. The major problem is not rooted in a lack of legislation that officially already protects these rights on paper, but in the lack of effective application.

Piracy and infringements of Intellectual Property Rights (IPRs) can be confronted not only from a legal point of view, but also economically, politically, culturally and socially. It is especially with respect to this point that it is essential to stress the enormous difference between chinese culture, art and law (*fa*) and these western concepts. Since the time of Confucius the art of the copy has been praised as a form of learning.

Because of the deficits mentioned the WTO has established that states may enjoy periods of extension of the times required for the fulfillment of the TRIPs obligations. For all these factors it is important to analyze the basic characteristics of IPRs in China: the legal protection and the related mechanisms of dispute processing (administrative processes, civil and penal adjudication, and arbitration); the procedures of registration and the existing legislation on this subject in China, and also the chinese institutions related to IPRs; and the extent of infractions and sanctions. In order to solve the major problem of the moment, the fight against piracy, it is necessary that there should be effective application of rights to intellectual property generally in China.

**Claudia Ituarte**, UCL, University of London, UK

**Upper Amazonian people and collective knowledge governance: Challenges and prospects of the Peruvian registers**

In the context of national implementation of international legal instruments such as the Convention on Biological Diversity and the Andean Decision on access to genetic resources, Peru established its first legal regime for the protection of collective knowledge of indigenous people related to biodiversity. The regime's objective is to provide "fair and equitable distribution of the benefits derived from the use of collective knowledge". It includes public, confidential and local registers of knowledge as sui generis forms of intellectual property rights. Peru is the first country with large indigenous population to create such regime (Alexander, Chamundeeswari *et al* (2004). This paper shall analyse views of Upper Amazonian indigenous leaders about the way collective knowledge registers operate under this regime.

In spite of the establishment of a legal regime for the governance of Amazonian plants and knowledge, ownership continues to be contested. Additionally, even when discourses associate the notion of "just

benefit sharing" to solidarity and equity, its meaning and implementation is polemical. The fashionable terminology of "just benefit sharing" has significant social, political and environmental effects (Burnham 2000) since each project participant will attempt to define "just benefit sharing" in terms of their own interests (Tobin 2002; Parry 2004).

Empirical analysis is needed if laws and policies are to reconcile the interests of different actors, specifically in the use of medicinal plants, associated knowledge and land with biodiverse ecosystems (William-Jones and Graham 2003). In this paper, I propose to distance from stereotypes that have resulted in irreconcilable definitions and positions. The two main stereotypes are, firstly, knowledge conceived as a restricted commodity, and secondly, knowledge as a common heritage of humanity. Instead, through ethnographic research in the Amazon, this paper analyses empirically Amazonian gatekeeper' discourses and practices related to the collective knowledge in a context of legal pluralism. Moreover, conclusions show that is not only a matter of recognising co-existence of different legal regimes on indigenous knowledge governance, but also the power implications of information access and exclusion.

**Wang Mei-Hsin**, National Yunlin University, Taiwan

**The Roles for Traditional Wisdom and Knowledge in relation to Intellectual Property**

Intellectual property ownership, especially when it is involved in cultural heritage, or traditional wisdom or knowledge, always carries a risk or worry for investors, assignees, inventors and related personnel. Even a quality patent may not be secure enough to free the holder from future litigation and social criticism. Because patented technology can give rise to considerable profits, competitors will try every possible means to take over the market and the technology, sometimes aiming to make use of core technology, and also to develop in their favour marketing awareness or brand promotion. They can claim that a patent is invalid through their having anticipated the invention (35 U.S.C. § 102) or through the obviousness of the process (35 U.S.C. § 103), for example. Unfair tactics are the new fashion, with various tactics being used such as attacks on unsupported specifications, or more obvious objections, such as objecting to a slight lateness in the filing of an Information Disclosure Statement (IDS) for new applications, or using the crime fraud exception to the attorney-client privilege. These counteractions will be described in detail with cases.

The current worldwide economic recession has aroused more competition over cash flow and patent securitization. However, the most advanced financial technique for the recent 20 years started with pass-through and then mortgage-backed bonds to collateralized mortgage obligations. Asset-backed securities have expanded from mortgage loans to cover car loans, credit cards and suchlike, providing a wide variety of financial instruments. Intellectual property is a kind of intangible asset. Its use to back asset securitization gives opportunities to inventors, start-up companies and capital-demanding industry to raise funds with flexible resources and to employ capital on a much large scale. Patent-backed asset securitization has attracted attention from international companies which seek to apply it in their intellectual property strategies. For developing countries or independent inventors, it is a useful financial tool to support the development of possible inventions involved in cultural heritage and traditional wisdom or knowledge.

In the case of some intellectual properties involved in traditional knowledge, such as US patent nos. 6589780 (Bio-reactor for enhancing the Biomass yield of plant organs), 6511821 (Process for the preparation of novel growth media from distillation and other plant wastes for mass multiplication of bio-control fungi), 7297659 (Synergistic fermented plant growth, promoting bio-control composition) Indian assignees have been lucky enough to develop and own them. However, while in these cases the intellectual properties are well protected with good quality patents and owned by Indian parties, things are not always perfect. Developing countries have supposed that if they forbid original material or species to be

patented, or set up specific regulations to govern their use, then they can avoid the problems of possible infringements or competition from high cost goods made in western countries by using the original materials or species within their own countries or regions. But there are always tricks and alternatives which will be used as long as profits exist, and law or regulation, or even international treaties cannot solve these conflicts and provide justice.

This paper will discuss whether there are possible measures to ensure justice and the protection of human rights in cultural heritage and traditional wisdom or knowledge, and what is the current situation regarding the issues previously mentioned. Because it involves human culture and social activity, the application of intellectual property law to cultural heritage will be more complex and will have to allow for variations in individual cases. International organizations and treaties have only provided guidelines for reaching a common consensus, and there has not yet been developed a powerful enforcement system to implement intellectual property rights in this field. This paper presents from the perspective of patent law a demonstration of the patentability of repairing techniques, copyright in government-owned objects, design patents derived from known cultural objects, trademarks derived from known cultural objects, regulations regarding trade in private antiques, and the duplication of government-owned cultural objects. Interpretations of the considerations and conflicts which hindered the inclusion of cultural objects into the current intellectual property system are illustrated from legal points of view. Practical examples of patentability are also included.

**Frank Muttenzer**, IUED, Geneva, Switzerland

**Global conservation, Afro-pessimism and the Austronesian frontier: The three cultures of environmental governance in Madagascar**

Imagine a world in which political agendas and class interest determine environmental discourses. Conservation biology would appear colonialist. Political ecology would appear existentially determined by the interest of defending the poor against the conservation hegemony. The integration of epistemic communities in a unified problem-solving environmental dialogue would also appear slightly ethnocentric. There are no such trans-cultural standards, no middle-ground from which to judge ideologies. Social scientific research instead requires the multiplication of worldviews and disciplinary paradigms.

Around A.D. 800 a frontier people of mixed Indonesian and African origin settled the island of Madagascar. Since then, the presumably entirely forested paradise has become desperately eroded and rampant human burning is wiping out the last remnants of pre-historic ecosystems. Political ecologists argue that this narrative is in large part a Western ideology and that the environment should be considered as changing rather than degrading. Degradation is shown to be due to unwise policies that create conflicts over resources, rather than to traditional land uses. Human actions and institutions are identified not by shared physical traits but in terms of what they mean to the participants. The stigmatisation of slash-and-burn agriculture as well as the claim that the core cause of deforestation is population growth have been criticised accordingly, with a view to humanise conservation policy.

There is, however, a fundamental difference between communication in socially and intellectually homogeneous groups and communication in heterogeneous groups. To conservationists, carbon payments simply mean compensation for a change in agricultural technique. To a peasant, compensations mean giving up ancestral rights to land and livelihood for himself and his children. Given cultural heterogeneity, the issue of meaning cannot be settled through negotiation, nor is it possible to resolve political conflict by means of epistemology. Social scientists, on the other hand, may feel that the middle-ground epistemology of critical realism conceals the social processes of marine and forest frontiers. The commitment to shared, empirically based, evaluative standards irrespective of worldviews, may lead them

to reject the notion of environmental problem-solving. The meaning and validity of public policy is, after all, relative to the worldviews of the participants.

**Nursyirwan Effendi**, Andalas University, West Sumatra, Indonesia

### Practice of Globali%ed Good Governance in Indonesia: Reclaiming Local Rights on Global Development in the context of regional Autonomy

Development in Indonesia is visibly related to globalized processes. As a result, Indonesia carried out a political reform and a governmental paradigm shift following the widespread economic crisis among Asian countries in 1998. One of results which followed immediately on the impact of that crisis was the production of the government policy of regional autonomy (*Otonomi daerah*), set out in governmental regulation no.22/1999. Since then all the provinces of Indonesia have implemented policies of regional autonomy as the new style of local development. Decentralization is the main principle that becomes the *geist* of local development together with policies on certain issues of civil society and human rights. A globalized pattern of democratization by means of the concept of clean and good governance became an integral part of local development in the regional autonomy framework. Needless to say, this kind of governance became a requirement which the development mission demanded of local leaders. What was the impact of that? Local government had to reform structural and cultural patterns of development and bureaucracy, moving away from the local point of view towards the national and even global points of view and interests. However, problems emerged at the local level. Local people defined regional autonomy in terms which gave effect to local rights to live as they wished, for example to strengthen the position of customary law in the regulation of local governance, or to reposition local leaders who mainly come from *adat* (customs and traditions) as the principal leaders. A number of cases in Indonesia have shown the conflicts of interest between government at the local, provincial and national levels. This conflict was also shown in a number of contradictions which arose in the regulations. The paper will focus on the case of the practice of regional autonomy in west Sumatra. This case will show how some local cultural responses to the implementation of the regional autonomy policy had the effect of actually bringing the global concept of clean and good governance down to the local level, while at the same time local government and local people have understood the concept differently from their perspective. Therefore, the demand to reclaim local rights on development becomes a major issue, although this also has triggered some conflict over regulation, perspectives and development practices at the higher level of governance.

**Patricia Wiater**, University of Freiburg, Germany

### The approach of the European Court of Human Rights towards Legal Pluralism — Intercultural Dialogue?

In its "Faro Declaration on the Council of Europe's Strategy for Developing Intercultural Dialogue" (1) from 2005, the Council of Europe faces the challenge resulting from the cultural diversity among its 47 member states by stating: *"(...) Convinced that the Council of Europe, on the basis of the universal human rights reflected in the Universal Declaration of Human Rights and other relevant instruments of the United Nations and the European Convention on Human Rights, has an essential part to play in the systematic development of intercultural dialogue as advocated at the Summit, with a view to both building Europe without dividing lines and promoting dialogue and co-operation with neighbouring regions and the rest of the world (...).".* The Council of Europe refers in particular to the European Convention on Human Rights as the main tool for the political promotion of intercultural dialogue in order to live together peacefully and constructively in a multicultural world, and in order to develop a sense of community and belonging within Europe and the rest of the world. The Council of Europe is a political inter-

national organisation, mobilizing the European Convention on Human Rights and intercultural dialogue as *political tools* for reconciling cultural diversity.

The European Convention on Human Rights as a binding legal text is interpreted and applied by the European Court of Human Rights in Strasbourg which aims at elaborating a "European Culture of Human Rights". Just as the Council of Europe, the Court is confronted with a diversity of cultural and legal traditions among its contracting states. In particular, diverse religious orders and customary law systems constitute within Europe a variety of unwritten normative systems. If submitted by individual applicants and responsible states in judicial proceedings, the Court is asked to develop theoretical and methodical approaches appropriate to reconcile conflicting pluralistic legal systems. The presentation aims to reflect the question: If intercultural dialogue is the Council of Europe's *political tool* for dealing with cultural diversity = what is the *legal approach* the European Court of Human Rights adopts in its jurisprudence towards issues related to cultural diversity and legal pluralism?

(1) The Declaration was elaborated by the Ministers responsible for Cultural Affairs of the States Parties to the European Cultural Convention, meeting in Faro on 27 and 28 October 2005. See the Council of Europe's document CM(2005)164 7 November 2005, the electronic version is available under: https://wcd.coe.int/ViewDoc.jsp?id=927109&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

**Zaenuddin Hudi Prasojo**, The Graduate School of Gadjah Mada University, Yogyakarta, Indonesia

**Restorative Justice and *Hukum Adat of Dayak Katab Kebahan* of West Borneo: A Study of Restorative Justice and Customary Law in the Legal Justice System of Indonesia**

Over the past thirty years, the criminal justice system has been challenged by some scholars, thinkers, and even practitioners of the discipline. In parts of the western world such as North America and Europe, the growth of a new field of study, restorative justice, has been fascinating and challenging to many people, including not only those working in criminal justice systems but also academics and other practitioners. One of the reasons is that restorative justice theories and practices have grown and challenged mainstream thinking and the practices of current criminal justice systems in almost every country in this modern world. A number of scholars like Caley (1998), Johnstone, (2002) and Zehr (1990) have worked intensively on the issue of restorative justice. The United Nations has also recognized the theories and practices of restorative justice and even acknowledged them to be an alternative justice system. In addition to the theory and practice of restorative justice, efforts to improve the justice system have inspired practitioners in New Zealand to apply restorative justice principles in the justice system of the state.

This work aims to discuss the principles of restorative justice theory and practice and their relevance to the criminal justice system and customary laws (*hukum adat*) or practices in Indonesia. I will analyze a particular *hukum adat* within an indigenous community in West Kalimantan of Indonesia, namely *Dayak Katab Kebahan*. The work will also examine the use of *hukum adat* in dealing with environmental disputes between the community and a state-owned forestry company that provides reforestation, production, and marketing services. I have come to understand that the principles of restorative justice theory have inspired some practitioners because they address the needs of people seeking alternative justice systems beyond the criminal justice systems in place. Thus, I try to see and discuss what could and could not work, from restorative justice principles to justice practices, seeing the community as a part of Indonesian society applying criminal justice adopted from the "western justice system" inherited from the Dutch colonists who were in this region for more than 350 years. This work is indeed interesting since it talks about the most populous Muslim country in the world that applies a "secular justice system" instead of Islamic law.

Finally the paper will contribute to the discourse of locality and development in developing countries which have been influenced by globalization. "Glocalization"- the interaction of local cultures and practices with modernism - has become an important term in the humanities and social sciences since it includes the dynamics of people and their responses to globalization and modernism in both developed and developing societies. The responses of local community-based practices such as *hukum adat* to so-called "modern life" is becoming an exotic phenomenon. How can local communities living far from modern cities take part as members of this global village-- the borderless village consisting of communities living in this planet, both in developed and in developing countries?

**Hsu Yao-Ming**, Institute of Law for Science and Technology, National Chung-Hsing University, Taichung, Taiwan

**Climate Change and Differentiated Responsibility**

Nowadays the climate change becomes the most serious problem in our planet. But as we know, the attitudes toward this seem sharply different between the United States and the European Union, and between the developed countries and the developing ones. Based on the UNFCCC and its Kyoto Protocol, the contracting parties try to eliminate the emission of greenhouse gas in order to diminish the artificial destruction to our environment. But, the outsiders of this mechanism seem not caring about this.

Facing on this possible environmental catastrophe without national frontiers, a global vigilance appears necessary. Nevertheless, how to achieve its aim in the name of global governance, on considering the possible different wills and capacities in each country? This would be the major concern of this essay.

First of all, an intercultural approach seems to be indispensable, for the cultural backgrounds of the protection of environment forms a basis of our discussion here. Further, a mutual understanding of these cultural backgrounds helps us to cultivate the different attitudes towards the climate change and the global warming. Secondly, a consideration of sustainable development should be taken, as we have just one chance to save our plant. Thirdly, a system of development theory in political science serves here a basic theoretical hypothesis, too. In the global south/north contrast developments, a differentiated responsibility both for developed countries and developing ones appears reasonable and justifiable. In sum, an intercultural concern, an environmental caring and a differentiated responsibility would construct the whole image of strategies for the climate change.

## Panel 3

## Local state and access to productive resources in (post)postsocialist settings

Prof. Dr. **Peter Finke** and Dr. **Tatjana Thelen**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

As everywhere inhabitants of (post)postsocialist countries always secured and maintained access to productive resources in many ways, but reforms after socialism brought fundamental shifts leading to new patterns of legal pluralism. In the socialist period access to productive resources such as land, seeds, machinery and forest wood was often mediated by membership in collective farms and these socialist access rights were widely lost in the first period of reforms (Harcsa, Kovägh and Szelänyi 1998). In the first phase after socialism, people in countries with collectivised agriculture gained new forms of access to agricultural land, forest, and machinery primarily by the property reforms instituted by the central state (Verdery 2003; Sikor 2004). Often property legislation was implemented by local state ac-

tors, who staffed the commissions, thereby shaping the process of distribution of access among competing legal claims. Sometimes land reforms became caught up in extensive legal disputes with profound impacts on both familial and social relations. Concrete implementation of land reforms has received most scholarly attention and many case studies show the great diversity in local solutions (Cartwright 2001, Dorondel 2006, v. Hirschhausen 1997, Thelen 2003, also various case studies at the MPI for Social Anthropology: httpll:www.eth.mpg.de).

While these assessments of the forms of local power have been mainly developed during times of great change (privatization), there is now—after these processes have largely been completed in agriculture (they continue in the forest and water sectors)—the need to explore how such formations have or have not stabilised. In this workshop, we seek to explore how access to productive resources connects to mechanisms of control and other networks. We invite empirical inspired case studies as well as theoretical contributions.

**Contact**

**Peter Finke**, University of Zurich, Department of Social and Cultural Anthropology, Andreasstrasse 15, CH-8050 Zurich, Switzerland, Tel : 0041 44 635 22 33. E-mail : p.finke@access.uzh.ch
**Tatjana Thelen**, University of Zurich, Department of Social and Cultural Anthropology, Andreasstrasse 15, CH- 8050 Zurich, Switzerland, Tel : 0041 44 635 22 28. E-mail : thelen@access.uzh.ch

**Abstracts**

**Stefan Dorondel**, "Francisc I. Rainer" Institute of Anthropology, Bucharest, Romania

**Conflictual *Pasts*: Property Negotiation, Local Politics, and Access to Postsocialist Assets in Romania**

One of the main tasks of the newly post-socialist governments was the restitution of land, forest, and assets to the historical (prior 1948) owners or to their legitimate heirs. Restitution is based on documents that have to prove the ownership of the claimant. On the one hand, this policy has triggered a "war of memory" among villagers (Verdery 1998; Dorondel 2005). On the other hand, the past is called into present as a main actor into a rather political process. This paper seeks to highlight that one of the main features of property in postsocialism is represented by the negotiations among different actors at various levels. The local past is used into this negotiation as the most powerful instrument to prove one's ownership. Moreover, the past itself is negotiated among different actors. The ethnographical findings suggest that different owners have different understanding of the past. Family genealogies, history of the village and of certain places become a powerful instrument within the present local conflicts for property rights.

This paper suggests that property should not be defined only as a bundle of rights (MacPherson 1978), as a bundle of powers (Verdery 1999) or as negotiation among different actors (Sikor, Stahl, Dorondel 2009) but also as an instrumentalization of the past for present claims. Local history is an important part of the political process of property claims over valuable places.

**Peter Finke** and **Tatjana Thelen**, Department of Cultural and Social Anthropology, University of Zurich, Switzerland

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**Lale Yalcin-Heckmann**, Max Planck Institute for Social Anthropology, Germany

**Access to Productive Resources and Access to Markets: Assessing two key factors for economic mobility in rural Azerbaijan**

This paper looks at a rural settlement in West-Azerbaijan and the agrarian politics and strategies in early 2000s. The particular settlement was known with its herbs which rural households produced either on their household plots or the newly received privatized land shares. The produce went almost solely to Russia, primarily to Moscow and St. Petersburg; the sale of the herbs was organized informally and the access to these foreign markets as well as the income made from these sales was considered to be essential for rural livelihood. The paper will discuss the production of herbs and other agricultural products as alternatives and will assess the role of access to foreign markets as opposed to national markets and access to land as key factors in determining production strategies. Further factors of organizing labour and technical support for production and cultivation are also relevant in this process. How the local state bodies power holders assist, control and/or extort from these processes will be another topic of discussion.

**Julia Schmid**, Department of Cultural and Social Anthropology, University of Zurich, Switzerland

**Land conflicts, migration and tourism in coastal Albania**

Nearly twenty years after the breakdown of communism land distribution of former collective property has not yet been finished in Himara. Located at the Albanian South Coast close to the Greek border the small town has a growing tourist industry: fast tourist development provided new opportunities for investments and the prices for private and community property are rising sharply. At the same time many inhabitants of the mostly Greek speaking minority migrate temporarily or on long term basis to Greece. In this situation the negotiation of access to land is a significant factor for social stratification and identity building in Himara. Land conflicts are used to develop and strengthen concepts of national identities. The local actors demand a special status as a Greek minority in the Albanian nation state and challenge the central authorities.

This presentation is based on six month fieldwork, in which I looked at different patterns of conflict and strategies people use to get into possession of land. I identified different actors involved and the concepts and arguments underlying their land claims. Locals, immigrants, emigrants, remigrants and transmigrants, local authorities and the central state, all have different interests and resources to allocate land. So do international organizations like the World Bank, whose concern is not so much how the land is distributed, but rather is focused on development plans for the area restricting property rights, in order to balance the protection of the coast line and economic interests.

In this presentation, I will focus on a case study of local negotiation of land rights and terms of property. The families involved in this conflict try to appropriate land for investment possibilities. But the struggle of the different actors for land involves far more: the negotiation of their position in the family, in the community as well as the negotiation of their identity in the geopolitical field.

## Panel 4

## Negotiating Gender and Legal Pluralism: Local, National and Transnational Perspectives on Law

Prof. Dr. **Anne Griffiths**, University of Edinburgh, UK

In recent years the mobility of persons and law both within and beyond nation-states has been such that is necessary to reformulate the relationship between local, national and transnational domains. This requires a reappraisal of the role of the state and its relationship with law for given the intersection of development, transnational capital, civil society, non governmental actors, and states it is clear that nation-states can no longer be treated as discrete legal entities that can be studied in isolation either internally or externally. These factors that are driving social and economic change highlight a need to reassess the relationship between law, culture and rights, in an age where law and legal institutions now cross local, regional and national boundaries and in which the 'local' is embedded in and shaped by regional, national, and international networks of power and information. This is especially pertinent given the emergence of and prominence accorded to international human rights in the struggles over claims to non-discrimination and equality, land and resources, rights to cultural property and recognition and protection of minority and/or group identity.

However, in reappraising legal pluralism little attention has been paid to the gendered dimensions of law, despite the impact that this has on women's and men's access to resources, including legal institutions. This panel will explore the importance of gender and its impact on law at multiple levels. It will investigate how gender as a construct is socially and legally constructed and the consequences that this has for people's access to property and resources and the strategies that they employ in their pursuit of the latter. It will consider the extent to which international instruments and conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women or the African Charter on Human and People's Rights, may be used to empower women, as well as the extent to which such international instruments and conventions (that set up cross cultural expectations and agendas with regard to women's rights) may be applied or tailored to tackle the local, everyday domains in which men and women operate.

In tackling these issues the panel seeks to highlight women and men's experiences of legal pluralism, with a particular emphasis on the advantages and disadvantages that plural legal systems pose for women. Such issues raise questions about the potential, as well as the limits to, a rights centred discourse in this context. This in turn raises questions about who has the power and authority to define, interpret

and implement law at the many levels at which it operates, and the implications that this has for women's access to, and use of, law.

**Contact**

**Anne Griffiths**, University of Edinburgh, UK, Anne.Griffiths@ed.ac.uk

**Abstracts**

**Mäirdad Enright**, University College Cork, Ireland

**Desiring Boundaries: Women, Equality before the Law and England's Imagined Law-Sharia Divide**

In this work in progress, I want to examine a series of government statements about the relationship between English family law and khula divorce made in the year or so following the Archbishop of Canterbury's ill-fated 'multicultural jurisdictions' speech. In rejecting the Archbishop's proposal for expanded interactions between civil law and religious legal practices, Gordon Brown's government has, in piecemeal fashion, articulated a vision of English law's role in securing equality for Muslim women upon divorce - in particular those who deal with sharia councils in ending a religious marriage. In these statements, the family courts are unproblematically constructed as sites where women's rights are inevitably vindicated; accessible to all Muslim women who choose to approach them. In order to sustain these three premises, the domain of the courts and the sphere of angrezi shariat are and must be understood as separate, so that Muslim women's equality in divorce only becomes concern for law or relevant to law at the point when a women exits the bounded alegal zone of sharia and enters the law's territory. Legal pluralist theory provides ample tools for demonstrating the falsity, or at least the fuzziness of that boundary - enabling us to argue that civil law is implicated in, shapes and drives women's engagement with 'angrezi shariat' practices, so that if those practices work to oppress Muslim women, that oppression is in a very strong sense an issue for civil law. If we can argue that sharia councils are 'law's responsibility', the crucial question then becomes one of how and why Brown's government insist on the discursive separation between civil law and sharia - on denying that responsibility. Reading the government position against the background of the wider political British 'sharia council' debate, the paper argues that we should understand the production of a law-sharia divide as an exercise in boundary control and containment- of the production and exclusion of a strange legal 'other' assumed to pose a threat to the stability of the nation-state legal order. In the aftermath of the Archbishop's speech in particular, sharia was presented as the dangerous opposite of civil law: un-British, barbaric and unfair to women. The maintenance of the law-sharia divide acts to depoliticize English law's violent encounter with 'angrezi shariat' and with the women who engage with it. In the English case study, we see an important intersection of law's own vulnerability and Muslim women's vulnerable citizenship - one which must be explored as a precursor to any effective discussion of legal pluralism and gender equality.

**Mohamed Abdo Mahgoub**, Anthropology Dpt. Faculty of Arts, Alexandria University, Egypt

**"Woman's Rights in the Customary Laws of Awlad Ali Tribes of the Western Desert of Egypt"**

This paper aims to give an ethnographic presentation of the status of women and their rights in Awlad Ali tribes in the Egyptian Western Desert as follows:

Firstly: The structure and functions of the "Awayid or Drayeb" which consists of sixty-seven articles, and currently is practice and governing the different tribal groups of Awlad Ali tribes, which belong to distinct kinship and ethnic origins, as they are living in distinct patterns of semi-nomadic and rural villages,

and traditional urban communities. Secondly: Presenting the customary laws articles which codify the women's rights, particularly in the following aspects:

*Individual and tribal criminal responsibility.
*The Rights of inheritance.
*The marital choice.
*Adversarial husband in marital disputes.
*The right to divorce.
*The right to acquire individual property.
*Compensations in case of sexual assaults.
*Right to education.
*The status of women working outside the home.
*The right to participate in public life (political and social activities).

Thirdly: Tracing the impact of social changes and cultural developments in the Egyptian desert areas on the Status of Women, especially regarding education - political and economic changes - urban growth — information and new media - means of communication - the growth of the role of civil society — the demographic changes.

**Erman Rajagukguk**, Faculty of Law, University of Indonesia, Indonesia

**Legal Pluralism in Inheritances: Case Studies on Women Rights of Lombok Island in Indonesia**

Lombok Island is located in the middle part of Indonesia. The population consists of four main ethnic groups, such as, Sasaknese, Balinese, Sumbawanese, and Chinese. This research will focus on the inheritance system of Sasaknese who embrace Islamic religion. However, some Sasaknese obey to their Customarily Law or Hukum Adat. Under Sasak Customary Law the woman does not inherit from her parents, because the Sasak family is patrilinealy organised, i.e. the wife belongs to the family of her husband. She only receives the goods she wears, such as, rings, ear stud, bracelet, necklace, sometimes made from silver or gold. However, land and house will never be part of her inheritance; this property belongs to her brothers. Even the family of Sasaknese embraces religion of Islam that inheritance between man and woman would be to one appeal, some Sasaknese families obey their customary law. However the woman who has not satisfied with this customary law system will go to the Islamic Court, submit their complain in order to get two one appeal in inheritance. The Islamic Court under the Islamic Law i.e. the holy Quran will decided that the heirs would be divided between man and woman base on two one appeal. In the year of 1978, Indonesia Supreme Court in Inaq Rasini v. Imaq Atimah et.al. No. 1589 K/Sip/1974 mentioned that under independent Indonesia man and woman has an equal status and equal rights, therefore inheritance man and woman has equal rights i.e. fifty percent appeal fifty percent. This Supreme Court decision quoted the previous Supreme Court decision in Kaban Jahe, South Sumatera, in Sitepu v. Ginting No. 179/Sip/1961 that stated woman of Batak Karo ethnic group has the equal rights with man. Woman of Batak Karo before the Supreme Court decision had not right to inheritance. After Supreme Court decision, many woman in Lombok went to the Court for First Instance to submit a complain for equal rights in inheritance. At present, in the Lombok Sasaknese ethnic group who embrace the religion of Islam has legal pluralism on inheritance : Customary Law, Islamic Law, and State Law. The tree legal system coexistence in Lombok.

**Li Na**, School of Law, Yunnan Finance and Economics University, China

**Legal Costume of Domestic Violence: Woman's life, Man's Law? A Study of Battered Women as Law-breakers in China**

The international history of women movement and the global flow of human right protection have greatly shaped the current context of counter-violence against women in China. More specifically, it is not until the Beijing Conference 1995 that the awareness and debates on violence against women in China has been increasingly made public. The state's institutional framework, as a result, is congenitally deficient in the understanding of gendered discourse from inside.

The paper, based on a study that battered women are in conflict with law as strategies, seeks to discuss how legal institutions are deployed in the treatment with women, especially in judicial process. The paper holds that law is, in fact, constructing particular personhoods of battered woman at different stages of the whole process of violence, e.g. as 'victim' or 'criminal'. It is important, however, to examine the very context of domestic violence for a 'deep interpretation'. One is the historical and structural context of social relations, in which violence against women is legitimated in the private sphere and become invisible for the public intervention. The other is the context of legal tradition and practice, in which legal institutions, with ignoring and neglecting gender difference, produce the paradox in both protection and constraint of women's rights. It is argued, hence, that the imbalanced gender power in access to law will influence the nature of justice in domestic violence against women.

**Annika Rabo**, Centre for Research in International Migration and Ethnic Relations, Stockholm University, Sweden

**Family and family law among transnational Syrians**

For decades Syrians have been significantly involved in temporary migration or permanent emigration to Europe, Canada, the USA and Australia. There is also a significant labour migration to the Lebanon and the Gulf countries. Every Syrian family has members who live, or have lived abroad. The movement of Syrians across national borders has become more and more transnational, and family ties are established, maintained or dissolved across national borders.

Syria can be characterized as a multicultural and multireligious society. Most Syrians are Sunni Muslim, but there are various Christian as well as Muslim minorities. Religion is also crisscrossed or affirmed by ethnic labels like Arab, Kurd, Armenian or Suryoye. Although Syria in many was can be regarded as a secular country, citizens are obliged to have a religious affiliation. This affects women and men in different and conflicting ways since children inherit both citizenship and religious affiliation from their fathers. The family law of the state is to a large extent based on Hanafi Islamic jurisprudence, but religious minorities such as different kinds of Christians are must follow their own family law in issues of betrothal, marriage, divorce, and - for some — inheritance. They have their own religious courts to which they have to turn to settle disputes. The legal pluralism of Syria thus serves to maintain boundaries between religious groups. Transnational marriages may both challenge and reaffirm these boundaries.

This paper will analyze how Syrians with various ethnic/religious backgrounds discuss family law and transnational migration. Cases where migrants and/or family members left behind have needed to go to court will also be brought out. Syrian cases are highly interesting not least in the light of recent debates about Muslim migrants' "family law" in various European countries. Gender and family are today crucial in identity politics on both sides of the Mediterranean, where perceptions of, and rhetoric about, gender equality or gender differences are used as boundary-markers. It is thus interesting that transnational

Syrian Christians often have greater difficulties than Syrian Muslims in negotiating between two — or more — legal systems.

**Marleen Renders**, Human Rights Centre, Faculty of Law, Ghent University, Belgium

**Developing a localized rights-centered discourse in a legally pluralist setting. Women's rights and Muslim NGOs in Mombasa, Kenya**

This paper draws on fieldwork conducted among the Muslim communities of Mombasa, Kenya in the Spring of 2009. The purpose of the research was to look at the lived realities of women and their human rights in a context of de facto legal pluralism. How are women in their daily lives affected by the contentious relationship between statutory laws, any existing 'customary' law (sometimes called 'living' or 'local' law) and *shari'a* based law? How are women able (or unable) to negotiate and/or manipulate this context to secure entitlements, rights and livelihoods? How does this process impact on women's economic and socio-political strength or vulnerability? Which forums do they use to deal with disputes? Where do they go when they feel they have been treated unfairly? How does this impact on their enjoyment of human rights? In depth-interviews (n=50) with legal councils (formal, informal, secular, islamic), religious leaders, human rights and women's groups were completed.

The forums proved to be of particular interest. Muslim women proved to use a wide range of forums, which is typical of a legally pluralist setting. They included family councils, ward chief's offices (the lowest rank of provincial administration in Kenya), formal courts and the Kadi's court, (which acts often as a place of informal mediation, rather than a court). Interestingly, they also included a number of locally-based (Muslim) human rights organizations. The paper will look at the discourse and practice of these human rights organisations in relation to the appeals for help from individual women. It will look at how they contribute to infusing and/or modulating the idea of women as endowed with 'rights' (albeit not necessarily western-modelled rights) in the community. Finally, it will reflect on the (potential) role of these organisations in the local grounding of women's rights as human rights.

**Julie Stewart**, Southern and Eastern Regional Centre for Women's Law (SEARCWL), University of Zimbabwe, Zimbabwe

**Tools for Engagement? Contextualizing Women's Human Rights and Transformation Imperatives in Potentially Resistant Plural Legal Settings**

This paper will attempt to identify and develop methodological approaches, both at the theoretical and practical implementation levels, which are required if human rights in potentially contested arenas are to be provided to and utilised by females at all levels of society and in plural legal contexts.

It seeks to build on a variety of methodological initiatives which attempt to create real opportunities for multi-faceted dialogue on issues affecting women and the girl child's (females') capacity to use and benefit from the human rights based approach to addressing issues of *de jure* and *de facto* discrimination against females.

The paper seeks to ask and hopefully answer the (huge but not entirely unrealistic) question: - How can those who oppose the rights of females wherever and however this manifests itself be engaged in a transformative engendered dialogue about rights and positive change in the lives of the female members of the human family both globally and locally? The approach is a methodological one rather than a purely rhetorical or theoretical one. [We shall explore and hopefully see if it can be done!]

**Malcolm Voyce,** Macquarie University, Sydney, Australia

**Muslim Women and Traditional Norms of Married Property: Divorce and the Persistence of Personal Religious Law in Australia**

In Australia there is one nationwide system of law and no forms of legal pluralism in the area of personal laws as regards divorce. In other words Shari law is not recognized.

The *Family Law Act 1975* in Australia is commonly regarded as a progressive law in guaranteeing gender justice. The principles of no-fault divorce usually allow for equal sharing of property under this law. This sharing of the resources of the marriage is subject to recognition of the homemaking contribution of the parties. Muslim women are in a different situation. Islamic law even though not officially relevant informs the ideas and conduct of Muslim communities. A dominant idea in Islamic law is that in divorce settlements matrimonial fault should be taken into account and that the men should receive the larger share of the property.

This paper is based on Foucault's notion of 'genealogy' which is used to track the formation of ideas on traditional married property and individual ownership based on western notions of individuality. At the same time I utilize of the theory of Durkheim and his ideas on religion and community solidarity to theorize how may groups of people may change and develop their core ideals.The paper will report on the response of surveys and interviews amongst the Islamic community as to the differing views on the implementation of Sharia law as regards the division of matrimonial property. Finally, the paper sums up the pressures and the complexities that face Muslim communities in Australia as regards problems of the maintenance of traditional views on marriage and property. These are issues two issues involved.

First, the extent that the Muslim community has absorbed Australian 'equalitarian value's based on gender equality and the equal distribution of matrimonial property. Second, the extent that economic changes as regards privatization have introduced notions of *laissez faire* forms of 'enterprise character' and self-sufficiency that rub against ideas of community solidarity. In light of recent world financial collapse the paper will also test the extent that views of the Government and Muslim communities have changed as regards welfare polices based on ideas of redistribution of welfare funds. The paper will conclude on the evidence that report on the maintenance and persistence of traditional views in the light of these factors and the possible emergence of a new, perhaps hybrid, view of family life and the sharing of property.

## Panel 5

## Plural socio-legal spaces, power and resistances

Dr. **Fauzia Shariff**, London School of Economics and Political Sciences, UK

Contemporary challenges posed by the global and national juxtapositioning of diverse cultures and faiths has led to increasing interest in enquiries into the nature of parallel normative social fields or legal orders, referred to as legal pluralism. Overlapping normative social fields may range from legal systems such as state law, customary laws and religious laws, to socio-legal spaces such as the community, family, or other groups defined through ideology or group identity. These legal orders are spaces in which individuals are constituted and socialised and which encompass rules and the means of inducing or coercing compliance.

For socio-legal scholars, sociologists, anthropologists and policy-makers interested in issues of social justice, unpicking the dynamics of these co-existing normative social fields is a valuable prerequisite to resolving and theorising problems facing modern law and society. These challenges demand a better understanding not only of the legal orders themselves but also of how individuals and sub-groups inhabit and navigate through them.

This session will consider examples of how individuals move between legal orders to avoid or challenge inequalities and disadvantage or in search of benefits. Papers may consider:

1. Examples of individuals navigating through a number of legal orders to challenge perceived inequalities or injustices;
2. Factors that affect when and why individuals take recourse to a particular legal order as an act of resistance, and factors that might prevent them from doing so;
3. How power and power relations in one legal order are affected by this navigation of legal pluralism.

Examples may consider legal pluralism through legal implants (migrant communities acting in accordance with law that is not incorporated into state law), or other parts of the world where legal transplants (imposition or reception of foreign laws into state law) differ from indigenous legal orders. Papers are particularly encouraged to consider other spaces where individuals are constituted such as the family, community or other group where they face inequality and the possibility of using alternative legal orders as a means of resistance.

**Contact**

**Fauzia Shariff**, London School of Economics and Political Sciences, Department of Law, Houghton Street, London WC2A, 2AE, UK, F.Shariff@lse.ac.uk

**Abstracts**

**Arskal Salim**, Max Planck Institute for Social Anthropology, Germany

**Inheritance Disputes in the Post Tsunami Aceh: Contested Norms and law in Plural Socio-Legal Spaces**

As the Boxing Day tsunami badly affected coastal areas of Aceh and resulted in massive deaths, the inheritance case became the major problem encountered by many who lost their relatives. Many inheritance disputes between heirs were settled by local religious leaders or through village meetings. Nevertheless, it was very often that objection as well as resistance from either side of contending heirs arose. In fact, because of their complexity, a number of cases were brought forward before the religious courts of Aceh.

This paper seeks to look at one kind of those inheritance disputes, the issue of heir replacement in particular. This paper focuses on whether orphaned grandchildren would be able to replace their predeceased father and take up position as the substitute heirs. The classical jurisprudence of Shafi'i school, which has been widely practiced in many villages of Aceh, does not recognize the concept of substitute heirs. Thus, the orphaned grandchildren are foreclosed by surviving children and, hence, they do not entitle to the estate left by their grandfather. However, the practices at the shari'a courtrooms, which is mostly directed by the Indonesian Compilation of Islamic law, reveal different decision. Most judges tend to allocate a share to the orphaned grandchildren despite the presence of their uncles and aunties.

My purpose with this paper is not only to show the competing norms and practices between what happened in villages and what would be decided in the courtrooms of Aceh, but also to demonstrate how the interaction between the living Muslim law and the state's Islamic law often involves various legal reasoning and interpretations that come out from different sources of law and are introduced by diver-

se agencies. To this end, I will look at a case in an affected tsunami village where orphaned grandchildren with information from an international relief agency sought to challenge their aunt to obtain a share of inheritance and to oppose the traditional customary view that does not accept the notion of heir replacement. Despite the existing formal Islamic legal system clearly acknowledges their rights to inherit the grandparent's estate, the orphaned grandchildren are financially poor and politically weak to challenge the power of living Muslim law in that particular community.

**Carolien Jacobs**, Max Planck Institute for Social Anthropology, Germany

**Enforcing rituals: The power of tradition in non-traditional spheres in Mo%ambique**

The Mozambican judicial landscape is characterized by its legal plurality where actors can shop between different forums in order to find a solution for the conflicts they are struggling with; some of these forums are strongly oriented towards tradition (f.e. traditional authorities), others are part of the national framework for the management of disputes (f.e. police, district courts). 'Traditional' arguments however, do not only come up in conflicts dealt with by the traditional authorities but figure as well in the non-traditional spaces, even when people have rationally chosen not to appeal to a traditional authority. This paper will focus on the way people in the district of Gorongosa, Central Mozambique make use of elements derived from the traditional legal order in 'non-traditional' spheres. The use of a 'traditional' argument in some instances is indicated by a sincere belief in the directives set out by the spirits, in other cases it serves as a rational argument to justify behaviour or defend rights. The advantage for the local population in using this argument versus 'outsiders', is that they, as the legitimate heirs of tradition, are the ones that are able to set out the rules of tradition. This is illustrated by a case study on a land conflict at Mount Gorongosa. The mountain is a disputed area between the local population and the adjacent National Park. People are defending their rights over the land by emphasizing the sacredness of the mountain. Attached to the sacredness is a complex of rules and rituals that have to be obeyed when accessing the mountain. By imposing these rules to outsiders, local people are able to regulate access to the mountain and thus have a powerful instrument in their own hands; the inhabitants of the mountain are the ones that are able to define the rules. Despite an agreement with the government on managing the mountain area, the park still has to stick to the rules of tradition. Critics argue that the rules are no longer defined by the spirits, but are redefined by the local population in their own interest. This paper will explore the way in which tradition, instead of serving the spirits, serves as an instrument of power for the local population in a domain in which they would otherwise be rather powerless.

**Gordon R. Woodman**, University of Birmingham, UK

**New Immigrant Communities in the UK: An Instance of Legal Pluralism through Legal Implant**

The current phase of globalisation has included the migration into Europe of unprecedented numbers of people from other continents. This paper seeks to contribute to the understanding of power relations within and in relation to the legal pluralism generated by the resultant new immigrant communities in the UK.

After an introductory outline account of the formation of these communities, considering immigration from South Asia, the Caribbean, sub-Saharan Africa, and elsewhere, the first main section of the paper considers the distinguishing features of the customary laws of these communities. In most cases these laws have been derived from the local customary laws of immigrants' communities of origin. They continue to be strongly linked to those customary laws, since social relations can today be maintained between communities separated by great geographical distances. This linkage is one of the main features which distinguish the customary laws of immigrant minorities from those of indigenous minorities.

Another is that the legal regulation of land use within the territory of habitation is of little importance in the laws of immigrant minorities. Detailed exploration of the customary laws of immigrant communities is difficult, because research on the sociology of immigrant groups has so far given little explicit attention to their laws. The information available poses the analaytical problem of distinguishing between non-state law and other non-state normative orders, or between customary law and customary morality. A problem also arises from the fact that some of the laws observed by immigrant communities are religious laws: thus the distinction between religious law and customary law also needs consideration. Despite the lack of information, one feature of these communities which seems clear is that their members observe and use their own customary laws, but also navigate daily courses through English state law. Some have adapted considerably to enable them to do this. For others it may not have required much adaptation. Most immigrants come from states in which the common law derived from England forms the basis of the official law. In so far as state laws were effective or were becoming effective in these immigrants' places of origin, relatively little adjustment is needed to adapt to English state law. In this respect there appears to be a difference between immigrants from urban and from rural areas.

The second main section considers the current debates over the policies which English state law should adopt towards these customary laws. English law has long followed a policy of recognising customary laws, including those of immigrant communities. However, the rise of legal centralism and the emphasis on national sovereignty in the 18th and 19th centuries reduced somewhat the overt continuance of the older policies. Furthermore, the traditional policies are placed under strain by the fact that the modern migrations differ from those of the past also in the degree of contrast between English local customary laws and the migrant communities' laws. The paper considers the possible recognition of migrant communities' laws under (a) the principles of private international law, (b) as cultural facts relevant to the application of English law in certain cases, and (c) as laws which state law might recognise as coexisting with state law. It considers the opposition to all forms of recognition which has been publicly expressed in recent years. It notes also a few reports of the experiences of experts who have been called to give evidence of customary laws in the courts.

The concluding section seeks tentative answers to the questions: What is likely to be the policy of state laws to minority customary laws in the future? More broadly, what is likely to be the future of this instance of legal pluralism? What does the experience of this instance tell us, through its peculiarities, of power relations within legal pluralism generally? What is the significance of this instance for the global spread of doctrines of human rights?

**Gugu Nkosi**, University of South Africa, South Africa

**It Takes a Village to Raise a Child: Accessibility of Social Assistance Benefits in African Indigenous Com munities**

South Africa has a multi-cultural society and multiple legal systems are applied, officially and unofficially. The dominant legal system is the so-called "western law" which is derived mainly from Roman-Dutch law as influenced by English law. In terms of the South African Constitution Indigenous African law is formally recognized as a source of law. However the "western" law still dominates the legal system as a whole.

Like most African countries, South Africa has social problems which are typical to South Africa. These include the prevalence of HIV/AIDS, poverty and other related problems, concomitantly to that there is an ever increasing number of orphans due to HIV/AIDS. In this regard social security presents a problem in South Africa. The State's response to these problems is exclusively from a western perspective, ignoring the existing African institutions of social assistance.

For the past few years the 'mother' legislation (the Child Care Act of 1983) on child law has undergone a review by the South African Law Reform Commission. The review was necessitated by a number of shortfalls in the Act. The two major shortfalls are:

1) the Act did not adequately assimilate the principles contained in the Constitution pertaining to children and the international instruments ratified by South Africa.
2) the Act was not flexible enough to accommodate the diverse needs of South African children as far as alternative child care systems are concerned, especially in the light of the fact that vast numbers of children are left parentless owing, inter alia, to AIDS.

The review of the Child Care Act gave birth to the Children's Act of 2005 and the Children's Amendment Act of 2007. These two pieces of legislation have attempted to address these shortfalls. In this paper the writer will argue that despite this welcome legal intervention, alternative child care structures in indigenous African communities are not covered in the legislation. And currently, there is no legislation in place which recognizes and/ or regulates these alternative child care structures. As a result, care-givers of children living in these structures are unable to access adequate social assistance grants for the benefit of these children.

**Iker Barbero Gonzalez**, University of the Basque Country, Spain

**The *encierros* of undocumented immigrants: Resistance shaped across legal orders**

In January 2001, 700 undocumented immigrants (mainly from Pakistan, Bangladesh India, Morocco and Black Africa) shut themselves (in *encierros*) during 47 days in 10 churches of the city of Barcelona. At the same time, other coordinated protests occurred in other places of Spain (Madrid, Valencia, Almeria, Murcia). The objective was clear: to resist against the Aliens law that discriminated, criminalized and condemned undocumented immigrants to an unlawful status. After three months of *encierros*, massive demonstrations and even hunger strikes, the Spanish government was forced to negotiate and to open an extraordinary regularization process. During those three months of struggles, the resistance was shaped among different legal orders: human rights' transnational law, State aliens' law, customary law from immigrants' origin, (religious) natural law and insurgent law. This paper aims to observe how the interaction of these different legal orders was used to achieve legal change and, ultimately, another way of constructing citizenship.

**Joy Dasgupta**, International Centre for Mountain Development, Kathmandu, Nepal and **Tika Laxmi Gurung**

**Am I am equal to my male colleagues? A narrative of change between two divergent patriarchal systems of Afghanistan and Nepal**

The emerging narrative in much of the developing world is that women need to be part of the formal economic space. The passage of numerous international conventions like CEDAW along with the passage of national legislation has in theory guaranteed the equal rights of women both in the space of the household and in the so-called outside space. Thus in theory issues like a glass ceiling and institutionalized discrimination should not exist. This paper looks at the emerging Himalayan scenario drawing from the narratives of two divergent patriarchal systems in the case of Afghanistan and Nepal. The paper contrasts the nature of patriarchies in these two countries and argues that though there are a lot of differences, there are also a lot of similarities. The lens applied is through the narratives of women who are very much in the economic space especially women who occupy senior positions in the Government bodies and international Development organizations. The paper argues that while legal spaces needs to be reformed, the greater challenge lies in reforming social attitudes and perceptions imbibed by male

colleagues. The notion of political correctness is very much there but harder and more real issues are always pushed under the carpet. The real challenge also as the paper shows through empirical evidence is that men and women do not share a social space where they can discuss the everyday office related issues without any overt sexual overtones coming into play. The paper also argues that sexual objectification by men is very much linked to ideological moorings and educational status. There is a strong probability that exposure to a more "westernized" notion of education allows men to actually appreciate women's role and interact them in a manner that goes beyond sexual objectification.

**Lucy Finchett-Maddock**, Birkbeck School of Law, UK

**Finding Space for Resistance through Legal Pluralism: The Hidden Legality of the UK Social Centre Movement**

This paper concerns the practices and tactics of contemporary Anarchist movements, specifically that of the social centre ilk, and their interactions with the law, and the determination of their own law. The social centre movement uses a mish-mash of both illegal and legal forms, labelled illegitimate by the law and yet incorporating and manifesting new forms of law at the same time. Social centres shall be argued as embodying spaces of resistance that are created through the navigation of alternative normative fields, in parallel with the influence of the state order.

These innately anti-authoritarian forms of resistance actually operate in a law-making fashion, creating what shall be described as 'hidden law'. This is law that evades the spotlight of the system and demands no form of coercion. It is the intention of this paper to highlight these legal/illegal processes and forms of hidden law as instances of resistance to social injustice through the aegis of legal pluralism.

**Mengia Hong Tschalaer**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

**Legal Gender Reforms within 'the garb of tradition'? Studying a tribal women's court in south Rajasthan, India**

By studying a local tribal women's court (The Social Reform Committee), this paper will analyse how poor tribal women in south Rajasthan make inroads into the complex landscape of legal pluralism in rural India. This extraordinary legal body constitutes, without a doubt, a special feature within the local landscape of jurisdiction that is defined by strong gender and power hierarchies and has hitherto deprived women from participation. The Social Reform Committee is, although independent from the state courts, still embedded within state structures. The post-colonial state in India recognises, besides the state courts *de facto* a variety of non-state legal institutions for the settlement of disputes within the realm of personal and family laws. The category of non-state legal institutions features legal bodies, ranging from the local caste/village councils (*panchayats*) and family assemblies that exclude women to the newly established women's courts such as the *All India Muslim Women's Personal Law Board* in Lucknow or the Social Reform Committee in south Rajasthan that will be at the centre of this study.

Based on empirical material collected during six months of field research among the Meena tribe in Rajasthan, this paper will examine whether and how gender equality and gender justice, can be realised in such a new hybrid legal body. It will be argued that the Social Reform Committee constitutes a room of resistance where ongoing concepts of gender and power relations are actively challenged and negotiated. This is not only by the fact that these women do 'justice' in the shadows of state jurisdiction but also by creating a mainly female legal arena where 'modern' (1) liberal women's rights are introduced and opened up discussions within a 'traditional' male local setting. The study focuses on the

(re)production and contestation of gender relations and norms by drawing on a case study. The example of this case study cautions against the judgment of such a women's court by western liberal or feminist criteria since the establishment of individual rights and gender equality have to be seen in a context where women's lives are intertwined within their communities and where abstract citizenship rights do not exist. Therefore, women's rights must be realised in the context of their embeddedness within family ties and the solidarity of caste and kinship networks in which the lives of rural women are inextricably enmeshed. A case will be made for legal pluralism as an opportunity, whereby such a women's court offers a valid alternative for the negotiation of gender-just reforms, besides the 'modern' expensive and ineffective state courts, and apart from the mostly corrupt and male dominated 'traditional' caste councils (*panchayats*).

Unlike other works within the field of political science and women's studies, this paper does not focus on the plurality of personal and family laws *within* state jurisdiction, but sheds light on the options and restraints for social actors to do 'justice' within the complex landscape of legal pluralism in rural India from a gender perspective.
(1) Putting the terms of 'modernity' and 'tradition' within quotation alludes to the uneasy fit of the 'tradition-modernity' dichotomy. The various non-state legal institutions existing in India today can not just be conceived as a relict of the (post)colonial times. They are in fact an inherent feature of modern life in India. This outlook favours the notion of *uneven* or *entangled modernities* (Randeria 2002, 2004) that pays tribute to the fact, that in India different cultural concepts co-exist. This creates a wicker-work of pre-colonial, colonial and post-colonial structures in a modern setting.

**Nathalie Peyer Strauss**, Department of Social and Cultural Anthropology, University of Zurich, and Interdisciplinary Centre for Gender Studies, University of Bern, Switzerland

**`Doing Panchayat': Marital Conflicts and Women's Agency in (socio-)legal institutions in Madurai, South India**

In the south Indian town of Madurai 'traditional' conflict settlement forums such as caste and village councils, called *Panchayat* , have lost their importance for separation or divorce cases. However, the practice of *doing* 'panchayat', as a specific form of mediation or arbitration still remains very popular and has shifted not only into the realm of the family but is also being used in 'modern' urban institutions like NGOs, police stations and even the district court. Family members of the husband and wife will come together and with the help of a mediator decide on the terms of a formal separation or — much more often- a reunion. If the 'panchayat' does not take place within a formal institution, the decision of an informal gathering will often be formalized through a 'written agreement'. The mediator can be a respected elder person of the family, a caste leader, a village head of the native village, a local politician or any other local authority, a policeman, a judge or a social activist. Sometimes the places and the respective mediator vary: it may happen that police men or lawyers do 'panchayat' in their private homes or in the homes of the families concerned. 'Doing panchayat' thus becomes a practice, which transcends the binary oppositions often constructed in debates on legal pluralism: state and family, civil society and state, or modernity and tradition as these are.

On the basis of my empirical material on women's agency in marital crisis collected in Madurai during one year of fieldwork in 2005/06, I would like to discuss this practice in detail. In this paper I will argue, that 'doing panchayat' is a practice based on the dominant moral system, in which - unlike the state law - the well-being of the family has priority over the interests of an individual. Whether and under what circumstances such 'panchayats' take place depends on the caste, class and gender of the persons involved. 'Doing panchayat' is thus a practice within a field of power relations in which women may become empowered but their agency may as well be very limited. I will finally criticize the concept of 'forum shopping', which suggests individual choice that may often not exist from the women's point of view.

**Nel Vandekerckhove**, Ghent University, Belgium

**Beyond Contested Legal Orders: Tangled Public Authority, Violence and Land Dispute in Karbi Anglong, Assam, India**

In India's Northeast, public authority has never been a state affair only. A wide range of political and politicized institutions tend to exercise public control at various levels in multiple domains. However, this article challenges the popular belief that a plethora of power players instantly entices exhaustive institutional strife. In-depth field research in the rural district of Assam, Karbi Anglong has demonstrated that land tenure is indeed defined by a large set of social relations, norms, values and structures, though which in reality often overlap and interact. Only intermittently these social orders tend to collide, largely when a key political strong holder attempts to expand its authority beyond its realm of power. Therefore, the study of land dispute demands a critical approach beyond the classical dichotomy of 'the customary-traditional chief' versus 'the formal-modern state', and away from the dysfunctional categorization of 'the criminal rebel' as opposite to 'the guardian state'. Only a multiple-layered analytic frame that acknowledges the complex, variable social dynamics between the varied legal-normative orders and their loci of public authority, will allow anthropologists, historians and political scientists to truly grasp the logics behind land tenure and land dispute in regions like rural Assam.

**Saskia Vermeylen**, Lancaster University, UK

**Law as a Narrative - Resisting Euro-American (intellectual) property law through stories and myth**

Through several thousand years of Western history, intellectual property rights have expanded to materialise abstract ideas so that individuals can gain private ownership of them. This expansion is increasingly problematic today, as it is being applied to a range of radically new ideas, such as the ownership over indigenous peoples' knowledge, nature and culture. Indigenous peoples are contesting the universalisation of Western intellectual property law by arguing that the application of Western property law threatens their social and cultural integrity. This paper addresses the issue of how Western property law subordinates different kinds of property law, including customary law and informal law as enacted in daily social practices.

Zooming in on the - now — famous case study of the San of Southern Africa whose 'traditional' ecological knowledge of the succulent *Hoodia Gordonii*, is not only appropriated but also protected through Western intellectual property regimes, reveals that indigenous peoples like the San are contesting the property claims of more powerful actors by making use of different legal discourses. Depending whether they are contesting property claims at the local, regional, national or international level, the San engage with different legal narratives and discourses to resist competing property claims over their natural resources, knowledge system and cultural heritage.

Based on the findings of ethnographic research with the San in Southern Africa, I will argue in this paper that although the San seem to be more successful in resisting competing property claims by engaging with the discourses of the formal and international legal order; these institutionalised and formal bodies of law (i) do not reflect the legal norms and values of indigenous peoples and (ii) continue to colonise alternative' legal orders. It is argued that in order for indigenous peoples to contest competing property claims through a body of law that is untainted by colonialist or post-colonialist framing more attention should be given to the stories, ceremonies and traditions of indigenous peoples through which they express their legal norms and values. Using the San's stories, myths and ceremonies as an example, it is demonstrated in this paper that these narratives are a source of law which can reveal the deeper principles of order and disorder of a community and therefore should be recognised as a primary source of

authority for indigenous peoples to contest or resist property claims on the multi-dimensional levels of law making.

**Dewi Oetami**

**Resistance of Indigenous People (Plasma Farmer) vis-ä-vis a Palm-oil Plantation in West Kalimantan**

Palm-oil estates are believed by the government as a business undertaking to boost the well-being of the peasants and provide job opportunities in rural areas. Palm-oil estates are also believed to be able to boost economic growth of provinces. In establishing palm-oil estates, the government prompts cooperation pattern between the capital holders (private companies) and the local farmers in model called People's Nucleus Estates (Perusahaan Inti Rakyat — PIR) in which the company provides the capital, technology and the management of marketing, while the local farmers provide the lands and the labour.

West Kalimantan is a region preferred to develop palm-oil estates for the vast area of "no man's vacant lands" and the palm-oil estate companies are expected to conduct the transfer of technology to the local horticulturalists (agriculturalists with swidden/slash-burn cultivation) so that the well-being of the locals get increased. This paper describes forms of resistance that the *plasma* smallholding plantation planters make against the (State-sponsored) palm-oil estate company in Ngabang Sub-district, in the district of Landak, West Kalimantan province. The problems started when the communal lands the local communities managed as agricultural lands to sustain their life and as reserves for additional income were taken over by the company. As the population number of the *plasma* smallholding plantation planters' family grew while the palm-oil at their smallholding plantation produced less and less due to the old age, the planters assumed that the company had no attention to the planters' economic problems. The planters made various forms of resistance such as palm-oil fruit theft, land reclaiming, imposing customary sanctions on the company, selling palm-oil fruit to other factory, planting uncertified palm-oil seedlings and burning palm-oil trees at the company-managed core plantations. All of the planters' resistant actions were covered, not an open movement. This is due to the fact that the company already managed to build strong cooperation with the local government, the police and the military, politicians and communities' leading figures that the planters had no option to have open resistance against the company.

## Panel 6

## Resignifications: Law, Justice, Moralities

Prof. Dr. **Susanne Brandtstädter**, University of Oslo, Norway

This panel suggests readdressing the problem of law and culture by exploring ethnographically new constellations of law, justice and morality and their different principles for social action: *accountability, responsibility, and sensibility*. Though separate from justice as a social aesthetic and morality as an emotional compass, the workings of 'the rule of law' depend on its promise to deliver fairness and sustain 'the good' by means of due process or constitutional rights. The globalization of the rights discourse today demonstrates the cross-cultural attractiveness of this promise. It also demonstrates, however, frustrations that the reality of global law often falls far short of it: access to law might remain a privilege of elites, decisions that emphasis individual accountability can offend moral sensibilities, or responsibility stands in conflict with the principle of equality before the law. Increasingly complex political, cultural and social settings seem here to result both in 'law's fetishization' (Comaroff and Comaroff 2006) and\or the exodus to alternative arenas and means to make 'right'. This panel looks at 'ethnographic moments'

where the contradictions between *accountability, responsibility, and sensibility* become manifest, and which inform political processes of resignifying the 'right', the 'just', and the 'good'.

**Contact**

**Susanne Brandtstädter**, University of Oslo, Norway, Email: s.e.brandtstadter@sai.uio.no

**Ab stract s**

**Susanne Brandtstädter**, Social Anthropology Institute, University of Oslo, Norway

**Balancing Act: Law Activism and the Morality of Politics in Rural China**

Law in the People's Republic is perceived as a tool of social engineering and cannot be neatly separated from either government politics or (post)Maoist public moralities. In order to explore local visions of law, and law's possible resignifications, it is furthermore necessary to take into account the reality of the juridical process in the People's Republic, and of fazhi ('governing through law') as a top-down disciplinary discourse that emphasizes accountability towards the state, citizen morality and social stability/harmony. My paper looks at law activism and the phenomenon of self-taught 'barefoot' lawyers in rural China. I argue that while legal processes might formally work towards establishing accountability, in China's particular context this is typically diverted into efforts to rebalance relations between particular local activists (and their 'constituencies') and particular local governments. 'Settling a case' here means to create new spaces for political and moral negotiation, a new 'balance' of interest by bridging the quest for accountability with situated sensibilities, derived from particular moral relations. Justice is here primarily sought as a social aesthetic ('balance') not as the outcome of legal processes. Such a search for justice with, but ultimately beyond the law, is often interpreted as 'culture corrupting law'. This is a serious misinterpretation/beyond the point. Instead, my paper argues that such appropriations of law are central in linking local moralities to the public sphere, in creating new spaces of negotiation and in injecting local relations (including what is ordinarily seen as state and society) with a new notion of the 'right' (as opposed to both 'rights' and to the morally good).

**Niklas Hultin**, Sociology and Anthropology, Swarthmore College, US

**Hope, Human Rights, and the Disincarnation of Legality in The Gambia**

The paper explores the possibilities of - and limitations on - the instrumental use of international human rights to shore up the boundaries of legality and morality in a context where government accountability and the rule of law are increasingly called into question. Drawing on research in The Gambia, the paper looks at invocations of "state law" and human rights in the midst of what might seem like a fragile or suspended legality - or "disincarnation of legality" in the paper's terms. I examine these invocations a intrinsically prospective events (cf. Miyazaki , Riles, and others) aimed not just at redressing a grievance or concern, but expressive of a desire for a "perfect" legality. The paper thus speaks to how Gambians do not always think of the law and rights as judicial measures, but - in more general terms - as the possibility and desirability of formality, accountability, and predictability in the midst of what might otherwise be seen as the law's decay, lack of completion, or stagnation.

**Kenneth Bo Nielsen**, Centre for Development and the Environment, University of Oslo, Norway

**Farmers' use of the courts in an anti-land acquisition movement in India's West Bengal**

In 2006 Singur in India's West Bengal was chosen as the location for a new car factory that would produce what would ostensibly become the world's cheapest car. In order to make way for the factory app. 1,000 acres of farmland was expropriated by the state government, yet farmers unwilling to relinquish their land refused to comply with the acquisition and instead organised politically to challenge the legitimacy - both moral and legal - of the government's exercise of the right of eminent domain. While these farmers have relied on a broad repertoire of contention during their prolonged agitation, the courts and the law have provided them with perhaps the most important arena for challenging the state.

In this paper I discuss the following aspects of the Singur farmers' use of the courts: (1) How have the farmers practically gone about accessing the court and the legal system? (2) What has been their experience of engaging with such a complex system of procedures and institutions that rely on a language with which few farmers are familiar? (3) Given that many other options have been available, why have the Singur farmers chosen to repose such faith in the courts?

**Frank A. Salamone**, Iona College, New Rochelle, New York, and University of Phoenix, US

**An Anthropological Perspective on Asylum Cases**

Over a lengthy period of time, I have acted as an expert witness for people seeking asylum in the United States from West Africa. I have noted changes in the manner in which courts have treated these asylum seekers from the relatively easy process of the Clinton years to the much more hostile culture of the Bush ones. In this paper, I wish to discuss the manner in which an anthropologist can use knowledge about the culture of the person seeking asylum and that of the political party in power to translate the motives of the asylum seeker in a favourable light. I provide a number of examples of this process and of the changing culture of political administrations.

**Dorothea Schulz,** University of Cologne, Germany

**Muslim activism, legal reform, and the politics of morality in Mali**

Starting with a controversy over a recent family law reform proposal in Mali, the paper elucidates the recent momentum gained by Islam in Mali as a model of "alternative" political ethics and ethical politics, and as a source of contestation among various Muslim actors, men and women. To this end, it analyzes the positions of the principal actors and interest groups invited as representatives of "civil society" to the public debate of the draft law: women's rights activists supported by international women's movement and international donor organizations, protagonists of the two influential wings of the national Muslim organization, and representatives of the state administration who are in charge of implementing what the government considers to be "proper Islam". Based on this analysis, the paper retraces the ways in which broader processes of social change and political liberalization, an international and national context of women's rights activism, and the insertion of transnational trends towards Islamic renewal and reform inspire new parameters for the invocation of moral belonging and community in the national and various local contexts By emphasizing both the historical continuities and changes in these reassessments and reconfigurations, the paper makes a sustained argument for a careful exploration of the nexus between shifting boundaries of the political, gender dynamics and changing notions of political and religious subjectivity. The paper examines debates surrounding the current family law reform in Mali to account for the way in which broader processes of social change, an international and national

context of women's rights activism, as well as various interest groups will shape the ultimate outcome of legislative reform. The article focuses on the discussion of the five main components of the proposed reform and analyzes the positions of the most important groups participating in the debate: women's rights activists supported by international women's movement and international donor organizations, protagonists of the two influential wings of the national Muslim organization, and representatives of the state administration. It is argued that although state officials and protagonists of a "Islamic" position lay claim to divergent ideological and normative orientations, they form temporary and shifting alliances around certain issues, often on the basis of pragmatic considerations. Also, while women's rights activists and "Muslim women" claim to represent women tout court, the positions and arguments of the former can be seen as representing particularistic, class-specific interest.

**Betram Turner**, Max Planck Institute for Social Anthropology, Germany and
**Melanie Wiber**, University of New Brunswick, Canada

**Moral Talk. The Ontological Politics of Sustainable Development**

Following Latour and Law, this paper examines the ontological politics of sustainable development in two separate field sites, the Moroccan Souss and the Canadian Maritimes. Two case studies involving rural production transformations are compared. In both examples, successive waves of technological innovation have led to normative pluralization, as the relative merits of different modes of production are debated in what we describe as 'moral talk'. These debates take place among local actors, between local actors and state or transnational actors. In the process, values such as environmental sustainability or economic development are fiercely contested, and several different versions of possible future realities are at stake. The resulting outcomes reveal the complex nature of globalization, the real impacts experienced both for the environmental and for social equity, and the role that legal pluralism plays in rural property transformations.

**Josd G. Vargas-Hernandez**, University Centre for Economic and Managerial Research, University of Guadalajara, Mexico

**A review of Theories of Conflict. Co-operation and conflict between firms, communities, New Social Movements and the role of government**

The struggle for the recognition of indigenous rights is one of the most important social movements in Mexico. Before the 1970s, existing peasant organizations did not represent indigenous concerns. Since 1975 there has been a resurgence of indigenous movements and have raised new demands and defence of their cultural values. However, indigenous social mobilization had been laid in local and regional peasant struggles across the 1970s and 1980s. Also the indigenous movement is not homogeneous and does not include all ethnic groups in the country, but it has many different expressions and encompasses different entities at local, regional and national levels. This paper aims to analyze the historical social approach and under the frame of indigenous political ecology of social movements for recognition of indigenous rights in contemporary Mexico.

**Nerina Weiss,** Social Anthropology Institute, University of Oslo

**Pro-Kurdish activists and the Turkish state (in)justice**

Drawing on fieldwork among pro-Kurdish activists in a Turkish border town, I explore how concepts of justice and legitimacy are negotiated and expressed. Borders and margins have been defined as the

classical sites from which extend and limits of state power are comprehended. The state seeks to create its sovereignty 'in the face of internally fragmented, unevenly distributed and unpredictable configurations of political authority that exercise more or less legitimate violence in a territory (Hansen und Stepputat, 2005)'. In the Kurdish dominated areas of Turkey, however, the state is mostly experienced through the illegitimacy of its actions and its sovereignty is challenged. How do pro-Kurdish activists relate to the Turkish legal system that is *per se* considered as unjust and illegitimate? In situations where the state and the Turkish legal system are experienced as violent and transgressing, how do people claim recognition and where do they demand reparation?

### Panel

### Pluralism within Pluralism in Small Island Nations of the South Pacific

Prof. Dr. **Anthony Angelo** and Associate Prof. Dr. **Jennifer Corrin**, TC Beirne School of Law, University of Queensland, Australia

In countries of the South Pacific, societies are often discussed in terms of the dichotomy between 'traditional' and 'modern'. Similarly, legal systems are often described by reference to the dichotomy between 'traditional law' or 'informal justice' and 'state law' or 'formal justice'. In fact, these divisions are becoming a thing of the past, gradually blurred by changes in the pattern of society caused by greater mobility and the impact of Western ideas. Further, the approach usually taken to the accommodation of customary law, which has been to formally 'recognise' it in constitutions, has, at least in theory, put an end to its independent operation. In the search for a more effective approach to legal pluralism, the existing dichotomy may often obscure a more complex interplay within the spheres of 'traditional law' and 'state law'. In each of these spheres there are uncertainties, including questions of definition and scope, which constitute a potentially destabilising factor and have significant rule of law implications. This panel seeks to stimulate discussion on these uncertainties and on the tensions between different sources and types of law within the 'traditional' and 'state' law spheres in the South Pacific region. Within this theme, sub-themes of human rights (including but not restricted to gender issues), natural resources, and other issues of perennial concern will be used as a focus for discussion.

### Contact

**Jennifer Corrin**, TC Beirne School of Law, Asia Pacific Law Centre for Public, International and Comparative Law University of Queensland, St Lucia, Qld 4072, j.corrin(law.uq.edu.au

### Abstracts

**Sue Farran**, University of Dundee, UK

#### 'Fragmenting land and the laws that govern it'

In 1980 the Constitution of the newly independent Republic of Vanuatu returned all land to the custom owners and their descendants and declared that '(T)he rules of custom shall form the basis of ownership and use of land' (Articles 73 and 74). What the Constitution did not state was what these rules were or should be, leaving it to Parliament to implement a national land law. As a result of Parliamentary inaction there is a plurality of rules of custom which govern customary land tenure, varying from place to place and island to island in a country of over eighty islands. Traditionally these rules are unwritten, but increasingly they are being recorded, in the reports of courts and tribunals, in published research and in

the policy documents of councils of chiefs. These are processes which in themselves are re-shaping the rules of custom but also providing a partial codification of customary practices. However, these are not the only rules which regulate land transactions. Introduced laws and post-independence national legislation are also important and exist alongside customary law. Different interests over the same land may therefore be regulated by different legal frameworks. Moreover the boundaries between these are shifting as land is used and developed in different ways to meet changing social and economic demands and pressures — both internal and external. There is therefore a pluralism of legal sources; a pluralism of values and concepts; and a pluralism of interests which in combination present substantial challenges for the articulation of a national land policy or the development a national land law.

This paper explores the nature of a plural land law and examines the potential for positive and negative outcomes in a rapidly changing environment in which land plays a pivotal role in the broader context of sustainable development and human rights.

**Yves-Louis Sage**, French Polynesia University, Tahiti

**Theory and notions of legal pluralism in the South Pacific**
This paper will be presented by Prof. Dr. A. Angelo

## Panel 8

### Property Rights and Community based Natural Resource Management: A Legal Pluralistic Perspective

Dr. **Satyapriya Rout**, Department of Sociology, University of Hyderabad, India
*Introduction and moderation*

The natural resources of planet earth are not only economic assets of a nations contributing for its economic development and progress, but they also form the basis of livelihood for many rural population of the world and serve as an essential foundation for the cultural survival of indigenous population. Recent decades have witnessed an impressive growth of popular movements by rural and indigenous people claiming their collective rights over access, control, and management of such natural resources. As a response to it countries around the world have modified their domestic legal frameworks to accommodate such claims of local populations. Acknowledgement of such collective and traditional claims of rural and indigenous groups has resulted in creation of new legal figures within the broader framework of state-law, which permits the local people to gain new realms of freedom and arenas of participation in the field of natural resource management. Community based Natural Resource Management (CbNRM), thus has become the emergent paradigm in governance of natural resources, owing to its social, cultural, economic and environmental benefits.

Central to the theme of CbNRM is the institution of property right — the institution which determines the way people interact with themselves in the context of natural resources as well as with the resource base itself. Property right not only affect who may use which resource and in what way, but also shape the incentives people have for investing in and sustaining the resource base over a period of time. Notwithstanding the recognition of CbNRM as emergent paradigm in resource management by the states in developing world, the approaches to understand property right have too often focused only on static definitions, usually as it is defined in statutory law, which are again very much fixed and unitary. Restricting the concept of property right only to statutory law, the policy makers and development planners

have often sought to consolidate such rights, which is very much contradictory to the arguments of CbNRM.

In the contrary, the legal anthropological perspective highlights the coexistence and interaction between plural or multiple legal orders ranging from state to customary, religious, cultural, project and local law. And most importantly, all of these legal orders provide bases for claiming property rights, and in turn, play a dominant role in success or otherwise of CbNRM. These multiple legal frameworks also generate considerable flexibility for people for claiming, negotiating and renegotiating property rights over natural resources, thus helping them to cope up with uncertainties with regards to livelihood, environmental, socio-political and cultural aspects.

In the context of above discussion, the proposed panel aims at gathering information and generating discussions and academic reflections on property rights institutions in the context of CbNRM from a legal pluralistic and/or legal anthropological perspective. The basic issue of the panel would be how to approach the property right institutions in the context of CbNRM from a legal pluralistic perspective. The primary questions that the panel would investigate would be following:

- What is the meaning and role of property right institution in the context of CbNRM?
- How different and multiple legal orders generate different property rights in the context of CbNRM?
- How do different groups claim separate and exclusive rights over natural resources based on different legal normative orders?
- What happens when the multiple legal orders forming the bases for assigning property come into conflict and contradiction with each other?
- How legal pluralistic approach can be used as an analytical framework to understand the conflicting property rights over natural resources.

While attempting to answer some of these questions, the panel could address the following specific topics:

- An analysis of property right debate over natural resources in the context of community based forest and/or water resources.
- Exploration of different legal procedures leading to assignment of rights to local indigenous people to manage forest/water resources.
- An examination of conflicts over natural resources management from a legal pluralistic perspective, while highlighting how different stakeholders or claimants take resort to different legal orders to justify, legitimize and rationalize their claim.
- An examination of conflicts between multiple legal repertoires such as statutory, customary, project, and religious laws concerning natural resources.

**Contact**

**Satyapriya Rout,** Department of Sociology, University of Hyderabad, India sprout@rediffmail.com

**Abstracts**

**Satyapriya Rout**, Department of Sociology, University of Hyderabad, India

**Competing Property Rights and Community Conflict in Joint Forest Management: A Legal Pluralistic Perspective**

Competing claims over natural resources have been one of the important characteristics of Indian environmentalism. Consequently, conflicts over natural resources such as, forests, water and land, have become a ubiquitous theme in natural resource management literature in recent decades. Even the issue of community management of natural resources has not been able to keep itself away from conf-

licts due to existence of multiple stakeholders who enjoy different rights and claims over the same resource base.

The question then is why conflicts occur over natural resources. Even while finding answer to the above questions, one is left with another question as to how to understand the differential claims that different stakeholders put forth to justify their rights over the resource. Viewed from a legal perspective, several sets of laws or normative orders — local folk law, religious law, state law and various forms of self regulation — are taken into consideration while claiming differential rights over natural resources. In case of such conflicts based on different social, economic and political interests, different legal systems are inevitable invoked to assert and justify one's own claims. Thus, a monolithic perspective of state law as the dominant one may not serve the purpose of either understanding or resolving these conflicts. In such a context, legal pluralism, which acknowledges and tries to explore multiple legal and normative orders that individuals or communities make use of to rationalize and legitimize their competing claim, serves as a better framework.

In the backdrop of above information, the paper explores different conceptualizations of right over forest and the consequent conflicts from a legal pluralism framework. By focusing on one Indian state, i.e. Orissa, the paper examines a variety of legal statuses attached to the forest and the resulting confusions created in the Joint Forest Management (JFM) programme. The paper discusses the state narratives of JFM and tries to explore the disjuncture and differences between the state perspective (dominant state law) and local notions (subordinate customary law). The empirical work for the paper has been carried out in two villages namely Nagiapasi and Beltikiri, in the Dhenkanal district of Orissa.

The paper is divided into four sections. The first section deals with the introduction and delimits the scope, objective and methodology of the research work. The second section engages with a theoretical discussion of legal pluralism. The third section traces the history of JFM in Orissa and its current legal aspects. Following this, the third section depicts the nature of conflict between the two village communities, chosen for the study, over the issue of use and management of forest through the JFM programme, and brings out the lacunae in the state policies towards natural resource use and management. The fourth section deals with the application of legal pluralism to the concrete case of conflict, and discusses the issue of changing property rights and mechanism involved to ensure such rights in the context of forest resources.

**Hoang Huy Tuan**, Hue University of Agriculture and Forestry, Vietnam

**How Does Forest Decentralization Influence Property Rights in Community Forest Management? Case Study from Thua Thien Hue's Upland, Vietnam**

After forest allocation, villagers become forest owners. In this context, the study's conceptual framework views the allocating forest to community is seen as political decentralization- a form of decentralization in forest management and changes in property rights under forest decentralization as transfers of "bundles of rights". This study was conducted in two villages in Hong Ha commune, A Luoi district, Thua Thien Hue province, Vietnam. Kan Sam village was selected as representation of community that is allocated forest by state and Pahy village was selected as representation of community that manages forest by customary law. Through two villages in Thua Thien Hue's upland, the study found out three key findings as follows:

The first finding argues that allocating forest to community was initiated by outsiders' demand. Reducing costs of forest management is a major incentive for the local governments and government agencies to allocate forest to community. The second finding point out that changes in formal rights (legal rights) in the two villages vary, while informal rights (rights in practice) are similar. The forest decentralization has

significantly changed formal rights over community forest. Before allocating forest, both villages just have formal rights of access. After allocating forest, Pahy's villagers are the same formal rights, while Kan Sam's villagers have formal rights of access, withdrawal, management and exclusion. Contrary to formal rights, informal rights over community forest seem to be unchangeable under forest decentralization. The third finding makes a proposition that gaps between formal rights and informal rights over community forest always exist. There are three main causes lead to these gaps: lack of legal environment and support from local authorities; social and power relations (kinship); and differences of perception between old and young generations.

**Yuerlita**, Asian Institute of Technology, Thailand

**Payment for environmental services and Legal pluralism: Lessons learned and direction for the future**

Water is a unique resource compare to other substantial component for living organism such as sunlight, land and air. The uniqueness of water has been described by Young (2005) that cover hydrological and physical attributes, social attitudes as well as legal political consideration. In addition, water bodies such as lake, river, and coastal water can be private or collective goods. In this context, water cannot only be seen as a natural resource but also as an economic resource. Management of water resources becomes a challenging issue particularly when dealing with the status of the resource as the common property. Effectual water management does not merely deal with water resource, rather it should also take into account surrounded land uses and various groups of people who make use and obtain benefits from the resource and rules, regulation govern in particular. In the context of watersheds management, there are two main groups of dweller which is highly interdependent, namely upstream and downstream stakeholder. Upstream community intensively use forest resources at the catchment area, therefore land uses and practices would determine the provision of environmental services to various stakeholders at downstream area.

The relationship of upstream and downstream dwellers is strengthen in the context of payment for environmental services (PES), mediated by the third party. PES has been widely implemented to conserve watersheds and as the stepping stone for watersheds sustainability both in developed and developing countries. PES scheme is specific and different from one to another which is based on characteristics of ecological, socioeconomic condition in particular area and institutional condition (Wunder et al., 2008). There are groups of stakeholders that should be considered in formulating PES mechanism in the context of watersheds conservation. In this paper, stakeholders are classified into four main categories, namely providers which are upstream dwellers, service users are downstream beneficiaries, potential providers and intermediaries. The paper explores different types of PES scheme at watersheds level from Rewarding Upland Poor for Environmental Services (RUPES) project's sites including Indonesia, Philippines, and Thailand. It further discusses the success and failure of PES, the role of various legal systems in supporting or hindered development of PES at the watersheds level. The deliberate process of PES is caused by lack of trust between service's providers and buyers hence clear mechanism of implementation process cannot be achieved (Asquith et al., 2008). However, it is argue that the existence of various laws, rules and regulation at different level plays important role in shaping PES mechanism. In what extent those pluralism influence PES implementation would further discussed in this paper. The paper would contribute to an insight of formulating PES mechanism that could be made more effective to watersheds conservation.

## Panel 9

### Pluralistic approaches to land tenure regulation

**Janine Ubink**, PhD, Leiden University, The Netherlands

Throughout the 20th century, both practice and research concerning land law in developing countries were marked by strong differences of opinion about the kind of law that would fit these societies. The main divide was between those convinced of the need to design and introduce law as a state-led program — the 'centralists' — and those who would rather leave matters of law to local groups and communities — the 'localists'.

From the 1960s onwards, centralist approaches dominated the field in the name of development, emphasizing codification of land rights, land registration, and land reform. This centralist paradigm was broadly supported by the economic discipline as well as by other disciplines as diverse as law and land surveying. From the 1ate 1970s 'localists' again raised serious questions concerning the feasibility of the centralist approach. They called attention to continuing local practices and arrangements of 'indigenous law' or 'local law', and to the failures of state-led registration projects.
Recently, both paradigms seem to be faltering. The centralist promise of a rule of law was damaged by implementation failures, while the localist promise of a community-based law often remained unfulfilled as discriminatory practices and unpredictability prevailed. There is an ongoing quest for a new paradigm in land tenure regulation based on pluralism, reconciling state perspectives of a programmatic, national and legal nature with people's perspectives on local land law and land use.

In this panel we want to analyze concrete cases of governmental tenure reform programs that have evolved in selected countries since 1990, particularly "third way approaches" to incorporate 'local' rights to land — such as customary rights or urban squatters' rights — into the national legal system. We would like to invite papers that discuss the ensuing plural regimes of land rights and management, with specific emphasis on their rationale and goals; their implementation, and their effects on tenure security.

#### Contact
**Janine Ubink**, Van Vollenhoven Institute for Law, Governance and Development, Faculty of Law, Leiden University, The Netherlands, j.ubink(law.leidenuniv.nl

#### Abstracts

**Imam Koeswahyono**, The University of Brawijaya, Malang East Java Province, Indonesia

#### An Alternative Model For Right of Cultivation In Plantation Management Based On Land Reform And Corporate Social Responsibility Toward Agrarian Reform. A Case Study in East Java Province, Indonesia

The end of New Order regime had brought multi-dimensional crisis that pushed a political reform, including reform in agrarian. During the agrarian reform, farmers and NGOs demanded the government to give farmers Right of Cultivation/RoC (*Hak Guna Usaha*), especially on plantation lands. This demand was also pursued by farmers in the regencies of Blitar, Malang and Kediri (the research locations).

Problems that are analysed in this research are firstly, how to implement the idea of RoC management model which is based on Land Reform and Corporate Social Responsibility (CSR), as an alternative model to manage plantation lands. Secondly, what the potentials and challenges faced by the RoC manage-

ment model based on Land Reform and CSR are, and what positive laws that can support its implementation are.

Some legal frames have been designed to implement the idea, for example, the Act No.19/2003 regarding State Owned Enterprises and Act No.40/ 2007 regarding Limited Company. These Acts recognise the principles of CSR. This research shows how the realization of the CSR policy in the three research locations varies accordingly.

The research finds that in general, the communities that live around the plantation areas in the three research locations prefer the redistribution scheme of land reform model by grace (Articles 7, 10, 17 of Law No. 5/1960 regarding Basic Principles of Agrarian Law, Act No. 56/Prp/1960 and Government Regulation No. 224/1961). Forty-seven percents (47%) of landless farmers agree that the redistribution scheme is not always the best solution because it can generate horizontal conflict. Based on that finding, the result of this research recommends three models of plantation management which are based on land reform and CSR. Each of these three models will be suitable for state owned plantation enterprises only, private owned plantation enterprises only, and both of the plantation enterprises. The CSR scheme must be implemented according to the real conditions of each of plantation enterprises. Until now, the CSR scheme mandated by the Act No.25/ 2007 regarding Investment Law and Act No.40/ 2007 regarding Limited Company, has not yet been implemented because of the lack of supporting regulations

**Irina Wenk,** Department of Social and Cultural Anthropology, University of Zurich, Switzerland

**Tenure security, natural resource control and competing jurisdictions within titled territories in the Philippines**

In the Philippines, the government passed an indigenous rights legislation that recognizes indigenous peoples as owners of the territories they have historically occupied and utilized. On the basis of the Indigenous Peoples' Rights Act of 1997, better known as IPRA, indigenous groups may delineate their so-called ancestral domains and ancestral lands and are issued certificates of title, either communal or individual. The passing of the IPRA in 1997 is connected to increasing concerns about the rate of forest degradation and efforts at ecological conservation as well as global policy trends of decentralization in the 1990s. The statute is furthermore the result of significant pressure from civil society and indigenous organizations demanding tenure security for indigenous peoples throughout the country. With the IPRA, concepts such as customary land tenure and communal ownership and land use found entry into national legislation and the statute is considered the most progressive in this respect throughout Southeast Asia.

In my presentation, I would like to discuss the case of the Matigsalog-Manobo, an indigenous group that was among the first in the country to be awarded a Certificate of Ancestral Domain Title (CADT) in 2003. Inhabiting a portion of the Central Mindanao uplands in the Philippine South, they were able to secure for themselves a territory of roughly 102,000 hectares, the management of which is now their responsibility. Fieldwork in the immediate post-titling years shows that from the securing of land rights, self-determined management of land and natural resources does not necessarily follow. Due to various reasons, indigenous control of land is still precarious. The statute's exclusive focus on the establishment of boundaries and a lack of concern with socio-economic aspects within the bounded spaces, keeps indigenous land holders facing old and additional new challenges of land loss such as encroaching settlers and agro-industrial plantations. The IPRA itself is ambivalent when it comes to questions of land management. It guarantees indigenous groups the right to control, manage, develop, protect, conserve, and sustainably use land, bodies of water and surface as well as sub-surface natural resources in accordance with their indigenous knowledge systems and practices, customary laws and traditions and encourages „sustainable indigenous agriculture" while discouraging mono-cropping. At the same time however, it

provides mechanisms for entering into agreements with third parties such as agro-industrial investors or mining companies for the development and extraction of natural resources respectively.

Within the indigenous territories established under IPRA, inhabitants (indigenous and non-indigenous) face a plural legal order not just in relation to land management. While the indigenous leadership bases its legitimacy to self-govern on tradition as well as the IPRA, the previously existing local government (consisting of indigenous and non-indigenous representatives in this case) remains as de-centralized extension of state power in the area. Through the IPRA, which is hierarchically equivalent to the Local Government Code of 1991, the state recognizes institutions of indigenous governance within ancestral domains as equal to local government units, yet it has failed to address conflicting issues stemming from such dual and often competing authorities. Jurisdiction over questions of land ownership, distribution and transfer, for example, is thus hotly contested between officially elected local state representatives and indigenous authorities within titled domains.

**Janine Ubink**, Law Faculty, Leiden University, The Netherlands

**Legalising for tenure security: a pro-poor perspective**

Many developing countries have been involved in or are currently undertaking efforts to legalize or formalize 'extra-legal' land tenure. Such efforts range from the recognition of communal ownership to the creation of full private title and various forms in between. One of the main stated objectives of these legalization programs is the enhancement of tenure security. The rationale behind this objective is that people who are not secure in their property rights will not invest labour and other resources in the fertility and productivity of their agricultural land, in the improvement of their houses built on the land, and in the infrastructure of their neighbourhood. Tenure insecurity also hinders the provision of services and infrastructure by the government. Furthermore, people are unable to acquire formal loans, as they cannot use their land or houses as collateral. The lack of state-guaranteed documents moreover inhibits the ability to make transactions of land and houses with strangers who are not familiar with local ownership structures, which will restrict the land market.

A research group from Leiden, Amsterdam and Nijmegen has studied and compared eleven legalization efforts in eight countries in Africa (Ghana, Namibia, Senegal, Ethiopia), Asia (Indonesia, China), and Latin America (Bolivia, Mexico). These case studies deal with urban, peri-urban, and rural land, and focus on agricultural as well as residential land use. They examine the different designs of land tenure legalisations, the justifications and objectives for the legalisation processes, and their effects on tenure security and on the vulnerability of smallholders to losing their land rights. They furthermore identify the winners and losers of the legalisation processes and the challenges that need to be addressed to improve the tenure security of smallholders.

This paper will discuss a number of essential concepts for this research, such as extra-legality and tenure security, and draw some conclusions from the case studies on the relationship between legality, tenure security, investments, and marketisation.

**Myrthena L. Fianza,** Department of Political Studies and Resource Center, Mindanao State University, Philippines

### State Responses to Land Tenure Issues in Contested Domains: Perspectives from a Pluralistic Southern Philippines

Historically, land issues have been a flashpoint, stimulating social unrest in rural Philippines. Part of the plurality of the Philippine agrarian situation in transition is the persistence of pre-colonial land tenure patterns. Indigenous property concepts having to do with resource use and ownership survived the Spanish and North American conquests in the Philippines, despite integrationist and assimilation policies which continued to be adopted by the post-independence state. The setting of this study is Mindanao, the southern island-region with a critical history of inter-ethnic relations; with the Christianized North-Filipino migrant settlers, encouraged by a succession of state land laws, emerging to dominate the political and economic activities in a region originally occupied by the indigenous Islamized Moros and the *Lumads*, the non-Moro natives. A resulting heterogeneity of the island's agrarian situation, thus, is the persistence of pre-colonial land and natural resource tenure patterns practiced by these indigenous peoples in their remaining ancestral domains which also possess much of the country's store of exploitable natural resource systems, co-existing with migrant lowland tillers whose land tenure and usage structures have been induced by the state's legal institutions governing property ownership. This paper is based on an ongoing study of contemporary issues on indigenous land tenure in the Philippines, focusing on some case examples of legal tensions brought about by the interface of major land law reforms in a pluralistic ("tri-people" or "tri-ethnic") setting populated by the Muslim Moros, Mindanao Lumads, and the North-Filipino (Christian) majority group. The paper gives scope to three major law reforms, the Comprehensive Agrarian Reform Law (or CARP), the Indigenous People's Rights Act, and the Organic Act creating the Muslim Mindanao Autonomous Region, contemporary key policies instituted by the central state in responding to the Mindanao (land question), unpacking the contradictory outcomes of their implementation in ensuring land rights. These recent legislative reforms in response to mounting protests and movements for land and natural resources law and policy changes have become a cutting edge in the transformation affecting indigenous peoples' customary practices and land tenure security, mitigating in some instances, the continuous undercutting of pre-existing systems of resource use, landholding and production (caused by state expansion projects and capitalist intrusion) by supporting indigenous knowledge and community rules of access. However, these practices are exposed to more strains and stresses as a result of critical shifts in other new laws and policies as the Philippine state's development thrust towards economic growth and industrialization is conditioned by the demands of globalization. This paper attempts to look into this perceived ambivalent approach of the state in resolving the land question by examining some policy solutions that appear to remain within a framework of land ownership rights based on Western colonial legal traditions. How the various indigenous movements and advocacies in the Philippines are responding to these reforms and their expressed alternative solutions that pay appropriate attention to the local contexts of land conflicts will also be dealt with in this study; especially in the light of present developments following the Supreme Court's decision on the Memorandum of Agreement on Ancestral Domain forged by the state and Moro rebel peace panels (for the establishment of a new autonomous Juridical Entity which has served as the apple of discord among Mindanao peoples).

**Yonariza**, Center for Irrigation, Land and Water Resource and Development Studies, Andalas University, Indonesia

### What is so special about Thailand Land Tenure System?

Thai scholars claim that land tenure system in the kingdom is incomparable with the rest of neighboring countries where customary land right does not exist. This paper on the other hand sees that the process

of land tenure modernization in Thailand is very much comparable with those in neighboring countries. This is because it evolves from similar traditional land tenure system.

Using perspective of customary land right in nagari social system of Minang Kabau, West Sumatra - Indonesia where land right is differentiated between original settler and new comer, this paper will examine land tenure system in Thailand; drawing similarity and differences between land tenure system in Thailand and those of ulayat nagari in West Sumatra; and suggest land use and land right model to solve Thailand acute land tenure conflict under modernization process.

**Susilaningtias**, Perkumpulan, HuMa, Indonesia

**Recognition on Indigenous Peoples' Land and Natural Resources Rights in Indonesia**

*One evening in mid-August 2005, suddenly the community of Kasepuhan Cisiih, Banten Province in Indonesia were shocked at the arrest of one of their own by the police. Accused of illegal logging, Sudendri cut down a pine tree on his own land that has been handed down for generations and governed by Kasepuhan Cisiih customary law.*

In 1999, Indonesia ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). On September 13, 2007 the UN General Assembly established the Declaration on Indigenous Peoples'. Indonesia was a Party to this declaration. However, both international instruments are not used as main references in national legislation.

In 1999, Law No 22 of 1999 came into force in Indonesia on Regional Government. Since then , there have been political changes, also affecting more open policymaking. In that era until now, attention towards indigenous people in several legislations has increased compared to previous times. Until the present, there are at least 4 (four) national legislations that recognise the existence and indigenous peoples' rights regarding land and resource tenure, including human rights protection for indigenous peoples'. Those four legislations are : MPR Decree No. IX of 2001; Law No. 41 of 1999 on Forestry; Law No. 39 on Human Rigts and Minister of Home Affairs Regulation No. 5 of 1999 on Customary Land Rights Conflict Resolution Guidelines. However, implementation of these four policies is not yet optimal as: (1) they are often in conflict with each other; (2) the diverse management of community natural resources is not recognised ; (3) a layered indigenous peoples recognition system, thus creating difficulties for indigenous peoples to gain their rights; (4) the local government's inability to respond to the existence of new legislation; (5) an unclear concept for guaranteeing rights.

This paper will discuss various efforts undertaken by the Indonesian government to fulfill its obligation to respect, protect and fulfill indigenous peoples' land and natural resource rights before and after the existence of the aforementioned 3 legislations and what transpired after Indonesia ratified ICERD and agreed to the declaration. There will also be a discussion on legal conflicts due to the aforementioned legislation and international instruments, as well as resolution efforts carried out.

## Panel 10

### Developing Institutional Frameworks for Translating Global Conventions on Natural Resources Management into Local Actions in the Context of Decentralization: Experiences and Reflections Related to Land, Water, and Forestry Resources Management and Conservation in Asia

**Helmi** PhD, Andalas University, Padang, Indonesia
**Shyama Prasad Rout**, Jawaharlal Nehru University, New Delhi, India

This panel embarking from three major factors related to natural resources management especially land, water and forestry: global conventions, decentralization, and empowerment of community for local actions. There are a number of global conventions related to land, water and forestry resources which already agreed upon as a response to the deterioration of the resources and their uses to fulfill human needs. Millenium Development Goals (MDGs) is the latest (which more comprehensive to cover poverty, natural resources, health, etc), the Dublin Declaration (which concern with water), Kyoto Protocols (which concern with carbon dioxide emission), Biodiversity Convention are among others. The principles and general guidelines contained in the convention provide a basis for improvement of natural resources management in general and land, water and forestry in particular.

Following the agreement on principles adopted, efforts have been made to translate the conventions into action at local levels. Various organizations including government agencies, civil society organizations, private sectors (national and international), and research institutes have involved in the processes. These efforts have to take into account the latest development on governance: decentralization and empowerment of local people to actively play roles in managing provision of public goods and services (including provision of environmental services). Institutional frameworks have been developed and implementations have taken place which trying to deal with pluralism of laws at different levels (from global to local). However, the results are mix, some are successful to some degree and some were not achieved the objective as expected. The deterioration of the land, water, and forest resources which continue to happen at alarming rate give indication that there is a need to review institutional framework used to facilitate action at local levels and the implementation experiences. The basic questions are: What are the characteristics of the institutional frameworks developed? What are the characteristics of strategies adopted and the dynamics of interactions in the implementation among the actors? How do they reflect the interest of national and local governments to conserve and increase revenues from natural resources management? How do the institutional frameworks and implementation strategies reflect the concern of local people on their culture, rights, obligations, and welfare? How the interests of the stakeholders were reconciled? How best (performance) is the land, water and forest managed within the institutional frameworks and implementation strategies? Answers to these questions would enable us to draw lessons and make reflections related to legal pluralism issues which can help to improve concerted action (from global to local) in land, water and forestry management and conservation.

Researchers and practitioners are invited to submit papers which could provide answer to some or all of these questions.

**Contact**

**Helmi**, Andalas University (Center for Irrigation, Land and Water Resources and development Studies), Padang, Indonesia. E-mail address: helmi59pdg@yahoo.com. Phone/Fax: +62-0751-74389.
**Shyama Prasad Rout**, Centre for Political Studies, Jawaharlal Nehru University, New Delhi, India. E-Mail address: shyama2u(rediffmail.com Phone- +91-9437110826

## Abstracts

**Greg Acciaioli**, Anthropology and Sociology, The University of Western Australia, Australia

### Translations form Environmental Legal Pluralism to Centralist Conservation Justice in the Era of Regional Autonomy. Recentralising Environmental Management in the Lore Lindu National Park, Indonesia

The early stages of post-New Order decentralisation in Indonesia, as formulated in the 1999 Regional Autonomy laws and implemented beginning in 2001, witnessed the revitalization of local customary law (*hukum adat*) as part of the dismantling of uniform administrative village (*desa*) systems of local governance. In such regions as the Lindu plain of Central Sulawesi, *adat* was re-empowered as part of a community resource management system that included the right to try people accused of violating regulations of the Lore Lindu National Park, which encompassed the Lindu enclave. However, one of the other (unanticipated) consequences of Regional Autonomy has been the proliferation (*pemekaran*) of new administrative units — provinces (*propinsi*), districts (*kabupaten*), and subdistricts (*kecamatan*) — as local peoples sought to gain greater access to the devolved structures of regional authority.

Recently, conservation interests in Indonesia have harnessed the trend toward this proliferation of new administrative units to establish 'conservation districts' in Sumatra, Kalimantan and Sulawesi. This paper traces the rationale and rise of these new 'conservation' administrative units generally, but focuses particularly on consequences of the establishment in 2007 of a 'conservation subdistrict' (*kecamatan konservasi*) based on boundaries of the Lindu enclave within the Lore Lindu National Park, Central Sulawesi. Ironically, the operation of this new subdistrict has led to a retrenchment of the sphere of authority of local customary officials in environmental regulation, even though the strengthening of customary institutions of the dominant indigenous group —the To Lindu — had been a major rationale for establishing the conservation subdistrict. Using an extended case study methodology based on participant-observation, it discusses the ways in which the this new administrative unit has circumscribed the only recently revitalized powers of the local customary councils (*lembaga hadat*) to adjudicate cases involving conservation infractions, as these cases have begun to be tried once more by the national court system. This result is investigated specifically through analyzing the context of the court trial of a group of local Lindu men men accused of selling garden land within the national park beyond the Lindu enclave boundary. The paper concludes by discussing how this new administrative strategy of conservation undermines previous initiatives in co-management of the national park involving the devolution of the adjudication of transgressions of park regulations, suggesting that such a strategy undermines in the interests of recentralization the earlier rebalancing of state and local legal systems in relation to conservation conflicts that had been introduced with the advent of Regional Autonomy.

**Dianto Bachriadi** and **Anton Lucas**, The Flinders Asia Centre, Flinders University, Australia

### Trees, Money, Livelihood and Power: the Politics of Conservation in Bengkulu Province In the Era of Decentralisation

Increasing political pressure on the formation of public policies to establish conservation forest areas and National Parks has occurred in Indonesia since the downfall Suharto. At the same time there is increasing criticism over deforestation rates in this country. At the same time, the politics of decentralization and regional autonomy, implemented since 1999, has strongly affected local government at the District (kabupaten) level. The newly autonomous local governments have become involved in management of national parks that are part of its administrative territory. The District of *Lebong* is a newly formed district in the Province of Bengkulu, Sumatera that has more than half (around 70%) of its territory as part of the greater area of the *Kerinci Seblat* National Park. In the context of autonomous local

administration, (which also mean the capacity of local government to raise its autonomous local income or PAD), the district government had declared *Lebong* as a "Conservation District". This means all local administration should meet ecological and conservation goals, which include recognition of the district as a buffer zone of the world-heritage National Park. On one side, the establishment of a 'Conservation District' also shows how the local government can manage local assets to support local income raising, for instance through tax regulation of forest resources usufruct. On the other side, challenges to this 'Conservation District' policy are not coming only from illegal loggers, but also from local people who need land for their livelihood. The *Serikat Tani Bengkulu* (STaB), as an alliance of different political interests, has organized local communities to occupy lands in the forest and conservation areas within the national park area in this district. This has been done with two aims in minds. Firstly, in order to support their members' struggle for better livelihood, and secondly to increase its political mass-based power in the province.

This paper will explore and analyze a competing interests to use a huge land claimed as part of the world-heritage national park through following questions: (1) what is the main idea behind the establishment of 'Conservation District' concept and the dynamic of political interests behind this concept and its implementation; (2) what are the local government's implementation practices, and how do they work to grow district income; (3) What is the dynamic of political contention between the interests of conservationists (to established the national park), local government (to increase local income), and local people (who need land for their livelihood).

**Beria Leimona, Meine van Noordwijk, Niken Sakuntaladewi, Suyanto** and **Ujjwal Pradhan**, World Agroforestry Centre (ICRAF), Bogor, Indonesia

**Linking international, national and local rules and incentives for different phases of tree cover transitions in Indonesia: emerging REDD and A/R-CDM praxis in Indonesia**

Scale relations in the way land use, climate change, livelihoods, regulatory systems and internalized norms of human behaviour interact involve space, time, currency, language and cultural/religious dimensions, across global, regional, national and local levels of organization. Legal pluralism at local levels interacts with national rules and increasingly international agreements and pressures that are framed in a legal — illegal dichotomy. Climate change has a two-way relationship with land use across the declining and recovery branches of a non-linear tree-cover transition, which interfaces the forest — non-forest institutional watershed. Emerging global agreements for including changes in terrestrial C stocks in climate change agreements are Reducing Emission from Degradation in Developing Countries (REDD or $REDD^+$) and Afforestation/Reforestation rules for the Clean Development Mechanism (A/R-CDM). Conflicts over access to, and use of, forests by local communities and over the legality of state-sanctioned concessions remains a major challenge for the fairness and efficiency of both mechanisms, at both driver and symptom (outcome) level. International agreements require national governments to accept accountability for net emission levels. Depending on the de facto bargaining power of local and national agents, the expected benefit flows at national scale can lead to reduction or increase of conflicts and stalling or advancing land access reform. We analyze case studies of Indonesian forest tenure reform and social conditions in three periods: New Order (pre-1998), Reformation/ Decentralization and Post-Reformation Era. Our analysis of A/R-CDM (formal and voluntary) and REDD pilots shows that international pressures increase both the urgency and challenges of forest tenure reform and cross-scale governance. Current approaches to linking benefits and responsibilities across scales may be too focused on a direct linkage of C-fluxes and monetary flows. Explicit translation steps across time, space, currency and language may lead to a focus on 'assets' (trees and forests) and access rules in disaggregated space for long-term livelihood benefits at local level, and to C emissions and financial transactions at national scale. Typically, current policies fail to achieve their goals because of jurisdictional mismatch. The 'compromise' solutions of Village Forest (Hutan Desa) agreements in the watershed protection and producti-

on forest domains offer new hope for solutions that provide local, national as well as global benefits, relative to a loose-loose-loose status quo.

**P.P. Balan**, Centre for Research in Rural and Industrial Development (CRRID), India

**National Rural Employment Guarantee Act in India: Towards Greater Livelihood Security**

The Indian parliament enacted the National Rural Employment Guarantee Act (NREGA) in 2005 expressing the consensus of the state to use fiscal and legal instrument to address the challenges of unemployment and poverty. This was the first time; a country had passed the law of this nature and scale, guaranteeing livelihood security to rural households. The rationale for such a legislation was based on the need to provide social safety net to rural households as well as to create assets that rejuvenate the natural resource base of their livelihood. In an economy where 60% of the people depend on agriculture for livelihood, a major share of the rural population is vulnerable to the vagaries of monsoon as an overwhelming share of gross cropped area is rain-fed. These households run the risk of sinking from transient to chronic poverty, in case of any exigency, especially during slack agricultural seasons or years. Income transfers to poor households during these critical times become necessary.

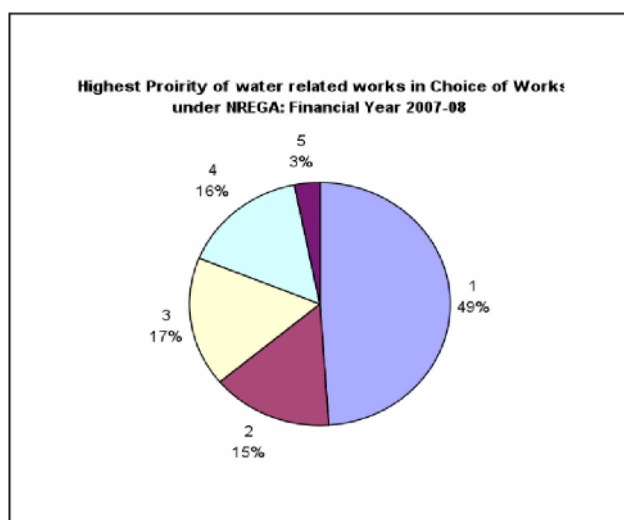
National Rural Employment Guarantee Act (NREGA) aims at enhancing the livelihood security of the households in rural area of the country by providing at least one hundred days of guaranteed wage-employment in every financial year to every household whose adult members volunteer to do unskilled manual work. The objective of the Act is to create durable assets and strengthen the livelihood resource base of the rural poor. Each district has to prepare a shelf of projects from the list of permissible works such as i.e. water conservation, drought proofing (including plantation and afforestation), irrigation canals including micro and minor irrigation works, horticulture and land development on lands of schedule caste and tribe population and land reform beneficiaries, renovation of traditional water bodies, land developments, flood protection and rural connectivity. The choice of the work suggested in the Act addresses causes of chronic poverty like drought, deforestation and sol erosion, so that the process of employment generation is maintained on a sustainable basis.. The extension of the NREGA to the whole country has provided opportunity to build the foundations of a social security system in rural India, revive village economies, promote social equity, and empower rural labour

Over the nearly three years since operational, The NREGA has had a positive impact on the lives of millions of people across the poorest district in India. Although implementation has suffered form procedural short comings it has a lot of positive gains in providing wage security for poor rural families, aided the economic emancipation of women, and created public assets. The adoption of a right based approach to work, including the payment of minimum wages, has contributed to enhancing the quality of life for the rural poor. Further, there are enough constructive experiences to show that corruption can be largely prevented through strict enforcements of the transparency safeguards. The Act has become a lifeline for millions of Indian who have been left out in the cold by high economic growth.

The act supports Millennium Development Goal (MDG) with its focus on environmental sustainability. MDG acknowledges that development rests on the foundation of democratic governance and the rule of law. Likewise NREGA provides a comprehensive legal framework for the democratic participation of the people in the implementation process of NREG programme. Institutional representing grassroot democracy such as the Gram Sabha, the assembly of all the electors in a village panchayat, have been empowered to plan, monitor and audit the projects which are implemented under the programme. Elected local bodies such as Gram Panchayat, Intermediate Panchayats and the District Panchayats have key roles to play for planning and implementing the works under the programme. Thus NREGA makes democratic processes and the rule of law fundamental to the strategy for removal of poverty and unemployment as envisaged under the Millennium Declaration.

**Outcomes**: **National Overview (2006-08)**

| | 2006-07 | 2007-08 |
|---|---|---|
| Employment Demanded | 2.12 crore HHs | 3.37 crore HHs |
| Employment Provided | 2.10 crore HHs | 3.34 crore HHs |
| Persondays Generated | 90.50 crores | 141.62 crore |
| SCs | 22.95 (25.4%) | 38.70 (27.3%) |
| STs | 32.98 (36.4%) | 41.36 (29.2%) |
| Women | 36.79 (40.7%) | 60.39 (42.6%) |
| Others | 34.56 (38.2%) | 61.55 (43.5%) |
| Works taken up | 8.35 lakhs | 17.76 lakhs |
| Use of Financial Resources | Rs. 8823.35 crores<br>(73% of available funds) | Rs. 15678.86 crore<br>(82% of available funds) |




**Note:**

1. Water Conservation
2. Provision of Irrigation Facility to land owned by SC/ST
3. Rural Connectivity
4. Land Development
5. Any other activity

**J.B.Rajan**, Kerala Institute of Local Administration (KILA), India

**Framework for eco-restoration through Local Governance:**
**Experiences from Kerala, India**

The restoration of eco-system is a major concern the world over nowadays. With the threat of climate change, there is widespread call for paradigm shift in development. The efforts to translate the principles and guidelines of international conventions for improving natural resource management into action also received much attention. In order to address pluralistic situation of natural resources at local levels, local governance has gained momentum. The advent of decentralised governance in India through its 73rd and $74^{th}$ Amendments to Constitution paved the way for creating local governments as institutions of self governments and ensuring direct democracy through village assemblies.

While many states were reluctant to devolve power to local governments, the state of Kerala chose radical big bang approach in decentralization and democratised the process. The state embarked on People's Plan Campaign during 9th plan and Kerala Development Programme during 10th plan. With the experience gained from last 10 years, the state is moving towards the agenda of eco-restoration during 11th plan through local governance. This is envisaged through integrated watershed management approach to bring about balance among eco-system triad viz. land, water, and bio-mass. Watershed planning top the agenda as per the state guideline on 11th plan issued for the local government institutions. There is also state guideline specifically for tailoring watershed planning. It is counted to achieve ecological balance to help sustainable natural resources management and livelihood security. To attain this, mechanism and methodology are in place. The working group for watershed is one among the mandatory working groups (plan committees) set up for LSGIs. The watershed committees as envisaged by the guideline embark active role of people. The preparation of watershed maps and mandatory provision for watershed plans are nothing but a leap towards the eco-restoration efforts. Suitable methodologies are designed to systemise the watershed planning process. The capacity building efforts at different levels; state level for master trainers, district level for trainers, sub-district level for active players are on. The interface of macro-micro plan is ensured through the preparation of district plan using iterative method. The watershed planning with an eco-restoration approach, envisaged by Kerala in India, embarks lessons for planners and policy makers for translating NRM into local actions. This paper looks into the methodological aspect of the plan framework in Kerala that envisage eco-restoration through local governance.

**Shyama Prasad Rout**, Jawaharlal Nehru University, New Delhi, India

**Indigenous Peoples' Rights over Land and Minor Forest Produce; Issues of Food Security: Plurality of Acts and Policies. A case study in Orissa, India**

This paper would examine the effects of legal pluralism at a variety of level, the ways in which the states regulate and respond to pluralism and its impact on the communities and social sector. At the outset it needs to be stated and understood that in India the preservation of natural resources includes within its fold the competing claims of humans on these very resources for their sustenance and livelihood. With this understanding any approach for sustainable forest management in India has to necessarily factor in the reality that a very large number of people living in and near the forests - and depending on them - are among the poorest. The forests form life support systems for them. The legal regime governing preservation and use of forests must reflect this understanding.

Apart from the above, over the last two decades even as the genuine forest dwellers have lived in fear of eviction, mafias have continued to encroach forests and alienate tribal land. There is a need to consciously distinguish between the authorised/unauthorized occupation of forests by dwellers for bonafide consumption, and the use of forest resources from the large scale timber and fuel wood smuggling and intensive commercial exploitation of forest resources. In the former case the so-called encroachment is a local and subsistence-oriented activity, while in the latter case it is a widespread organized industry largely driven by the mafia. The approach of the law and policy to the two situations cannot be the same.

**Hiambok Jones Syiemlieh**, Department Of Geography, North-Eastern Hill University, Meghalaya, India

**New notions of forest Management with special reference to Meghalaya, North-east India: Conflicts between the State and non State actors, a case study of evolving customary notions of forest management**

The development of scientific forestry was for all practical purposes the development of efficient ways of timber extraction. The management paradigm from the 19th to the closing decades of the 20th century had been timber extraction in much of South and South-east Asia. The transition to Biodiversity conservation has taken place in many cases with the same amount of coercion, whereas in other countries of the region it has taken place through executive action In India it has taken place through the initiates of both the executive and the Judiciary. The implications are discussed with special reference to the North-eastern part of India in general and Meghalaya in particular where community ownership/control of forestry practices has been the order of the day and intervention by any of the arms of the state has not been particularly significant. The region is especially important due it being a biodiversity hotspot and also a region, which is ethnically very diverse. The region also is being integrated within the wider Indian mainstream and the objectives of biodiversity conservation fall within the wider rhetoric of development in this region. There is substantial evidence to prove that the state has discounted the narratives of community based management systems and is in the process of creating frameworks that will enable it to play a more hegemonistic role in the context of the North-eastern region. The conflict lies in this clash of differing conceptions of the role of the local community. The local communities of Meghalaya and other north eastern states are beginning to carve out their own particular forms of forest management which have remained largely outside the pale of the state. The paper argues that the need of the hour in this region is to create an intersection on equal terms of both the state and nonstate narrative. The paper argues that that the state intervention should be largely in form of service delivery and technical support to these communities while at the same time creating enabling legal frameworks for further buttressing the rights of these communities over their forest land.

**Geetanjoy Sahu**, Centre for Interdisciplinary Studies in Environment and Development (CISED), Bangalore, India

**Environmental Justice Movement: The Case Study of Patancheru Environmental Movement in Andhra Pradesh, India**

Mass movements for environmental justice in developing countries are concerned with the livelihood of people and communities in rural areas. This is primarily because the lives and livelihoods of rural people are heavily dependent on the local natural resources and yet are vulnerable to disruption from external economic, social, political, and technological influences. This relationship provides a distinctive standpoint for grassroots environmental movements, furnishing not only the substantive character of the movements but also acts, on practical on a plane, as source of strength. Further, this standpoint influences the substantive demands and strategies of these movements, and even helps to shape their strengths and weaknesses.

This paper reflects on an environmental struggle, which is continuing in Patancheru industrial area of Andhra Pradesh, India since late 1980s. There are over 300 units in Patancheru that manufacture chemicals, pesticides and pharmaceuticals. Effluents discharge from such industries has severely affected public health, surface and ground water and agriculture in 22 villages in this area. The local community, which strongly resisted the industrialization process, opened a determined campaign against it.

The paper describes how this campaign has unfolded, setting it against the unique social landscape of modern India. The narrative of Patancheru is then used as a platform for investigating two more general

legal problems. The first problem concerns the regulation of hazardous Multinational Enterprises. In this context, the paper considers several legal domains: public environmental law, the law relating to Multinational companies (the OECD Guidelines for Multinational Enterprises) and private international law (e.g., transnational litigation). The second problem is a reflection of a more abstract legal puzzle. The struggle against the polluted industries involved two different legal domains: the international and the local. A close analysis of these domains reveals a strange picture of intense 'legalization', which is nonetheless highly ineffective. This strange picture deserves further reflection. Is it possible for the law, or legal communication, to sustain itself while having no effect on social praxis? This question is usually considered in terms of 'efficacy'. As such it is driven (and dominated) by a vision of law as an instrument of social control. In this, highly instrumental vision of the law, the idea of non-effective law is really a misnomer. It can only reflect a temporary failing, which requires external intervention or 'fixing'. The paper criticizes this instrumental narrative, and offers a wider outlook into the conditions that determine the existence and perseverance of the law as an independent social system. The paper pursues, therefore, three different goals: the first is to provide a 'thick' description of the conflict over the industrialization process; the second is a policy-oriented inquiry into the regulation of ecologically problematic Multinational companies; the third is a sociological investigation into the nature of law as a social system. All of these perspectives take the story of Patancheru as their point of departure.

**Panel 11**

**Traditional and informal justice systems, legal pluralism and human rights**

Prof. Dr. **Manfred Hinz**, University of Namibia, Faculty of Law, Namibia

In many countries, governments have enacted laws on traditional systems of justice, or are busy preparing relevant legislation. The scope of these acts reaches from accepting traditional justice systems as expression of legal (and cultural) pluralism to integrating these systems into the justice system of the state or even abolishing them in favour of unified state-centred structures. Where legal plurality has been accepted, the issue of compliance with human rights has become prominent, in particular in countries that possess constitutions providing for an overarching application of human rights. Although many superior courts have delivered relevant judgments and scholarly voices have enriched the discourse, the application of human rights to traditional governance and customary law (not to speak about informal justice systems) has remained a tricky and debated matter.

UNDP, the World Bank, UNESCO, the Office of the UN High Commissioner for Human Rights and other internationally operating non-governmental organisations are increasingly exploring traditional and so-called informal systems of justice. Why?

In many instances, field officers of the mentioned international organisations were informed by their working environments that state-run courts were unable to reach the people, were unwilling to accept their different concepts of justice, were too expensive, did not provide for reconciliation and the restoration of peace between wrongdoers and communities. They also learned that traditional and informal systems of justice very often offered helpful alternatives, in many cases, indeed, more suitable to the needs of the people as well as to developmental concerns. However, the practical work with these systems of justice has also led to questions similar to the questions mentioned above.

Experts and meetings of experts have given first answers, to question as listed in the following, but seek additional clarifications by legal and legal anthropological scholars:

- Are their common trends in the acceptance of traditional and informal systems of justice? Is there a difference between countries which are in a transitional phase in reorganising their sy-

stems of justice? Does the right to access to justice include the right to one's own system of law?

- What is the empirical and normative meaning of legal pluralism? What can it mean when state legal systems recognise legal pluralism?
- Are human rights standards, as they emerged internationally, applicable to traditional and informal systems of justice? To what extent reflect traditional and informal systems of justice indigenous human rights standards that coincide or do not coincide with internally emerged standards? What is the relationship between traditional as well as informal systems of justice and the formal system of justice? Is there a possibility to swap fora, to opt out of one and opt in to the other? Is there not even the need for a right to opt out?

These are only some of the (empirical and normative) questions that occupy the discussion. Others may be added depending on the empirical and theoretical backgrounds, which potential contributors to this panel may have. Comments and suggestions are invited and should be addressed to the organiser of the panel:

**Contact**

**Manfred 0. Hinz**, Faculty of Law, University of Namibia, PO Box 86519 Windhoek, Namibia, Email: okavango@mweb.com.na or by fax to: +264 61 220430

**Abstracts**

**Manfred 0. Hinz**, University of Namibia, Namibia

**Non-state justice, legal pluralism and social acceptance of non-state justice — Jurisprudential observations**

1) What is non-state justice?
Non-state justice is offered in this paper as an umbrella term for all sorts of institutions in societies, communities and other institutionalised entities that entertain more or less *specialised platforms* for the settlement of problems arising in the said societies, communities and other entities. Platforms, which are to a varying degree outside the mainstream of justice offered by states!

Traditional justice, is justice administered by traditional leaders in the conventional legal anthropological sense, ie. by community leaders who hold legitimacy because of their foundation in inherited concepts and rules of their communities and who apply local law (that may be solely the law of the community, or a hybrid of local and state law). Traditional justice is part of non-state justice. Ethnographical records show that the traditional administration of justice can be highly formalised although the areas of formalisation may be different from the areas of formalisation as they are normally found in the administration of justice by states. The same records also inform us about traditional justice platforms that do not require much or no formalities at all. Domestic statutory law informs us about the different degrees of independence left to (or control executed over) the entities administering traditional justice. The scope of independence or control reaches from unregulated dualism to integration.

Part of non-state justice is also what is called *informal justice*. While justice administered by the state is formal justice, informal justice means the achievement of justice outside the ambit of the state. Is traditional justice informal justice? Informal justice is certainly justice negotiated in arbitration and mediation bodies. But what about arbitration based on domestic statutes, which is, thus, more or less regulated? What about the international administration of justice where we find a broad variety of platforms, ie. platforms with different degrees of formalisation and also different degrees of binding force on the

parties concerned? As it may be debated by some who favour the concept of informal justice that all this resorts under this category, all this is surely part of non-state justice.

2) What is the jurisprudential (legal philosophical) relevance of the concept of legal pluralism in assessing the position of non-state justice within the framework of a given state system? To what extent is legal pluralism an appropriate tool in the jurisprudential conceptualisation of the various forms of non-state justice?

Legal pluralism is, from a legal anthropological or legal sociological point of view, the most obvious theoretical framework to interpret the broad variety of approaches to achieving justice outside the conventional state-administered systems of justice. As the author of this abstract has elaborated on elsewhere, the empirical orientation of the concept of legal pluralism has, with the growing acceptance of the basic findings in research on legal pluralism, received a normative dimension. One of the first indications of this normative dimension can be seen in the criticism of legal centralism by legal pluralists. The empirical demonstration of legal centralism as an illusion born from legal positivism has turned into a jurisprudential statement of general intention.

Although a lot of theoretical efforts have gone into the developing of legal pluralism as a jurisprudential concept, the dominant stream in jurisprudence, constitutional law and policies on states is still heavily infected by legal (and for that matter political) centralism, as can be shown with examples from the administration of non-state justice. The state-claimed monopoly for criminal cases is one outstanding example. The proposed paper will focus on this issue and recommend some changes in the inherited perceptions with respect to this.

3) Why reference to *social acceptance* of non-state justice and what are its criteria?
Reviewing relevant literature indicates that the interpretation of human rights for their application in the administration of justice only pays limited attention to non-state justice and is, above all, very much influenced by the state of affairs in the administration of justice by states. What developed in countries with western democratic traditions is often seen as the generally valid translation of human rights principles into the procedural reality in the administration of justice. This goes that far that sometimes scholars have difficulties to appreciate that the common law emphasis on adversarial processes cannot claim universal application, not to say the application based on human rights.

What this paper will aim at by focusing on societal acceptance is not to be seen as an alternative to the human rights-based approach, but as complementary in the sense that it will ask for possible criteria for social acceptance, which are to be interpreted as local reflections of the needs for the rule of law, legal certainty and the overall goal of the administration of justice: the restoration of societal peace.

**Helgard K Patemann**, Centre for Applied Social Sciences, University of Namibia, Namibia

**"... born of own soil." Why African philosophy matters in a discourse on African traditional justice systems**

This paper looks at the approach of a non-Western philosophy to some basic questions of humanity. The paper argues that valuable contributions to the discourse on traditional justice systems could emerge from a discourse between different culturally informed justice systems.

In the first chapter, I set forth the context of my deliberations. The metaphor of „roots and branches" is just one of many trying to catch some sense of what is called elsewhere "local and global". Where the roots are, there is the source of life. Where the branches raise and spread out in the open air, the sky seems to be the limit. In their determination, roots are tied to the locality while branches venture into

the cosmos, though not fully independent from their roots: speaking through proverbs and metaphors is a prominent feature of traditional Africa.

Turning to today's Africa, traditional justice systems maintained by local communities are followed side at side with state justice systems based on general law. The term "general" indicates the claim to higher authority and universal validity. General law, indeed, dominates the global legal scene. Encounters of people and cultures on the global market bring along questions such as of how one should live (ethics) and what are the correct principles of reasoning (logic). To remember that general law also developed from a local environment would foster a respectful and productive dialogue between cultures, their ethics and logic.

In the second chapter, I discuss some prominent features of a philosophy based on the human and cultural condition of what is commonly called Black Africa and located south of the Sahara. The overall picture of the discourse shows a controversy on how to approach the issue of comparison. One aspect concerns the importance allocated to the difference of traditions. There are voices that are most critical of the tendency to separate traditions of thought such as the African and the Western thought ("artificial divides"). (KA Appiah) The fear is expressed that a postcolonial African philosophy of this kind would lose its chance to engage with the positive values of Western modernisation. Other scholars emphasize the positive aspects of remembering "where we come from". A distinction is made between a sacred and a secular worldview and that in the latter it is humanity itself through technology that made science possible. Other scholars rather emphasize that the African thought frame is grounded in the collective sources of wisdom that include traditional religious belief. The Namibian theologian P Isaak characterises African thought as religious, communitarian, anthropocentric and holistic. The eminent African philosopher K Wiredu points to the opportunity translations of local concepts to "world languages" hold when he suggests that in this endeavour the African philosopher may be making contributions to general conceptual understanding.

Another aspect concerns the way of reasoning and raises the question whether African philosophy can claim being "scientific". The discussion ranges between the place the oral tradition of Africa could claim to occupy (HO Oruka) and the argument that African philosophy was as scientific as any other science can be. (Wiredu)

In the third chapter, I present and discuss findings from research in traditional justice systems. The first case deals with traditional courts and the assertion that they are unable to measure up to Western ideals of a fair trial. The second case looks at the relationship between customary law and gender equality, from the perspective of African (regional) human rights law. The third case asks what contribution African philosophy could make when customary law is being ascertained by a traditional community.

**Clever Mapaure**, University of Namibia, Namibia

**Recuperating our lost dignity? The compel of new constitutional values on the reform and reorganization of traditional courts in Namibia**

The functionality and administration of traditional courts in Namibia has been characterized by legislative rapidity and judiciary innovation in a bid to catch up with the demands of the newly thronged constitutional dispensation. The traditional court system or the so called informal justice system was subjected to apartheid policies and after years of de facto recognition and or complete isolation they came out of the brutal era with remarkable bruises. The democratic constitution prescribed the cure for the bruises and hence an obligation arose on the law reformers and the legislators to bring traditional justice systems into the mainstream. Inherent in the reform and reorganisation process is the need to create congruence between the values in customary substantive and procedural rules inseparable from the

function of traditional courts and the so called universal principles incorporated in the new constitution. To the law reformer and legislator the relationship has created a delicate but interesting relationship whereby the forces of monism and dualism present themselves at variant degrees of strength. These forces have become a critical factor in the reorganisation and reform process. This calls the legislator to sociologically characterize the factually existing plurality of legal codes - a clear case of legal pluralism.

Five years after independence the constitutional sting was felt when traditional Authorities, the primary administrators of traditional courts, found themselves subjected to more favourable legislative provisions. Some legislative enactments have acquired the force of law but have hot been given legal status — they are still in the shelves. This shows the rapidity of the process of reform and its loopholes where certain efforts are made only to be put on ice. Administratively ironic is that traditional courts are made to comply with a shelved piece of legislation. Notwithstanding this; favourable to traditional Authorities and their court system was the restoration of certain rights which they did not have before. Legislation and reform process is thus coming with moments of sighing and recuperation of the lost dignity. The challenge however is the liberalization of the rights which are imported into the system.

Traditional Authorities as administrators of the traditional courts new customs and cultural values enacted by a 'Spiritual Legislative Council', as the principal guidelines of adjudication. They feel that the constitutional imperative meant the acceptance of certain 'foreign' values into the system something which the traditional leaders were sceptical about. This drives into the relativity and universality divide, another point of challenge for the legislator and law reformer. On this note formal courts have come in also with their interpretation of the values and have struck a compromise by adapting customary values inventing tradition and the process has produced the system of 'African human rights jurisprudence' whose existence is still doubted. In this paper these issues are interrogated and an analytical consideration is done on the reform and reorganisation process in the current Namibian discourse.

**Maria Paula G Meneses,** Centre for Social Studies, University of Coimbra, Portugal

**The persistence of diversity: 'informal' instances of conflict resolution in Mozambique**

The role of traditional authorities in the post-colonial era has been one of the hottest debates in Africa today. Despite the dramatic changes that have occurred Mozambique over the last decade, the 'traditional authority' remains an important political institution that continues to exercise authority. However, the specifics of intervention of the 'modern' state have resulted in the proliferation of multiple 'alternative' instances of conflict resolution. However, these complex and diverse institutions in the resolution of social conflicts have failed to generate much research.

In this paper, I will seek to explores issues of authenticity and local requirements of belonging, as well as legal practices and legal discourse. By analyzing the interaction between traditional authorities' participation in the resolution of social disputes and ethnic identity — I will seek to unveil how the notion of 'traditional' are being both reinforced and disentangled. As such, this paper is an illustration of the role of 'tradition' in the constitution of indigenous identities and it introduces Mozambique into the global discussion of law, rights, and claims to citizenship.

**Eliamani Laltaika**, Tumaini University, Tanzania

**Court Assessors in the Tanzanian Judiciary:**
**A failed attempt to combine formal and informal justice systems?**

The concept of court assessors was introduced to Tanzania mainland (then Tanganyika) in 1919 by the British colonialists who took over the colony from Germans as per the Versailles Peace Treaty of 1919. The purpose of such a legal innovation was two fold: to guide the British court officials on matters of African traditional justice system and to convey a false impression embodied in the infamous 'Indirect rule' philosophy that natives were part of the colonial justice system. Nevertheless court assessors were looked down upon by the British court officials and even labelled as ignorant folks, unable to grapple the simplest of legal matters before them. Their opinion served only a persuasive purpose. After independence in 1961, Tanzania has been reforming its legal system inherited from the British, albeit at a pace of a snail. The concept of assessors has been modified time and again and it continues to exist in order to enable the judiciary to 'tap from the public repository of practical and tried wisdom' of the public. This paper is an attempt to assess the extent to which such a government intention has been achieved in the past four decades. Premised on the growing importance of incorporating traditional justice in national legal systems for enhanced human rights enforcement and protection of cultural and intellectual property rights of local and indigenous communities, it is argued that the court assessors' system is inadequate to 'tap from the public repository of practical and tried wisdom'. The author proposes that the role and tenure of assessors be clearly defined in the national constitution. It is further opined that time is ripe for the government of Tanzania to enact a law to provide for the application of traditional and informal justice in the country.

**Nonhlanhla Ndwandwe**, University of South Africa, South Africa

**The future of customary law in Swaziland under a human rights dispensation**

The recent advent of the new Constitution in Swaziland adopted in 2005 has formally recognised both the Roman Dutch Common Law and Swazi Customary law as the country's major legal systems. However, as with the rest of the former colonies in Africa, legal dualism in Swaziland is not a new phenomenon. The gradual and piecemeal recognition of Customary law in these colonies at some point resulted in the dualism of laws for most colonial territories, with customary law, though recognised, still subjected to strenuous conditions of application. Judicial attitudes towards customary law were always to regard and treat customary law in Swaziland as inferior to the imported Roman Dutch Common law. At independence Swaziland had an opportunity to uplift the status of customary law as a fully recognised legal system. However, Swaziland inherited a Colonial Westminster constitution with very little regard given to customary law. It was only the recent enactment of the Constitution in Swaziland that has seen customary law elevated as a full legal system in Swaziland. The Constitution of Swaziland also incorporates a Bill of Rights. One of the great tests for the survival of customary law principles today is through the impact of Constitutional intervention, especially its relationship with human rights norms and values. The likely interaction of customary law principles with principles of human rights cannot be avoided even in Swaziland. As the Constitution is fairly new, judicial interpretation of this interaction is very minimal to date. However, the dilemma of human rights versus customary law facing Swaziland has been experienced in neighbouring South Africa. In this paper I will argue that lessons of those experiences can be drawn from the South African's court's response to these problems. The future of customary law in Swaziland under a human rights dispensation can be predicted, especially where Swaziland is likely to follow the example of South Africa in interpreting this relationship.

**Lieselotte Viaene**, University of Ghent, Belgium

**Localizing Transitional Justice in Guatemala:**
**Micro-perspectives on justice and reconciliation after gross human rights violations**

The idea of using traditional and informal justice systems and revisiting traditional and local culture as a means of dealing with the legacy of gross human rights violations has increasingly gained currency in politics of peace and reconciliation and in the transitional justice field. Recently different countries in democratic transition have mobilized traditional mechanisms of conflict resolution in their transitional justice policies. Well known examples are: the Gacaca tribunals of Rwanda, the use of *mato oput* rituals, part of the Acholi justice system in northern Uganda and the incorporation of traditional leaders in the truth and reconciliation commissions in Sierra Leone and Timor-Leste. In the international community and transitional justice field there is a call for 'culturally sensitive' approaches, however this remains at a rhetorical level. Recent ground level empirical-research contributions have shown to enrich transitional justice and peace- building literature and discussions, which have so far held on to a highly abstract, legalistic and top-down character Yet, there is still a huge knowledge gap on the concrete (potential) role of 'traditional' justice systems in dealing with past massive human rights violations in different post-conflict contexts. This paper attempts to fill this gap and to contribute to the current debate on the importance of, yet contested role of, local justice mechanisms.

This paper examines the case of Guatemala and explores how concepts of justice and reconciliation are locally understood by Mayan Q'eqchi'. It forms part of a broader research question on the role of cultural context in transitional justice which examines how specific particularities of the Q'eqchi' culture could play or are already playing a role, at the local level dealing with the aftermath of the internal armed conflict. It uncovers the existence of multiple ways of understanding these concepts and further, the fact that they are perceived very differently from interpretations in international law and transitional justice studies. In Guatemala, the Maya indigenous population constitutes the majority. The Q'eqchi' were one of the Mayan groups severely affected by the conflict and is the second-largest Mayan group. To address the research question, 20 months of extensive ethnographic field research, was carried out between 2006 and 2009, in three micro-regions of the Cobän municipality. Multiple data collection techniques or methodological triangulation were chosen to reinforce an in-depth understanding of the research question: focus groups, individual interviews, linguistic workshops and participant observation. Analysis of ethnographic data reveals that there is an absence of demanding justice for those responsible for the atrocities. The analysis of an emblematic case of an ex-commissioner who became blind and lame, ties together the Q'eqchi' perceptions and reveals that at the local level of Q'eqchi' communities, impunity, as defined by international law, is not the end of accountability, nor truth recovery or reparation. Apparently, the internal logic of the cosmos through an invisible force creates an invisible space in which the perpetrator can reintegrate into communal life through which victims are acknowledged for their pain and suffering.

**Nic Olivier**, University of Pretoria, South Africa

**Legal Pluralism in South Africa: African Customary Law and Traditional Dispute Resolution within a National and International Human Rights Context**

The final Constitution (1996) of the Republic of South Africa provides for the recognition of customary law, traditional communities, traditional leadership and traditional courts. This is a continuation of the system that existed prior to the democratization of South Africa.

Traditional government structures in South Africa consist of (a) officially recognised traditional leadership (12 kings, ± 800 senior traditional leaders and approximately 15 000 headmen and headwomen) and

(b) approximately 800 partly democratized traditional councils (one for each officially recognised traditional community). There are at present approximately 12 — 15 million South Africans still (partly, to a varying degree) living within traditional community context. In 2003 a policy programme as well as the ensuing national framework legislation was completed. This vest certain customary powers and statutory functions in traditional leaders and traditional councils. All actions performed by these institutions must comply with the Constitution, and specifically with the basic human rights and fundamental freedoms as enshrined in the Bill of Rights (which forms chapter 2 of the 1996 Constitution of the Republic of South Africa).

As regards traditional courts, the 1996 Constitution provides a framework for the continued recognition of these courts. Following an extensive and empirical research project on traditional courts within the new South African democratic context, the South African Law Reform Commission (a statutory institution advising government on law reform) published a comprehensive report and a draft Bill on customary courts. The South African Ministry of Justice is in a process of finalising draft legislation which will probably be submitted to the RSA Parliament early 2008. In the meantime, the existing traditional courts continue to function.

It is envisaged that with the training of traditional leaders and traditional councils a major emphasis will be put on a number of key basic human rights. Special provision will be made to ensure that marginalised groups such as the youth, females and the elderly will be able to access these courts, participate in deliberations, and be treated in a fair and equitable manner. Other basic rights that will be addressed include approaches on how to deal with the exclusion of legal representation, reviews and appeals, training and appointment of paralegals who should act as clerks of the traditional courts, reducing to writing the core parts of the claim, the defence, the evidence, the judgement, and compensation to be paid. The relationship between the traditional system of reconciliation and the western system of winner takes all, will also have to be determined. Another key issue, which, to some extent, has exercised the Constitutional Court, is the relationship between substantive customary law and the Bill of Rights in respect of fields such as customary intestate succession.

**Oliver C. Ruppel**, University of Namibia, Namibia

**The Ombudsman and Alternative Dispute Resolution Facets of Legal Pluralism in Namibia**

The concept of legal pluralism is deeply anchored in the Namibian legal system. Different legal mechanisms may be applied for comparable situations. One of these mechanisms is the institution of the Ombudsman which has been established in 1990 as a constitutional office by Chapter 10 of the Namibian Constitution. The institution of the Ombudsman is designed to be an independent, impartial and neutral institution to keep a vigilant eye on the proper exercise of power and the protection of human rights.

Broadly speaking, the Ombudsman in Namibia investigates complaints concerning violations of fundamental rights and freedoms and about the administration of all organs of Government. More precisely, the Office of the Ombudsman promotes and protects human rights, fair and effective public administration, combats corrupt practices and protects the environment and natural resources through investigations and the resolution of complaints. The functions of the Ombudsman — in theory and in practice - are outlined in the first part of this paper.

Issues falling under the mandate of the Ombudsman may however also be governed by other sets of law, such as by mechanisms provided under statutory, common or customary law. The juxtaposition of the institution of the Ombudsman and other formal and informal justice systems will be analysed in the second part of this paper. In this context, it has to be determined, whether an aggrieved person has the

right of choice between different the mechanisms available and what the advantages or disadvantages of the Ombudsman are compared to other legal approaches available under Namibian law.

The Ombudsman may apply different techniques when dealing with complaints. In the first place, violations are corrected by attempting a compromise between the parties concerned. As the Ombudsman is not endowed with the coercive powers typical for formal justice systems, the institution rather follows the approach of alternative dispute resolution. The Ombudsman's investigation techniques and their elements of alternative dispute resolution particularly relevant for investigation are subject to the third part of this paper.

**Deborah Isser**, United States Institute of Peace, US

**Engaging Traditional Justice Systems in Post-Conflict Situations:
Conclusions of 7 Case Studies**

International efforts to reestablish the rule of law in societies emerging from conflict tend to focus on technical and legalistic approaches to building formal justice institutions. This is due to both ideological/normative constraints, including the overarching goal of strengthening the state and the obligation of certain international actors to adhere to international human rights standards, as well as practical ones, including institutional mandates and limits in knowledge and know-how. These efforts have been widely criticized as yielding limited results, in large part because they fail to account for local particularities including local perceptions and cultural practices of justice. This is particularly so in countries where much of the population relies on customary or traditional justice systems to resolve disputes. Drawing on case studies from Africa, Latin America, Asia and the Middle East, as well as direct experience in Afghanistan, Southern Sudan and Liberia, this paper will analyze the potential role that customary justice institutions can play in fostering the rule of law in post-conflict societies. This presentation takes a historical and anthropological approach to understanding the nature of and socio-cultural context in which the customary systems operate, with particular attention to the dynamics of their relationship with formal state institutions and the impact of conflict on their effectiveness. Arguing that constructive engagement with these systems is necessary both to complement limited formal justice in the short term, and to develop a legitimate and meaningful justice system in the longer term, the presentation explores approaches for national and international actors to take in managing legal pluralism.

**Renee Morhe**, University of Stanford, California, US

**Customary arbitration in Ghana: Doing justice in the absence of an institutional framework**

Legal pluralism in Ghana is evidenced by the co-existence of customary law, statutory law and Islamic law. Ghana is also subject to a number of international conventions. Customary law and customary arbitration have attracted criticism from various quarters. Indeed this system has been relegated to inferior status in relation to statutory or state courts. The problem for Ghana as well as for many African governments has always been determining the vehicle through which this law could be employed and how to reconcile the parallel and sometimes competing legal systems.

This paper discusses customary arbitration in Ghana as one important segment of dispute resolution that is usually forgotten when tackling the legal system and law reform because customary arbitrations do to a large extent alleviate the case load on the state courts. Using an ethnographic approach involving observation of actual disputes and in-depth interviews with chiefs and litigants at Ewe customary arbitrations at chiefs' courts, the paper establishes that customary arbitrations at customary courts are

still very popular especially among inhabitants of towns and villages. The research also revealed judicial recognition of arbitration awards and a level of reciprocity and interdependence with state courts.

The reasons for their popularity are very similar to those given for the establishment of post-conflict customary courts and the paper advocates that they must be formally established as lower courts along the lines of the old Native Courts and similar systems operating in Uganda because this would ensure supervision and counteract the downsides of the system.

**Sara Araüjo**, Centre for Social Studies, University of Coimbra, Portugal

**Legal pluralism, interlegality and access to justice in Mozambique**

In Mozambique we find a large number of community justice mechanisms solving local disputes according to complex combinations of laws (local, national, and global laws). Avoiding many of today's main problems of the judicial courts, community justices might be seen as more appropriated to some contexts and cultures and also be a reference to the creation of more democratic models of justice around the world. On the other hand, African legal pluralism is many times accused of being a fiction invented and imposed by colonial indirect rule, of creating first class and second class citizens and of violating human rights, namely by reproducing patriarchal models and the subalternity of women. This paper aim is to explore the contribution of Mozambican legal pluralism to citizens' access to justice, discussing those questions on the light of an empirical research conducted in two Mozambican provinces (Maputo and Manica). I will focus on the way people move inside the networks of litigation and the overlapped way they use the plurality of laws. The field work was part of a larger research project on the administration of justice in Mozambique in which I participated as part of a team composed by researchers of the Center for Social Studies - University of Coimbra (Portugal) and the Center for Juridical and Judiciary Training (Mozambique).

## Panel 12

## Legal Pluralism and Human Rights

**Yüksel Sezgin**, PhD, John Jay College of Criminal Justice, City University of New York

The panel will focus on the impact of non-state legal orders (customary, religious etc.) on rights and freedoms of individuals living under these systems. Existence of multiple jurisdictions often entails existence of multiple standards of rights and duties for individuals within the same politico-legal space. Yet, the lack of a common standard of rights and duties in a society can also lead to rise of differentiated or stratified categories of citizenry by grouping individuals into racial, ethnic, tribal, sectarian and gendered categories. In this respect, the first question that the panel will address is how universal human rights values can be instilled into a polycentric system where collective rights are held superior to individual rights or the principle of applying territorial, abstract and depersonalized norms to individuals without discrimination is either only weakly established or completely unknown. Moreover, the following questions will be also answered by the panel: Does legal pluralism help or prevent cultivation of international human rights standards? How much or what type of plurality can promote the so-called universal standards of human rights? Is legal pluralism an ill-intended tool for cultural relativists to deny international human rights to their constituents? Whose rights should prevail when there is a conflict between the rights of individuals and those of communities? In addition to purely legal and academic papers, the panel also welcomes papers from human rights or development practitioners who deal with public policy or immediate questions of how to reconcile differences between non-western

norms/values and the so-called universal human rights principles, by particularly focusing on vulnerable populations (e.g., women, children, indigenous peoples etc.).

**Contact**

**Yüksel Sezgin**, John Jay College of Criminal Justice, City University of New York, US, ysezgin(u.washington.edu

**Abstracts**

**Christa Rautenbach**, North-West University, Potchefstroom, South Africa

**Judicial Accommodation of Non-State Law in South Africa:**
**Emergence of Deep Legal Pluralism in South Africa**

Colonialism created an ideal breeding ground for the emergence of non-state law ("the other law") in South Africa. Pre-1994 state law, consisting mainly of Roman-Dutch law as influenced by English law and developed by means of legislation and court decisions, was used to oppress and exploit cultural and religious groups ("the Others") by keeping the people separated from one another, simply because they were considered not to be culturally (or "racially") equal. Since 1994 Customary law is part and parcel of the South African legal order on an equal footing, but still there are examples of other forms of legal pluralism which operate in the background. This can be seen in various areas of law. For example, as a reaction to the injustices caused by the colonial laws, some forms of non-state law emerged in the area of criminal law, so-called people's courts that applied alternative methods of "unofficial dispute resolution" developed as a reaction against (what was perceived to be) the inaccessibility and unfairness of the western courts (see Bennett *Customary Law in South Africa* (Lansdowne Juta (2004) 151-160). Also, in the area of family or personal law, members of the religious communities observe certain aspects of religious personal law which bind them *inter partes* (see Van Niekerk "State Initiatives to Incorporate non-State Laws into the Official Legal Order: A Denial of Legal Pluralism?" 2001 *CILSA* 349-361.)

So far the discourse on whether to include (or not to include) certain aspects of religious personal law into the state law of South Africa, had a domestic focus looking mainly at the constitutional provisions pertaining to culture and religion. Both the 1993 and 1996 Constitutions, in guaranteeing freedom of culture and religion (ss 14 and 31 of the 1993 Constitution and ss 15, 30 and 31 of the 1996 Constitution) provide that the state may pass legislation recognising systems of personal and family law consistent with and subject to other provisions of the Constitution. These constitutional provision does not compel the government to give legislative recognition to some forms of non-state law relating to religion, neither does it create a right to have a particular religious system of personal law recognised (Moosa *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights* (University Western Cape 1996) 354). In other words, there is no responsibility on the government to incorporate religious forms of non-state law into state law, and so far government and the legislature have remained mostly silent on these aspects.

Nevertheless, the judiciary and especially the constitutional court have been less passive in affording individuals forming part of religious and cultural groups protection where needed. These cases mostly deal with legal pluralism issues in the context of human rights law. For example, in a recent case of the Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) the court found that the school code which prohibited the wearing of piercing jewelry infringed the equality rights of a Hindu schoolgirl who wanted to wear a nose stud in celebration of his culture or religion. It is thus a clear example of how deep legal pluralism in accommodated in the South African legal system through the judgments of the judiciary. This presentation will be concerned with these examples of non-state

law, with special reference to the emergence of deep legal pluralism through the judgments of the South African Courts in the context of human rights issues.

**Josd Israel Herrera**, Faculty of Law, University of Amsterdam, The Netherlands

**Mexican cultural defence: The case of the Mayan people in federal courts**

Mexico has defined itself as multicultural since the 1990s. The political and legal system has been adapted to take account of the Indigenous and Tribal Peoples Convention, 1989 (ILO convention 169). However these modifications of old laws and enactments of new laws have exposed many structural failures in the application of this newly discovered multiculturalism.

One example is related to the Federal Criminal Code, which establishes a process of comparison for the purpose of determining who belongs to an ethnic group within the general Mexican population. However, the way this article has been worded causes a serious problem. Technical interpretation has led to the result that the indigenous person is viewed as being outside the category of average Mexicans. To be classed as indigenous a person must be shown to be a non—Mexican. So an indigenous person in Mexico is a person who doesn't belong to the country. However, this technical argument when used in the criminal process allows accused indigenous persons to secure acquittals and thus gain their freedom. This results in a contradiction: on the one hand they gain their liberty through being classified as non Mexicans (which involves structural racism); on the other hand, they gain their liberty through the fact that their traditions are recognized (which is a human rights benefit) This paper analyses some cases and the Mexican criminal law to enable discussion on how this process can be improved and how this situation can be analyzed.

**Rajshree Chandra**, Delhi University, India

**Collective Rights within Liberal theor**

The terms of the debate surrounding intellectual property rights are largely dominated by the fact that intellectual property, is often alleged to belong to the domain of liberal democratic rights which are individualistic in nature and therefore fundamentally conflict with the rights of the traditional people which are frequently located in collectives. These rights have becomes matters of intense debate and negotiations at both the theoretical and the global policy level, not to speak of their relevance to international relations. There is here an inherent divergence of interests. For instance, farmers' rights are group rights, as are indigenous knowledge rights. These rights are political claims which get their sense from the status of persons/communities as self-governing units. These self-governing members can belong to and claim allegiance to altogether different conceptions of rights, rooted in their own socio-economic and cultural milieu. The origin and conception of rights for them may not be the liberal-democratic paradigm. It is commonly believed that the terms of adjudication are constrained by the liberal individualistic premises that govern international regimes when negotiating rights pertaining to culturally different and collective entities. The liberal dilemma poses itself in international charters and Conventions. The Charter of the United Nations states that members shall promote human rights "without distinction to race, sex, language, or religion," but is in a quandary over the proper response to groups identified by race, language or religion that want differential treatment in order to preserve characteristics they cherish.[1] This dilemma finds a clear explication in the absence of any legally binding international instrument on farmers' rights and on knowledge rights of the indigenous peoples. The

[1] Francess Stevensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and its Impact on American Indian Tribes," *Political Studies*, 37 (September 1979): 421-430; Kenneth D. McRae, "The Plural Society and the Western Political Tradition," *Canadian Journal of Political Science*, 12 (December 1979)

dilemma does not exist at the level of diagnosing that these collective entities have moral claims; they

are well recognized and have become part of the official rhetoric at various national and international levels. The dilemma exists in according them the status of rights which will obligate states and entail a duty on the part of the upholders.

Rights often reflect a conception of human interests and needs. Some needs are so important, so basic and fundamental that they give rise to rights. In other words, those rights that are essential to the pursuit of the most basic interests and the satisfaction of the most basic needs have a strong moral basis for being considered as rights. Liberal- democratic thought assigns this as the basis of individual rights. Liberal theory holds that the freedom of *each individual* to live according to her own conception of the good is, as Mill said, the "only freedom which deserves the name."[2]; or as Dworkin states: "...The basic idea of right-based theory is that *distinct individuals* have interests that they are entitled to protect."[3] Ernest Barker goes a step further in demarcating the area of moral rights only for individuals for according to him "...in the moral world there are *no group persons*..." — no group exists that has collective moral rights.[4]

In the liberal scheme of rights, the objective of rights is to satisfy the interests and needs of the individuals. However, this paper proposes to argue that it does not necessarily follow that that the associated rights should go to individuals. There is no basis for assuming that individuals are the only significant units as repositories of rights. Sometimes, the associated right is better protected when located in a collective unit. For instance, a farmer's right to livelihood may be better protected through a collective right that the farming community has over its resources. States are collective entities, so are business corporations and both have rights. Some interests and needs are therefore better conceived as collective rather than individual. The same logic that leads from interest to rights for individuals also leads to rights for collective entities. Collective rights can therefore be claimed on the same basis and within the same system as individual rights. As Will Kymlicka argues, certain "collective rights" are consistent with liberal democratic principles[5]. When collective rights are not rights of a group to limit the liberties of its own individual members (internal restrictions) but refer to the right of a group to limit the economic or political power exercised by the larger society over the group, then these collective rights are consistent with liberal democratic theory.

This paper would seek to argue that the basic justification for individual rights and collective rights (or human rights the bearers of which are collectives) are the same. The problem therefore is not in conceptualizing or devising a basis for assigning rights to collectives. The problem is that once rights are assigned, these collectives become distinct political units or economic entities which have the potential to confront the dominant and existing political or economic entities. Just as groups may generate entitlements so also entitlements may generate political entities which may confront established rights and norms. In cases of conflict, as routinely occur between indigenous knowledge holders and claims for intellectual property rights, or between farmers' rights and breeders' rights, the intellectual property rights of the individual may be put in jeopardy; the rights of the group might always be held to prevail. Resisting collective rights might have therefore practical significance for societies based on individual rights. The issue of collective rights, specifically in the context of knowledge rights, is therefore not merely conceptual, but also one of pragmatic assessment based on vested self-interests of corporations and countries.

How do traditional resource rights (TRRs) fit in with the current regime of intellectual property? What are the sites of confrontation between the two? What forms of protection can evolve to protect the rights of indigenous prople? Do TRRs/CIRs belong to a class of rights which would typically be associated

[2] John Stuart Mill, *On Liberty and Other Essays* (New York: Oxford University Press, 1991), 17.
[3] Ronald Dworkin, *Taking Rights Seriously*. (Cambridge: Harvard University Press 1977), xi, 176, 188
[4] Ernest Barker, *Principles of Social and Political Theory* (Oxford: Clarendon Press, 1951), 71
[5] For details see, Will Kymlicka, *Multicultural Citizenship* (Oxford: OUP, 1995), Chapter 3.

not with the freedom to undertake actions but would concentrate more on outcomes that could result in the absence of these rights? Ought it to be more rights that preserve rather than create new oppor-

tunities? These are some of the questions that this paper would attempt to raise.

**IP Maithufi**, Faculty of Law, University of Pretoria, South Africa

**Legal Pluralism, Human Rights and Law Reform: Dilemmas to be faced**

Many countries of the world, in particular those formerly colonized, have plural legal systems. These legal systems were initially not afforded equal standing in that the received law acquired a dominant status. Thus most disputes were determined in accordance with the received law. The indigenous legal systems were either totally ignored or applied in cases where they were not in conflict with the received law. In many of these countries, particularly in Africa, this position continued until independence. The result was that at independence the legislatures of these countries had to reform their legal systems to reflect what was actually practiced. In this process, some countries unfortunately abolished the indigenous legal system while others retained it with some modification. The abolition was primarily aimed at outlawing or abolishing all forms of alleged discriminatory practices. Reforming the law in a society with a plural legal system is a complex task. The law reformer has to be equipped with the necessary tools, *inter alia*, knowledge of the legal system to be reformed, be aware of the conflict created by the application of plural legal systems and the prevailing social conditions. Where at independence a Bill of Rights was adopted, the problems of the law reformer become even more complex as the envisaged reform has to take into account the rights enshrined in such bill. In this process, some principles of indigenous systems of law may be sacrificed in order to comply with the Bill of Rights. This may, in certain instances, result in the proposed reform becoming "official law" and not reflecting the wishes and aspirations of the majority of the population it was intended to serve.

This paper gives a brief overview of the reform process already undertaken in one of the most culturally diverse countries, namely, South Africa. Attention will be focused on the reform in the field of family law and traditional administration of justice. These reforms were necessitated by the adopted constitution which entrenches equality of treatment and equal protection by the law. The reforms are a product of lengthy enquiries and consultations with various stakeholders, including but not limited to, lawyers, traditional communities and non-governmental organizations. The courts have also in their interpretation of the law in light of the adopted constitution, brought about important changes to the reform process. In their interpretation of the law, the indigenous legal system has been shaped in accordance with the adopted constitution which is the supreme law. The reform process, whether brought about by the legislature or court decisions, has in some instances led to a hybrid legal system which is neither indigenous nor Western. It also resulted in a distinction between "official law" and living law" for irrespective of the intention of the reformer the reform might actually not reflect the existing social conditions.

**Mustafa Yaylali**, Centre for Global Ethics and Politics, University of LUISS, Rome, Italy

**Legal Pluralism and Value Systems**

The first thing that gets to our mind when we think about law, is a legal system that consists of abstract legal norms, which are enacted and regulated in a more central way, applied to like cases equally. This is also called "Legal Centralism". However, in legal scholarship there has been a new trend in looking at the notion of law, which is more diverse, or plural, and is called "Legal Pluralism". The aim of Legal pluralism is to depict a real picture of legal-normative landscape, and acknowledge the existence of different legal systems within a geographical and/or political territory. Although the scientific interest in "Legal Pluralism" is rather new, the existence of different legal systems within a clearly demarcated political

and/or geographical territory is not. In other countries for example outside Europe, newly created states, mainly from the Middle East, Asia and Africa Legal Pluralism, do employ Legal Pluralism. Hence, this has lead to a distinction in Law between "official" and "unofficial law", whereby the latter is being studied by legal anthropologists. The need in those countries to apply Legal Pluralism is a consequence of the need they feel to get hold on the practical reality of its own society, which cannot be totally grasped by abstract rules.

Next to practical efficiency of the application of Legal Pluralism, especially in newly created states, there is also a political philosophical dimension into it, which is related to "legal instrumentalism". This view stresses the fact that law has been used by states, as a tool to direct its society in a certain direction by imposing certain values or value systems. This is a direct infringement of the individual's liberty to choose where to base his/her own action on which values or value systems of his/hers/their choice.

Therefore, I want to try to find ways, in my essay, whereby values can be stripped off from Law and be transferred to the society, letting them decide whether or not and if so how they want to deal with their own value systems on which their actions are based. More in particular, I want to find out how legal pluralism, in its newly defined functional value-regulator, can contribute to this process of stripping off values of Law in the sense of "Legal Centralism"

In this approach I want to find out how John Stuart Mill's "Harm Principle" and Max Weber's theory of "Value-Sphere" can contribute to my theory. My main aim is to explore how we can confine the state's power to its core tasks, with applying Legal Pluralism and preventing the state from interfering in individual's value system. With this approach I, not only try to solve the problem of the application of Legal Pluralism universally, but also try to redefine the relationship between the state and the individual, (and even the notion of Democracy).

**Kimberly Inksater**, Just Governance Group, Ontario, Canada

**Culture, Justice and Human Rights: The Legal Recognition of Indigenous Law**

The author analyzes the tensions between international human rights norms and indigenous justice practices, specifically, corporal sanctions. She argues that corporal sanctions such as lashings and stocks, as applied within some indigenous justice systems in Latin American countries, are acceptable within a model of legal pluralism she terms "transformative juri-cultural pluralism." First, the paper sets out a theoretical framework by: (i) examining three major theoretical models of legal pluralism: state-centric, socio-legal and critical post-modern, (ii) substantiating autonomy of indigenous law through an examination of indigenous difference and characteristics of indigenous law. This analysis leads to the author's proposal for a prescriptive and critical approach she terms transformative juri-cultural pluralism. Secondly, the author examines community-based indigenous legal orders in Bolivia and Colombia. Concepts of criminal conduct, processes and sanctions are examined in general and subsequently followed by in-depth descriptions of specific community norms and procedures. These case studies from Bolivia and Colombia provide the contextual basis for the analysis of jurisprudence from the constitutional tribunals in those countries. In the third section, the author examines the decisions of the constitutional courts of Bolivia and Colombia based on the three criteria that characterize transformative juri-cultural pluralism. Next, the author examines international human rights norms in order to identify the tensions arising between legal cultures. Instruments that offer individual rights protections, particularly those related to physical integrity, such as the Convention Against Torture and the International Covenant on Civil and Political Rights are reviewed. Instruments that promote collective rights, such as the Convention 169 of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples are analyzed. The author then looks to decisions of international human rights bodies related to corporal sanctions for responses to the specific tensions or questions that arise from the

individual and collective protections in human rights treaties. The author challenges the universalism of legal concepts such as humiliating and degrading punishment and the scope of the right to self-determination. Finally, the author proposes how transformative juri-cultural pluralism can respond to the tensions between legal cultures.

**I Nyoman Nurjaya**, Faculty of Law, Brawijaya University, Indonesia

### Adat Community Lands Rights as defined within Agrarian State Law of Indonesia: Is it a genuine or a pseudo-legal recognition?

In the last more than three decade it could be witnessed that cases of law on agrarian resources tenure and management have been increasing in accordance with rapid execution of national development in various sectors namely industry, agro-industry, transportation, transmigration, settlement and real-estate, as well as commerce and tourism infrastructures.

Conflicts over agrarian resources ownership and use are primarily caused by differentiation both interest of agrarian resources tenure and management, as well as differential perception to deal with agrarian law between the Government and the local people namely *adat* community (*masyarakat adat*) in the region of indonesia. In this respect, the Government tends to enforce State law to order and control lands in the name of national development, and the local people employs customary law or *adat* law (*hukum adat*) to control and manage their agrarian resources in the territories they depend on.

The 1945 Constitution of Indonesia that reflects State ideology of control and utilization of agrarian re-sources defines that the earth and water and the natural resources contained therein are controlled by the State and utilized for the welfare of the whole people of Indonesia. Such ideology of the State in the level of legislation reaffirmed within Agrarian Act No. 5/1960 concerning Basic Agrarian Law (BAL). In one hand, the BAL of 1960 establish the principle that the State law to deal with the agrarian resources included lands recognize rights of *adat* communities *as long as* was not in contrary to national interest and provisions of the State law. And on the other hand, the BAL of 1960 defines that the formation of agrarian resources tenure and use according to customary law or adat law regulated by provision of the Government. Moreover, the BAL of 1960 also confirms that agrarian resources which is not yet under national ownership were continue to be governed by adapt law *as long as* adat communities remain exist and was not in conflict with the spirit of provisions of the State Agrarian Law.

The proposed paper attempts examine position and capacity, as well as legal recognition of customary law and *adat* lands law in particular within the State Agrarian Law of Indonesia, whether is it a genuine or pseudo legal recognition?

**Vanessa Rüegger**, International Research and Consulting Centre IRCC at the Institute of Federalism IFF, University of Fribourg, Switzerland

### Legal Pluralism: On the interaction between religious law and human rights standards in the Middle East

The universality of the basic principles of the human rights corpus is in the western world widely accep-ted. This often belies the conflict that prevails in many regions between the international human rights standards and traditional or religious law. The Middle East is one region, where the existence of such a conflict is well known. Unfortunately, the debate about the interaction between religious law and hu-man rights standards in the Middle East is often highly political and different concepts, legal systems and political arguments are often - deliberately or by ignorance - being immingled. The research conduc-

ted (with geographical focus on Syria) identifies as the core problem of the conflict the application of two very different legal systems with different sources of legitimacy. Islamic Law is of divine origin, whereas human rights are made by men. If a larger cohesion between the two legal systems wants to be achieved, each legal systems has to be interpreted with its own methods of interpretation in order to evolve. The paper analyses possible methods of interpretation for each legal system (and their difficulties): the "evolutiv method" for a liberal interpretation of the Islamic law on the one side, and the "cross-cultural" approach for the interpretation of the human rights corpus on the other side.

In a next step, the paper analyses the differences between the constructive employment of a cross-cultural interpretation of the human rights corpus in the case of a prevailing conflict between religious law and human rights standards and the abusive employment of the argument of cultural relativism with regard to politically motivated human rights abuses. In a third part, the paper analyses the impact of human rights activism and international politics in Middle East upon the acceptance/refusal of human rights standards by the population and comes to the conclusions that most of the large human rights agencies fail to address the core problem (two conflicting legal orders).

The research concludes that a more distinguished approach in the debate around the relationship between Islamic law, universality of human rights, political rules and cultural relativism should be applied. The discussions surrounding those points should not be banned as being harmful to the universality of human rights, but be seen as an essential element for the approximation of the two legal systems and a better protection of human dignity.

**Barbara Oomen**, University of Amsterdam, The Netherlands

**Legal Pluralism and Human Rights: The Swiftly Shrinking Space for Orthodox Protestant Communities in the Netherlands**

Orthodox protestant communities in the Netherlands have long occupied a marginal but generally respected space in the political and social landscape. Over the recent years, however, the implementation of equal treatment legislation, fuelled by national and international developments, seems to have created a shift in the space granted to these conservative communities. An ongoing lawsuit based on CEDAW, for one, questions state support to the SGP party that excludes women from occupying political positions. Similarly, the Commission on Equal Treatment will be asked to look into the barring of actively homosexual teachers from teaching at the — state funded — orthodox protestant schools.

This paper discusses both the perception and the effects of the increased emphasis on equality in orthodox protestant communities. To what extent does this open up debate on these issues (internally) and lead to a shift in the relationship between these communities and the wider polis (externally)? As such, the paper seeks to contribute to sociolegal theory on the interrelationship between human rights and legal pluralism, and to understanding of the politics of the implementation of human rights law within a context of cultural diversity.

**Yüksel Sezgin**, John Jay College of Criminal Justice, City University of New York, US

**How to Uphold Universal Human Rights Standards in Traditional and Religious Legal Systems?**

A personal law system can be defined as a system in which each individual is subject to jurisdiction of her own religio-legal norms and institutions in regard to matters of marriage, divorce, maintenance, inheritance and so forth. In such a system, for example, a Muslim will be subject to Islamic Shari'a, a Christian to Canon law, and a Jew to Halakhah. Personal law systems have been historically employed by

imperial powers in order to categorize their colonial subjects into ethno-religious groupings, without giving much consideration to impact of these systems on individual rights and freedoms. In the postcolonial era, many countries have continued to employ archaic and discriminatory personal law systems to regulate familial affairs of their citizens. However, unlike their colonial predecessors most of these countries are constitutionally obliged to treat their citizens equally before the law, and not to discriminate on the basis of religion, gender and ethnicity. Against this background, looking at the individual examples of Israeli, Egyptian and Indian personal status systems, this paper will first explain why many countries continue disregard their constitutional obligations and discriminate against their citizens; how individuals cope with encroachment of communal and religious authorities, and what strategies and tactics they resort to in order to advance their rights and liberties within religious systems. The second part of the paper will prescribe a course of action to be taken by international development agencies and human rights organizations to promote and uphold universal human rights standards in religious and traditional legal systems. The section will develop a number of rapid assessment tools, identify entry points for human rights interventions, and demonstrate best practices from the field in the hope of providing a helpful "how-to" guide to human rights practitioners for promoting universal human rights principles and values in religious and traditional justice systems.

## Panel 13

### Legal pluralism in transboundary commodity chains

Dr. **Michiel Köhne** and Dr. **Otto Hospes**, Wageningen University, The Netherlands

This panel addresses controversies and complexities of newly emerging and changing forms of regulation in transnational chains of tropical commodities, such as cocoa, coffee, tea, soy, palm oil, meat and aquaculture. In the absence of effective state intervention and as a result of increasing levels of globalisation, somewhat misleadingly labeled as 'institutional voids' by Hajer (2003), various non-state actors design and try to impose new forms of regulation. These non-state actors include producer associations, trading houses, multinational companies, retailers and national and international NGOs. Many of these new institutional arrangements not only claim to organize commodity trade but also to contribute to 'sustainability' or 'socially responsible production'. Through consultative processes at round tables or multi-stakeholder platforms, non-state actors develop new 'sustainability law': principles and criteria for sustainable production as well as certification schemes.

These processes are hotly contested. There is constant debate among the non-state actors who act as the 'new governors' of commodity trade. The accountability and legitimacy of new regulatory powers is disputed by both insiders and outsiders. Finally, state actors and state regulation are increasingly interfering in one way or another with these new institutional arrangements, leading to further legal-institutional complexities and power struggles.

Legal pluralism provides a particular promising research approach for a better understanding of these processes of regulation. The panel wishes to identify and discuss the value of different research approaches for this field of study, which not only implies a plurality of normative structures, but also a plurality of interrelated practices in a variety of places. EU law, WTO law, various national laws, private regulation and customary and religious rules are all relevant in the different places, or links, along the chain of production, but get a variety of meanings depending on the position in the chain and contextual heterogeneity in actors, culture and power relations. The panel wishes to explore notions of spatiality, flows, shifting laws, legal interference and symbiosis.

**Contact**
**Michiel Köhne**, Wageningen University, The Netherlands, Michiel.kohne@wur.nl
**Otto Hospes**, Wageningen University, The Netherlands, Otto.hospes@wur.nl

**Michiel Köhne**, Wageningen University, The Netherlands
*The making and use of private regulations in tropical commodity production chains*

**Otto Hospes**, Wageningen University, The Netherlands
*A legal anthropological analysis of private governance and new sustainability law in soy and palm oil chains*

## Panel 14

### Contributes applied legal anthropology to an improved governance of legal pluralism

**Markus Weilenmann**, PhD, Office for Conflict Research in Developing Countries, Rüschlikon, Switzerland

In recent years, questions concerning applied legal and social anthropology have come more frequently to the fore, mainly in respect to the improvement of development politics. The German Technical Cooperation for instance requested legal anthropological advice for the designing of its good governance programmes from the mid 90s onwards. A leading question was whether such advice could develop practical recommendations which take the political, social and cultural living conditions of the recipient countries as starting point. And under the heading „cultural cooperation", the Swiss Agency for Development Cooperation strived for a closer collaboration with social anthropologists. More recently, also the UN requested a large-scale study on informal justice. Typically however, in all cases the focus rests only on those cultural aspects which are located *outside* of development agencies and thus hamper or enable a social change in the recipient countries.

Yet culture is of course not only „something" that is located outside of these agencies and thus only in the good hands where one discusses the existing links between culture, legal structure and „social development". Culture is also a typical mark of these agencies themselves, which invent the corresponding rules in order to design and manage development projects. With the growing globalisation such aspects gain importance, the more so as (private and public) development bureaucracies exert a growing pressure on the social and economic relations of local communities in non-western contexts. This process is particularly accentuated by the (not so new) discourse order on topics like good governance, the rule of law, the recognition of the human rights or the promotion of justice and democracy - topics, which are explicitly declared as new fields of action of private and public development agencies.

However, if one turns the scope to the social anthropological debates on development cooperation, which actually are largely influenced by exponents of development anthropology, one gets an ambivalent impression. While such an initial point would require substantial social and legal anthropological research on the socio-cultural impact of development aid, many anthropologists still prefer emphasizing the so-called „anthropological scepticism" and add that development aid is „of no use". Herewith, the debate is steered towards a direction which is rather due to a value orientation than to the upcoming cultural conflicts. Vis-ä-vis the development practitioners one insists on the one hand resolutely on the boosted consideration of social anthropological viewpoints during the planning and implementation phase of those projects which are located at the interface between national and local notions of law. And on the basis of de-constructive approaches one identifies the ethnocentricity of bureaucratic pat-

terns of decision-making. Those anthropologists however, who are engaged in such disputed territories are on the other hand accused of being „traitors" of the „common cause", since they would „sell" their local knowledge to bureaucrats and thus only help them to cover their own deficit of social legitimacy (see Escobar, 1991; Ferguson, 1994; Hobart, 1993: Mosse, 2003 and many others).

But when the discussion shifts to possible alternatives, the contributions are usually not very helpful. In most cases only commonplace points are stressed such as the postulation for more self-reflection, the promotion of actor-centred approaches or the „empowerment" of discriminated minorities (Gardner and Lewis, 1997; Grillot, 1997; Mosse and Lewis, 2005).

The goal of this panel is thus a qualified exchange of ideas and experiences between legal anthropological practitioners and researchers, which goes beyond wishful thinking and professional cynicism. The question whether applied legal anthropology contributes to an improved governance of legal pluralism or not is thus not only a value related question (whether one believes "legal pluralism" or "governance" is "good" or "bad") but a question, which also challenges our identities and our world views. With this panel, I thus call

- for papers that contribute to an improved understanding of the problems of "the other";
- for papers which analyse the social and political complexities, in which legal anthropological research or advice takes place;
- for papers which consider cultural and legal conflicts at the interface between state bureaucracies and local notions of governance;
- for papers which identify legal and political dynamics that could evoke distinct or controversial problem understandings, research agendas, operational strategies or management plans.

**Contact**

**Markus Weilenmann**, Office for Conflict Research in Developing Countries
Alpenstr. 25, CH-8803 Rüschlikon, Switzerland, drmweilenmann@smile.ch or by fax ++41 44 724 39 40
www.conflictresearch.ch

## Abstracts

**Michael Woolcock**, Brooks Poverty Institute, University of Manchester, UK

### Legal Pluralism and the Role of Interim Institutions: Challenges and Opportunities for Equity in Cambodia

Institutional reforms in contemporary Cambodia, like those in many other developing countries, are being undertaken in an environment characterized by pervasive legal pluralism—a situation in which numerous, and often contradictory and competing, sets of rules and norms regulate social, economic and political relationships. The international development community has a long and unhappy history of engagement with such environments, in part because their organizational and professional imperatives predispose them to favour interventions which encourage (or overtly require) 'legal monism'—that is, reforms that entail the wholesale adoption of, or the making of incremental progress towards, institutional forms deemed 'best practice' elsewhere. We present three case studies—of land, labour and local governance—from Cambodia which showcase an alternative approach to institutional reform, one which focuses instead on creating spaces for equitable political contests wherein the relevant stakeholders can forge legitimate, accessible, and context-specific 'interim institutions', the characteristics of which are largely unknown (even unknowable) ex ante. An interim institutional approach, we argue, offers a more equitable and effective (if less readily 'manageable' and neat, from a technocratic perspective) strategy for undertaking institutional reforms in environments characterized by legal pluralism.

**Michael Begg**, University of British Columbia, Canada

**From government to "government-to-government": Indigenous peoples and land-use planning in British Columbia**

Public land management in British Columbia, Canada is shifting towards a more pluralistic process touted as a model for the world. The first part of the paper summarizes the history that led to this shift, starting with the environmentalist challenge to the Province's dominant forestry and mining industries. Environmentalism provoked intense conflict in the 1980s, peaking in 1993 with Canada's largest act of civil disobedience: protests in Clayoquot Sound that resulted in 900 arrests. In response, the government expanded its internal land-use planning processes into province-wide plans founded on extensive public consultation. The plans did not alter the dominance of resource extraction industries, but did help to transform the environmental movement from grass-roots activism into professional NGO bureaucracies. These "ENGOs" have a more sophisticated relationship with the government, but some commentators question their effectiveness.

The second part of the paper takes up the history in the late 1990s, when indigenous peoples began to participate in the plans. Aided by court decisions that call for a reconciliation of indigenous laws and land-use systems with those of the settler society, First Nations refused to participate as "stakeholders" on par with industry and environmentalists. Instead, they asserted their own jurisdiction and incrementally assumed more authority in land-use planning. The provincial government in the 2000s began to negotiate "government-to-government" plans that attempt to reconcile the public plans with those of the First Nations. One result was a much heralded plan in 2006 for the coastal "Great Bear Rainforest".

The paper concludes by considering the degree of reconciliation in these plans, and what kind of model they offer for a new relationship among settler societies, indigenous peoples, and the environment.

**Corinne Wacker**, University of Applied Sciences, Basel, Switzerland

**Embedding International Environmental Law in Contexts of Legal Pluralism (with a focus on Water and Africa)**

Law has been designated by Giddens (1990) as a dimension of Globalization. Specialized fields of law, such as environmental law, create a trans-national legal culture, a system of expert knowledge which is 'disembedded' from the social context. We propose to share and discuss case studies and conceptual papers on the implementation of international environmental law in contexts of legal diversity. We propose to set a focus on the procedural conditions under which international environmental law can become meaningful in contexts of legal diversity and instrumental to local communities to claim entitlements over the natural resources of their environment (with a focus on water resources of water courses under international water treaty regimes).

To make the environmental dimension an internalized component of the decision making process and on the use and management of natural resources, International Environmental Law has adopted the principle of public participation. Through participation in the process of law making, law can become meaningful and instrumental to local actors and become part of their world (Cover 1983, Mellissaris 2004). In a dialogue between state and non-state actors, a "productive misreading" of the law (Teubner 1992) can facilitate an internal reconstruction process of the law in contexts of legal diversity. States can also voluntarily enter in agreements with extralegal institutions grounded in local knowledge, create linkage institutions and accept local autonomy on the management of natural resources (Guillet 1995). With these characteristics, linkage institutions between the state and non state actors have the potential to enable marginalized traditional communities to claim their rights on natural resources of their envi-

ronment (Zerner 2000). What are the procedural and substantive conditions to make international environmental law meaningful in contexts of legal diversity?

**Case Study: Environmental Law in the Making in a Context of Legal Diversity at Lake Victoria's Wetland Shoreline in Uganda.**

Formed by the bi-annual equatorial rise and fall of the lake level, the wetland bays and small islands along the northern shoreline of Lake Victoria were since thousands of years the privileged premises of a great aquatic civilization based on fishing, canoe trading along the waterways of the river Nile system and on flood recession gardening. Neglected by the colonial Nile Treaties which have allocated the rights to the Nile water to two countries having the right to grow irrigated crops and to eight others to whom this right has been denied, the wetlands of the Nile River and its Sub-Basin, Lake Victoria, have been bypassed as a specific ecosystem and habitat in the international water law of River Nile. By implanting additionally also modern land laws in the colonies, the wetland habitat of land and water has been dismembered into separate international and national legal units and has been marginalized. As part of public land, wetland habitats have become in Uganda, however, privileged premises for marginalized population segments who continue the traditional modes of swamp livelihood as illegal encroachers on public land and on a part of an international water body.

As country situated in the catchments of River Nile, Uganda has large areas of wetlands. Under President Museveni (since 1986) Uganda has set up a national environmental law endorsing the principle of participation in environmental law and the delegation of decision making on environmental matters at local level. Additionally the environmental law allows also the 'traditional uses' of wetland resources under the environmental law. This favourable legal context enabled a local community of wetland resource users, making a living illegally by using wetlands for fishing, gardening and craft making at the shoreline of Lake Victoria in Jinja town, to form a collective, to embark in a dialogue with government representatives and finally to become a "custodian" on the wetland, entitled to use the wetland resources for traditional uses and to monitor locally - as private sector collective under a co-management system with the local authorities - that the environmental wetland law of Uganda is enforced. This delegated co-management system enabled implementing environmental law in a context of legal pluralism. Uganda has inherited a dual legal system from its colonial period, but successive post-independence legal reforms have created diverging layers of laws on wetlands, which were, however, poorly enforced against the many poor who made a living from the urban and peri-urban wetlands of Jinja town, where the case study is situated. A "living law" (Tamanaha 1997, 2000) governed the transactions among the wetland user community, encompassing and keeping alive principles of customary African law which are distinct from the colonial customary law and the post-independent modern law of the country. With this case study based on six years of anthropological field research and on participatory legal drafting with the Wasoga and the fishing communities named "Bakenji" of Lake Victoria's northern shoreline, we propose to discuss some principles of African land and water law and procedural aspects on how to implement environmental law in a context of legal diversity. As le Roy and Le Bris (1982) underlined, African law is not linked to a specific space but to social relations of the people who interact and use this space and it is the collective that enables and controls individual user rights on a habitat which are effective as long as the resource is effectively used and the relationship to the authority which has allocated this right is maintained. The local case study of a collective of wetland resource users from the shoreline of Lake Victoria in Uganda suggests that international environmental law can be embedded in legal systems which derogate in their principles form colonial or modern land property law.

**Kossi Eyram Amouzou**, "Main dans la Main" (NGO), Lomä-Togo

**West-African Perspectives on Sustainable Human Development: It's Possible**

As a global concept, Sustainable Human Development is relatively new in West Africa, it has not yet become part of macroeconomics, development projects, or policy. Only the international organisations, NGOs, and some economists or ecologists have integrated it into their thinking, analysis, and study. Some political speeches and certain projects take into consideration some of the objectives, principles, or preoccupations of this new concept, but on a sectoral basis.

As we know, there is a large difference between speeches and actions, between laudable objectives of development projects and the practises in the field. West Africa does not have its own definition or approach concerning Sustainable Human Development. Nevertheless, considering the context and the constraints of development in West Africa, one can certainly affirm that Sustainable Human Development is a priority in this region.

**Markus Weilenmann**, Office for Conflict Research in Developing Countries, Rüschlikon, Switzerland

**Attempts to govern legal pluralism. Legal anthropological experiences in the development political consulting process**

On the basis of selected case studies from Malawi, Burundi, Ethiopia, Senegal and Germany, attention will be paid to the ways, development bureaucracies deal with legal pluralistic configurations. Two sepearte modes are identified, projects which explicitly refer to legal pluralistic concepts and thus develop their own notions of conflicting legal cultures and projects which are — due to insurmountable planning and/or realisation contradictions - oblidged to consider legal pluralistic problem constellations though not intended. Correspondingly, not only the role of a legal anthropological advise but also the impact such an advise might have, can vary. Projects with a legal pluralistic focus ususally refer to a legal anthropological advise when a project plan has to be set up or a project phase has to be evaluated; accordingly, such an advise might contain normative statements or even be turned into a project norm. Projects with insurmountable implementation difficulties require however rather an immediate support which often combines psychological help with legal anthropological advise. It is thus not very surprising that all kinds of everyday conflicts might go hand in hand with such an advise.

## Panel 15

## Religious, Corporate and Common Law: Coexistence in One State

Prof. Dr. **Elena Mokshina**, Mordovian State University, Saransk, Russia

The problems of legal development and transformation in the post-soviet countries will be discussed in the context of globalization and sovereignty. The reports will discuss the regulation of the different aspects of family and marital relations, social connections on the bases of common, religious and corporate law. There will be discussed the influence of those sources on the legal being of people within national and international law.

1. Coexistence of the state law and religious law, ethical traditions, common law in the sphere of marital and family relations.

2. The usage of natural resources: interests of international and national corporations v. aboriginal peoples of the North. Common law in the modern mechanism of aboriginal peoples′ rights protection.
3. Corporate law: coexistence and conflict with the state legal system (on the example of corporations, defense and security structures, informal gatherings).
4. A human in the system of legal coordinates (family, community, region, state, international community).
5. Federalism: problems of regulation within the post-soviet states.
6. NGOs and international financial corporations in the process of human and peoples′ rights protection.
7. Traditional law of the Finno-Ugrian peoples: the problems of coexistence with the state law.

Religious, corporate and common law as a system presents a unique legal heritage, which reflects the diversity of culture, traditions, folklore. Coexistence of multiple sources of law shows how the principles of humanity, development and cultural diversity are functioning in the state. The participants are thus encouraged to present original materials, which demonstrate the history, present situation and future perspectives on the issues.

**Contact**
**Elena Mokshina**, Mordovian State University, Saransk, yulenkam(mail.ru

**Abstracts**

**Yulia N. Sushkova**, Mordovia State University, Saransk, Russia

**Family and Marriage in Traditional Law of the Mordvins**

The knowledge of ethnic traditions becomes essential for building genuine democratic society, political and legal pluralism. From the middle 1980-s the processes of ethnic mobility increased in the form of multiple national movement, which aimed to conserve and restore traditional customs, culture and mentality. Nowadays there are broadly discussed the problems of ethnic rights and guarantees, among which is the official acceptance of the ethnic legal tradition as one of the sources of law along with state legal acts, international law, judicial practice (positive law).

For centuries people formed their unique socio-normative behavior model, which most adequately reflected the ethnic necessities of self-preservation and reproduction. The Mordvins actively followed the system of traditional normative rules; taboos in different spheres of life mainly till the beginning of the XX century before the revolutionary destruction of the commune, though even in modern times many traditional customs continue to function, evolving with the ethnos.

The central social structure and object of the traditional law system, on the micro-level presenting the existed complex of normative regulation, is the family. In this context the family is social, normative, economic union where the members are connected with each other by multiple relations (personal, property etc.), obligations, and mutual help, ethical and legal responsibility. The author analyses the legal side of family-marital relations: terms of marriage; marriage by svatovstvo (match-making); marriage by umikanie (kidnapping, abduction), samokrut (voluntary runaway); discontinuance of the marriage; inner family model, relationships among the members; personal relationships between the spouses; relationships between parents and children; property relationships in the family; resolution of the family conflicts; religious sanctioning of the family relationships. The book is structured according to the mentioned above outlines.

Being married was considered to be natural and necessary state for the Mordvins. This ideal got presented in religious beliefs. All Mordvinian gods had families with multiple children. Divine families of forests were Vir-ava ("vir" - forest, "ava" - woman) and Vir-atya ("vir" - forest, "atya" - old man), water ("ved) - Ved-ava and Ved-atya, land ("moda") - Moda-ava and Moda-atya, wind ("varma") - Varma-ava and Varma-atya, fire ("tol") - Tol-ava and Tol-atya, house ("kudo") - Kud-ava and Kud-atya etc. The refusal from marriage, staying and old maid or a bachelor in traditional law were regarded as a crime and a shame for the family and the kin. For example, in Mordvinian villages of Orenburzhie there was a custom to place a scarecrow or ordinary log near the house of the parents who have not arranged marriages for their children, unmarried women and men usually during the holidays have been made to carry logs.

The Mordvins believed in everlasting marriage, and traditional law does not open up the information in regards of divorce. Ethnographical research, folklore materials show that de facto there were divorced families, usually one of the spouses walked away from the house. Nonetheless such incidents were rare, the commune considered those acts as sinful and shameful. Spouses had possibility to divorce if the wife could not give birth to the child or there were facts of physical abuse.

At the end of the XIX-beginning XX century the Mordvinian family was organised in three types: big family managed by father-patriarch; big family as artel, the unit of several undivided after father's death brothers with their wives and children, managed by the oldest brother or another elected man; small family, including husband, wife, children, grandparents. Big families consisted of not only parents, children, but also other relatives, adopted children and home servants.

The typical features of those kinds of families were stable, strong authority of the head over other members and communal property. General regulation of family and marriage was set up depending on the gender and age. This stratification determined the status of the person, his rights, obligations and responsibility. Honoring the oldest was one of the strongest traditional principles. It substantiated the custom of avoidance toward the head of the family. The base of the Mordvinian family is the unit of a man and a woman who raise children.

The material base of the family - two forms of property: communal and individual, mainly female. In regards of the fact that the family from legal point of view is a contract, therefore it can also be observed as a unit of property. Individual property of a woman increased little by little her status in the family. The property included her family jewelry, hand-made clothes, and trunk with embodied and knitted bedding, cattle. The women saved her property for her children and it was passed after her death. In the meantime the head of the family managed all the communl property. Mordvins as a legal marking system used certain signs of property (different symbols), called "tyashkst" (moksh.), "teshkst"(erz.). Those symbols were usually put on the movable property. It was highly used in cases of conflicts about property rights.

**Irina Babich**, Moscow, Russia

**Islamic Law and Adat in Contemporary North Caucasus**

1. The focus of my paper is the relation between Muslim and Islamic Law in Contemporary North Caucasus. This region is a part of Russia and so there is only official state (Russian) Law. But in 1990s there is the Islamic revival in the North Caucasus. Most part of Muslims of this region wants to use norms of Russian Criminal and Civil Codes. But the young Islamic leaders are going not only to use Muslim as religion, but one as Islamic Law, including Islamic concept "Islamic State". Russian officials and jurists don't want to take into account on Islamic Law and Islamic concept "State", don't want to consider concept "legal pluralism". In my paper using empirical case studies I would like to consider the key relation be-

tween Russian State Law and Islamic one, on the one side, and between Russian State and Islamic one, on the other side.

2. Officially Russian State is secular state, but in fact Christianity is an important part of Russian ideology and is a state religion. Russian Muslims want to set up Islam as a state religion too. It will be good to create possibility to set up some norms of Islamic Law in Muslim regions of Russia (North Caucasus).

3. As a result of this situation are the conflicts between authority and Muslims. The key issue of relation between Russian administration and most part of Russian Muslim is possibility of set up some norms of Islamic Law (Family and land Law). The key problem pf relation between Russian administration and small part of Russian Muslims (radical Muslims — so-called "Vakhabbits") is possibility to create Islamic State in some regions of Russia, where Muslims are the most part of citizens — in the so-called "Islamic" republics of Russia.

4. In fact it's very difficult to combine Russian State Law and Islamic one, but it's possibility in some cases (Family Law), but it's not possibility to combine Russian State and Islamic one in one State. And so Russian administration wants to revive Islam without Islamic Law and Islamic concept "State". But Islamic leaders refuse to consider Islamic revival without all part of Muslim.

**Elena Mokshina**, Mordovia State University, Saransk, Russia

**Religion - Traditional Law - Ethnic Movement of the Mordvins in Modern Times**

Religious belief, which used to be the foundation of the worldview in the Russian Federation, was strongly suppressed in the soviet period and little by little lost its previous meaning. In the post-soviet era the confessional factor has become more influential in peoples' everyday lives in the Russian Federation, including the Mordvins. Nonetheless, existing for a long time in a complex social and economic situation, people lost their hope in the ability of state structures to create an orderly, safe, secure, and stable future, and many started to look to their ancient ethnic roots, perceiving them as a defense mechanism.

Recognition of the increasing role of religion in modern society prompted the leaders of the ethnic movement to create a special program for the restoration of the Mordvinian pagan religion as the cultural phenomenon which would most adequately reflect the mentality of the Mordvins in opposition to Christianity, which they consider to have been the main tool of russification. Mordvinian leaders take a more positive view of the Moksh-Erzyan (Lutheran) church, since in it the service takes place in the native language.

According to this analysis of historical events, the Russian Orthodox church will need to make a great effort to satisfy more completely the increasing cultural demands of the Mordvins, if it does not want the Erzyans and the Mokshas to tend toward pagan religions, the Lutheran church or other religious denominations. For that reason it is necessary to train ethnic Mordvinians as church priests, and to integrate into Orthodox Church ceremonies elements of the Mordvinian culture, especially the language.

## Panel 16

## Theoretical and Empirical Issues on Legal Pluralism

Prof. Dr. **Keebet von Benda-Beckmann**, Max Planck Institute for Social Anthropology, Halle, Germany

Participants are invited to present papers that deal with theoretical and methodological issues involving empirical research on legal pluralism under conditions of globalisation. Issues that might be addressed include: the selection of an appropriate site of research and choices between multi- and single sited research; local self-regulation and local responses to national and transnational regulation.

### Contact

**Keebet von Benda-Beckmann**, Max Planck Institute for Social Anthropology, P.O.Box 11 03 51, 06017 Halle/Saale, Germany, kbenda@eth.mpg.de

### Abstracts

**Lasha Bregvadze**, Institute of State and Law, Georgian National Academy of Sciences, Georgia

#### Plural Legal Pluralism: World-Society's Fragmented Law

Classical and modern concepts of legal pluralism are mostly dealing with the fact of coexistence of parallel normative orders within a given social unit — mostly defined as nation state, political system or local community. Legal pluralism within the nation state has been subject for the most of classical works in the fields of legal anthropology and sociology of law. Only the conceptions of global legal pluralism based on the empirical fact of emergence of trans-national legal regimes have enabled to formulate the notion of "global law without the state". Still, the concept of global legal pluralism describing the coexistence of multiple trans-national legal regimes on the global level existing beyond the control mechanisms of the nation states and international politics, reduce the notion of legal pluralism only to the trans-national processes.

The paper will argue that increasing processes of functional differentiation of the world-society and internal fragmentation of the social subsystems, including global legal subsystem require the reformulation of the concept of legal pluralism: the processes of the pluralization of law can be observed not only *within* the given national legal order or certain political unit, but also and most importantly *among* the different legal orders — local, national, international, supranational and trans-national levels of the legal subsystem of the world-society. Together with the reformulation of legal pluralism as the internal fragmentation among the legal levels of the global subsystem of law, the basic concepts of the *theory of autopoietic social systems* will be used as an attempt to develop the argument about coexistence of "qualitatively different forms of law" within different *social systems* — law of social interactions, law of organizations and law of functionally differentiated world-society.

**Tao Qing**, Department of Sociology and Politics**,** University of Sciences and Technology Beijing, China

#### The Coupling of Laws and Customs: The Space-time Conversion of Legitimacy. A Case Study on the Grassroots Chamber of Commerce in Fujie

This thesis aims at describing the fieldwork stories about groups of private businessmen in a certain famous shopping centre (which is named Fujie) in a certain coastal and opening-up city (which is named

Nanfang) in South China who have successfully operated the nongovernmental commercial chamber through eight-year-long autonomy until its legalization by the end of 2004, and also reproduces the vivid visions of the naissance of the citizenship identity between businessmen. With the compromise on justice ,the grassroots organization of the businessmen in Fujie has transformed their partiality and approached the local government on their own initiative .It is more effective for it to take part in both the social and political activities by developing its social legitimacy to the political and administrative legitimacy which taken root among the morality and regularity through the way of the deliberative democracy. Meanwhile ,the local government has transformed their partiality and approached the grass-root organization.It has also got so much more social identity to make the policy and social mobilization that it can counteract the weaknesses of the legitimacy through the way of mutual empowerment.

It is the fieldwork experience of the existence and development and legitimation of the modern"businessmen tribe"that exhibits the fact that separated topsy- turvydom of the traditional ancient society based upon patriarchal clan system which had no groups has changed correspondingly.Nowadays, the individuals start gathering toward the tiny political community and shaping the groups from"the cellularized society"in the social transformation in China. Though the Fujie grassroots chamber of commerce had not legalized until the end of 2004, it established the identity with both the local government and community.Without the sustaintion of the laws and policy,some non-government organizations have succeeded in conducting political activities and co-governing the commercial community with the local government harmouniously.

**Dwijen Rangnekar,** Warwick University, UK

**Making Place: The Politics of Geographical Indications as Narrative From Below**

The paper uses the provisions for geographical indications (GIs) (1) in the Agreement on Trade Related Intellectual Property Rights (of the World Trade Organisation) as a point of context and departure. GIs are unique in as an intellectual property right in that *demandeurs* for stronger protection come remarkably from global south member countries. For that matter, the global-speak on GIs suggests a variety of moral economies related to valorising 'place', promoting endogenous or territorial development, and securing traditional knowledge — among others. This attention to 'place' and territory allows GIs to speak to these various ethics. In another motif, the contemporary attention to GIs also relate to the changes in the global agri-food regime which has witnessed a proliferation of socially generated appellations (e.g. organic, fair trade, Rugmark, etc.). Some see in this proliferation of different appellations moments of reflexive accumulation — and opportunities for new social movements and networks that are transformative. However, in as much as these appellations seek to singularise things they also hesitatingly enable commodification. And it is this tension that the paper explicates through an analysis of GIs. In this vein, the paper situates itself in the call for a reflexive localism where the 'politics of place' does not erase and deny a 'politics in place'.

*Feni* is an alcoholic distillation from Goa, a state along the western coast of India, that is made from either cashew apple or coconut toddy. Over the last decade there have been calls to protect it with a GI and this has only recently been accomplished (March 2009). Though, only for *Feni* that is distilled from cashew apple. The opportunity to *re*code *Feni* through GIs opens opportunities for various interests to influence the scripting of the codes. The paper interrogates the eventual specifications for *Feni* — and uses this juridical code to unpack a 'politics in place' by juxtaposing it with other codes that relate to *Feni*. Based on fieldwork over a two-year period, the paper demonstrates how a section of interests amongst bottlers and distillers (those integrated into bottling) have shaped the codes of *Feni* to standardise the commodity; thus, undermining the inherent diversity of the craft of (home-based) distilling.

(1) The TRIPS Agreement defines geographical indications as "... indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation OR other characteristic of the good IS essentially attributable to its geographical origin."

**Melanie G. Wiber**, Department of Anthropology, University of New Brunswick, Canada

**The Promise and Perils of Participatory Research in Legal Pluralism: Methodological and Theoretical Issues from the Fisheries Field**

This paper follows two recent threads in social research and explores their implication for method and theory in legal pluralism. The first thread involves recent attempts to fully empower community in participatory research on natural resource management (Wiber et al. 2003, 2008). The second thread involves actor-network theory (Latour 2003, 2005 and Law 2004), which also promotes several methodological upheavals in standard social science research. This paper utilizes recent experiences in transformative co-learning arising from a multi-sited research project in the Canadian Maritimes to test the theoretical and methodological implications of these two threads for legal pluralism research. As John Law (2004) has argued: "paradigms are tools for handling 'out-thereness'. But they also in part *enact* that out-thereness." Method is not just a more or less complicated set of procedures or rules, but rather a *bundled hinterland* (comprised of politics, funding institutions, institutional authority and influence, and more). Law asks, if we change the methods, do we change the reality? And what alternative realities could we then create? What implications does this view of methods have for legal pluralism? For the methods we apply to understand the regulatory world? For what might be called the "applied aspects" of our work? What is "out there" in law, and how does our work change what is "out there" as a result of applying the legal pluralism paradigm? These questions will be explored from the perspective of "ontological politics", of the alternative management realities proposed by actors engaged in the fisheries sector.

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**K. K. Baiju**, School of Industrial Fisheries, Cochin University of Science And Technology, India

**Geography of Legal Pluralism in Marine Fisheries Governance: Perspectives from Kerala, India**

Introduction of blue revolution technologies into the Indian maritime zone has enhanced marine fish production and global fish trade. However, none of the federal states could sustain their marine fisheries and livelihoods due to the failure to craft maritime institutions and bring in the necessary reforms. The major reason for this institutional failure relates to its inability to understand the maritime biodiversity and the corresponding array of institutional diversity that sustained multi-species tropical fisheries along the Indian coast. Attempts made by the central and federal governments by crafting legal codes such as the Indian Marine Fishery Regulation Act, 1980 could not resolve the inter-sectoral conflicts in Indian marine fisheries. Most often, informal institutions and negotiations between conflicting fisher groups addressed and resolved conflicts more effectively and successfully than formal legal systems.

Consequently, traditional informal legal codes continue to govern activities especially in the artisan sector and coexist with modern legal systems. The interplay of modern and traditional legal systems hence decides the allocation and use of fisheries in many parts of the country. Even though several coastal districts have been amalgamated to form political jurisdictions of a marine state, legal pluralism exists even today and continues to influence the allocation and use of marine stocks. Under this background, the paper attempts to examine the geography and interplay of legal pluralism in the three maritime zones of Kerala fisheries. The implications of this legal dynamics to marine fisheries governance in Kerala are also highlighted. The paper argues that recognizing legal pluralism is essential for improving marine fisheries governance in India.

**Maarten Bavinck**, Department of Human Geography, University of Amsterdam, The

Netherlands**A comparative analysis of legal pluralism in the governance of marine fisheries in**

**South Asia**

This paper reflects on the results of a comparative research project, which investigated the state of legal pluralism in marine fisheries of five regions in South Asia (Gujarat, Goa, Tamil Nadu, Andhra Pradesh, and Hambantota — Sri Lanka). The premise of the project was that different patterns of legal pluralism will affect the extent to which problems of resource health and resource allocation are addressed. The authors suggest a typology of relations between legal systems, which range from indifference to mutual support. They conclude that patterns which involve two or more robust legal systems, and actors willing to engage in co-management, are generally more effectual than others. The problems affecting marine fisheries in the region are, however, so substantial that their governability is generally limited.

**Zod E. Headley**, Centre d'Etudes de l'Inde et de l'Asie du Sud, Ecoles des Hautes Etudes en Sciences Sociales, Paris, France

**Courts, Caste and Cursing: Justice and Resistance Among an Ex-Criminal Tribe (South India)**

The aim of the paper is to offer some ethnographic and socio-political insights on conflicting representations of justice in contemporary India. Our case study brings us to the central and southern districts of Tamil Nadu in a sociological landscape still very much fraught with inter-caste tension and violence, where the government's effort towards decentralized democratic process is still fragile. When Tamil Nadu took act of the 73rd amendment in 1994, this event was acclaimed by the media and the important Tamil political parties as a major breakthrough of local democratic participation. The "panchayati raj" created local units of power accredited to handle questions of local economic development but not to take judicial decision. This politic of positive discrimination posed these "new" panchayats at the centre of stakes of local power where tension between dominant and dominated castes is today exacerbated as it requires some dominant castes (amongst which we conducted our field study) to hand over forms of power they are use to monopolize, amongst which that of presiding over local courts. This has brought to the fore the disjunction between the traditional judicial system, founded on the legislation of the dominant castes, and the contemporary system inspired by the British model has lead to such situations that the Tamil government has recently (2003) announced its intention to outlaw these caste courts which it had so far ignored, the later entering in the field of of justice in a context marked by the rise of caste based parties and inter-communal confrontations. Conflicting representations of judicial processes are translated in local practices of democracy by the possibility given to certain subcastes to escape the legislation of dominant castes and, conversely, for certain dominant castes to comfort their position by way of manipulation of the modern tools of justice. If the surviving panchayat assemblies (local caste courts) represent a form of resistance to official judicial processes, the widespread use of sorcery represents a very individual form of resistance to caste-based legislation and more spe-

cifically to the rule of elders within the village and family social units. The fieldwork conducted for this

research was done in Tamil Nadu amongst the Pramalai Kallar subcaste, "an ex-criminal tribe", and more broadly amongst the caste-cluster the later belong to, the Tevars, also known as the Mukkulators, which represent an important proportion of the Tamil population of the central and southern districts of Tamil Nadu.

**Juliane Neuhaus**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

**The state in its margins. Legal pluralism and the state in Papua New Guinea**

My research on legal pluralism in Papua New Guinea (PNG) deals with the local practice of dispute resolution in different Wampar-villages in Markham Valley. There are different fora of dispute resolution available at the local level, based on state and non-state law and, of course, hybrid forms of law.

I am mainly interested in "village courts" - legal spheres constructed by the nation state - where local customs and traditional mechanisms of dispute settlement ought to be applied. This setting is a prototype of state legal pluralism (Hooker 1975) and weak legal pluralism (Griffiths 1986). There are about 1,000 courts of this kind in operation throughout PNG in rural as well as in urban areas. The first of these have been installed as early as 1975, during independence, and others are still mounted today. Legal planners designed these courts in order to provide law and order in the remote areas.

Most intriguing in studying village courts is the divergence between the local practice and national laws concerning them. I do not interpret local legal practice as resistance to or ignorance of national regulation but much more as unintentional practice born out of a lack of knowledge about national regulation (including human rights treaties) and state policy (especially on women's rights prevention). My re-study this summer (July-August 2009) will focus on local knowledge about recent state policies regarding village courts.

In my paper I would like to present my findings on this subject. Additionally I would like to elaborate on the usefulness of including the state and its representatives, actors and actions (Scott 1998, Shore & Wright 1997) in the study of legal pluralism in the margins of the state (Das & Poole 2004).

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**Franz** and **Keebet von Benda-Beckmann**, Max Planck Institute for Social Anthropology, Halle, Germany

**The social lives of adat law: Myths and stereotypes in discussions of the creation of adat law in Indonesia**

In our paper we shall describe the manifold historical transformations and changes which the local ethnic orders in Indonesia called adat or adat law have undergone. In particular we shall critically ex-

amine the deconstructivist literature that puts much blame on colonial administrators and scholars for

inventing or creating local customary laws. Since the early 1970s, such transformations of local ethnic laws have become a favorite topic in the history and legal and social-scientific study of colonial and post-colonial legal orders. Clammer for Fiji, Ranger and Chanock for Central Africa became the most noted deconstructionists in the Anglophone world. Similar critical discussions took place in Indonesia (Breman, Kemp, Burns, Fasseur, recently Davidson and Henley). The usual suspects of these critical deconstructions was the Leiden scholar of Adat Law, Cornelis van Vollenhoven, and his followers who formed the so-called adat law school, although they themselves already had distinguished between people's adat law and lawyers' adat law, a distinction later echoed by Woodman's notions of sociologists' and lawyers' law.

In our paper we look critically at these deconstructions. We shall argue that they were largely based on a rather legalistic conception of "law", underrated the strength of the continuity of local legal orders in many parts of Indonesia, especially outside Java, and grossly overrated the actual significance of these colonial legal constructions. They also had no eye for the agency of local people, elders and writers, who actively transformed and reshaped their own legal orders, not really caring of what foreign writers did. Such notions of colonial creations of customary law have become a stereotype which obscures rather than clarifies the complex interdependences between different actors engaged in the reproduction and transformation of adat laws.

**Sulistyowati Irianto**, Faculty of Law, University of Indonesia, Indonesia

**Tracing back the Passage: Studies of Legal Anthropology and Legal Pluralism in Indonesia**

The primary aim of this paper is to describe the progress of legal anthropological and legal pluralism studies in Indonesia in the last 40 years. This paper presents some notes on historical background. How legal anthropology, and socio-legal studies at large, have been developed in academic circumstances. It will be divided into three phases, that is (a) the period of 1960's until the end of 1980, and (b) the mid of 1980 to the mid of 1990. It portrays how legal anthropology has been taught in various universities in Indonesia, and the problems constrained deal with and (c) the mid of 1990 to present, which depicts the recent progress. Last of all, it is important to describe how the school of thought of legal pluralism more or less influenced the effort of legal reform in Indonesia through practical works done by NGO's. Many activities dealing with legal reform have been proceeded by NGOs in the last ten years. Some NGOs activists who have given legal aid for adat communities, have felt the needs for providing a deeper and broader explanation of legal pluralism to give better legal advice to adat communities. Taking these circumstances into account, the cooperation between academic circumstances and NGO's could be observed.

## Final Plenary Sessions

## Legal pluralism in a globalising world: Interdisciplinary dialogues

Dr. **Gerhard Anders**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

The nation states' claim to exercise exclusive lawmaking authority over a specific territory and population has always been contested by groups and organisations acting as sources of law in their own right. Current processes of globalisation have added another layer to situations in which several legal orders co-exist in the same social field. Transnationally operating social actors, such as international organisations or transnational corporations, increasingly influence local patterns of ordering, thereby creating highly complex situations of legal pluralism. This plenary will provide a platform for anthropologists and lawyers to discuss the potential of and challenges to interdisciplinary approaches to the plurality of legal and normative orders.

### Abstracts

**Bettina Dennerlein**, Chair for Gender Studies and Islam. Department for Orientalistic Studies, University of Zurich, Switzerland

#### Transitional Justice without Transition: Transnational Legal Concepts and Political Reform in Morocco

The presentation will focus on the experience of the Moroccan truth and reconciliation commission (2004-2005) and the process of political reform it has been accompanying. Adding another layer of legal norms and an additional normative repertoire to the problem of dealing with former human rights violations, the introduction of transnational concepts creates new opportunities for political action. While it may be looked at as a rather successful effort on the side of the monarchy to gain new legitimacy, it also opens up avenues for human rights and women's rights activists. Obvious differences not withstanding, the monarchy as well as civil society activism involved in the process of reconciliation both contribute to strengthening the authority of the nation state by consciously negotiating new rules for political behaviour that are more adapted to international standards while producing their own closures and exclusions on the national level.

**Julia Hornberger**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

#### The Possibility of Justice: Rethinking Law and Time

The avalanche of new constitutions written in the past fifteen years, especially in Africa, has marked a certain faith in these legal-utopian documents to inaugurate new and better forms of social life. Constitutions have increasingly come, since the collapse of the Cold War, to occupy the position of central guarantor in the project of creating justice. In South Africa in particular, the 1996 constitution written in the wake of negotiations at apartheid's end, stands as the sign of a new era of justice, occupying a particularly poignant place in local and international political imaginations. Constitutions invoke justice by means of the projection of future-perfect societies-to-come. These projections sustain the possibility of a hopefulness that cannot but evoke consent. And yet, in the moment of futuristic projection, constitutions also enable a consistent deferral of a radical politics of the present. Even as constitutions continue to radiate the possibility of justice, they have tended to simultaneously absorb and deplete more radical demands, enabling a closure on justice. This is in no small part because of their complicity with legal proceduralism as a reliable form of resolution.

How, then, do we understand this relationship between possibility and closure, between the promise and its deferral? Can we recover in the 'not-yet' of constitutional promises a plausible project of justice? Or does the deferral of justice inhere in the promissory, such that justice, whatever that may be, becomes perpetually evasive? It is these questions that seem to point us towards considering the temporality of justice, which I aim to touch on in the framework of this panel.

**Matthias Mahlmann**, Faculty of Law, University of Zurich, Switzerland

The Predicament of the Weak

The contribution will explore the content and prospect of legal pluralism in historical, contemporary and theoretical perspective. It will pay special attention to the practical effects of legal pluralism. Is it a legal key to the liberation and protection especially of vulnarable and much wounded minorities? What roles enjoy in contrast universal norms? Human rights will be the focus of attention reflecting on these matters.

**Shalini Randeria**, Department of Social and Cultural Anthropology, University of Zurich, Switzerland

**Shifts in State Sovereignty and Citizenship Rights in the Shadow of International Actors**

The new architecture of global governance, which entails the increasing transnationalisation of law and policy-making, is ambivalent in its effects on state sovereignty and citizenship rights. It is characterised not only by a proliferation of processes of juridification involving a diversity of actors but also by an enlargement in sites of contestation and adjudication. Non-state actors, supra-national and sub-national, have increasingly begun to shape the formulation and implementation of soft law and policy especially in IMF-World Bank borrowing countries. One of the consequences of these developments has been a transformation of the state itself, its part transnationalisation and part privatisation, which poses serious problems of accountability. The presentation will delineate some of these shifts based on my empirical research on the interplay between international organisations, civil society actors and the postcolonial state in India. It will address the issue of overlapping sovereignties and fragmentation of citizenship rights along with their consequences for democratic decision-making. It will also focus on the pragmatic judicial politics of social movement activists in their quest for social justice.

## Presentation of the Panel Summaries and final Discussion on the next steps and projects of the Commission on Legal Pluralism