

**AN INTERNATIONAL COURSE ON
'LIVING REALITIES OF LEGAL PLURALISM'
4-7 SEPTEMBER, 2011,
CAPE TOWN, SOUTH AFRICA**

Meeting Location:

Kramer Law Building, Room: 2A
University of Cape Town Middle/Lower Campus
(the building is marked with a red circle on the campus map)

Course Materials:

Required/Suggested Readings, the Course Program, and a copy of the Campus Map can be found at www.dropbox.com (User Name: lpcourse@gmail.com Password: 2011capetown). Once you are in the dropbox, please click on the folder "LP COURSE MATERIALS".

Sunday September 4, 2011

Legal Pluralism: Theory, methodology, and South African practice

8:30-9.30

Welcome and introduction to the course. Round of introductions of teachers and participants, Maarten Bavinck

9:30-12.00 (10.30-11:00 TEA BREAK)

Theoretical and Methodological Aspects of Legal Pluralism, Franz von Benda-Beckmann

Description: This session provides an introduction to theoretical and methodological aspects of legal pluralism, one of the most interesting and controversial concepts in the anthropology and sociology of law and legal theory. The session will sensitize the participants to the complexity of the co-existence of legal orders and the empirical and theoretical challenges it raises. One of the basic premises of legal pluralism is that the linkage between law and the state is not a constitutive element in the definition of law. State law thus becomes one variant besides other kinds of law such as (traditional or customary) ethnic or religious laws. This raises a number of questions which we can discuss in this first session in a general way. In the course of time and in the other sessions, these more abstract questions will get much more flesh and blood.

Required Readings: Franz von Benda-Beckmann (2002), Keebet von Benda-Beckmann (2001)

12:00-1:30 PM LUNCH

1:30-2:30 PM

The living realities of legal pluralism in South Africa, Chuma Himonga

Description: This lecture will argue that while challenges about the application of living customary law by state institutions (especially courts) persist, living customary law is likely to assume, if not maintain, a prominent position in African legal systems and to continue to regulate the lives of the majority of Africans on the African continent in the future. The lecture will highlight observable contemporary indicators as the basis of this argument.

Required Readings: Himonga (2005)

2:30-3:00 PM TEA BREAK

3:00-4:30 PM

Disputes and Dispute Management, Keebet von Benda-Beckmann

Description:

The session will provide insight in the processes of dispute management. It will start with a short review of the ways in which scholars have looked at disputes in the past and the purposes for which they wanted to analyse disputes. The major part of the session will be devoted to develop an analytical framework that enables students to study disputes in particular under circumstances of legal pluralism. Disputes will be discussed with regard to the ways they are embedded in social and legal environments. This entails an analysis of the participants involved in disputing processes and their possible relationships. The analysis will pay attention to the phases through which disputes go, beginning well before a dispute reaches an official institution of dispute management up until the time when a dispute has returned to the social environment in which it emerged. We will discuss why it is that only a small percentage of potential conflicts actually develop into full fledged disputes and that in the process they undergo a series of transformations. The ultimate objective is to see how the various kinds of law structures the choices made by the participants in these processes, and what alternatives there are of dealing with a dispute.

Required Readings: Felstiner (1980), Keebet von Benda-Beckmann (2003)

Monday September 5, 2011

Law and Development: Negotiations and Struggles over Rights

This session focuses on the role of law for the socio-economic development of poor and marginalized people in developing countries. It focuses on natural resource management, especially struggles for land, water, and aquatic resources, as well as on how indigenous communities cope with state, development agents, and market economy developmentalist efforts aimed at transforming local conditions. In these interactions, the legal dimension is one of the most important fields of contention because development projects entail a legal offensive aimed at redefining the local and traditional normative frameworks regarding community resources. In "successful" development projects, State rules, 'project law', and market regulations put an end to autonomic forms of control. But usually local societies and indigenous communities grapple with those external pressures by incorporating them into their normative and cultural milieus. The end result is a lively synthesis that allows the reproduction of the local forms of resource control and use.

8:30-10:00

Case 1: Indigenous communities, autonomic control over aquatic resources and development projects in Lake Titicaca (Peru, 1935-2005), Armando Guevara Gil

Description: Indigenous communities along the shoreline of Lake Titicaca exert a high degree of autonomic control over the lake's natural resources. Along the years they have shaped and enforced a well-established normative framework over the use and control of fisheries, reed beds and even the amazing landscape in which they live. At the same time, since the 1930s several projects have tried to induce development at the expense of those local forms of resource allocation. The outcome of this confrontation is the absorption of some traits of the development projects that allow the recreation and strengthening of the local normative framework.

Required Readings: Levieil (1990), Kent (2006)

10:00-10:30 TEA BREAK

10:30-12:00

Case 2: Land Power and Custom in South Africa, Aninka Claassens

Description: This session will look at land struggles in South Africa concerning the controversial Communal Land Rights Act of 2003 which was struck down by the Constitutional Court in 2010. It will examine the different approaches to

customary law adopted by traditional leaders, parliament and the Constitutional Court. In addition it will look at local-level processes of negotiated change in relation to women's land rights and customary law. It discusses the jurisprudence of living law emerging from the Constitutional court, and its implications for power relations at the local level. In addition it looks at the dilemmas and problems associated with establishing and proving the content of living law.

Required Reading: Claassens (2008), Claassens & Mnisi (2009)

12:00-1:30 PM LUNCH

1:30-4:30 PM (3:00 PM TEA BREAK)

Case 3: Access to and use of marine waters in the Palk Bay, South Asia, Maarten Bavinck

Description: Students will have the opportunity to participate in mock stakeholder negotiations over access to and use of marine waters in the Palk Bay, a sea area that is located between India and Sri Lanka.. This area has been plagued by conflicts between fishers from the two countries, and is also considered to be overfished. The fact that it is crisscrossed by an international boundary line impedes the development of a governance framework. As is the case in many ex-colonial countries, legal pluralism with regard to natural resource regulation in South Asia is rooted in the imposition of colonial law. In this region, there is still strong evidence of customary fisher law (particularly with regard to small-scale fishing), as well as newly developed fisher law (around the trawler fishery). International law (such as with regard to marine conservation) is also making an impact, however. The exercise will allow participants to address the following questions:

- What principles or values should underlie access to natural resources? Economic efficiency? Equity? Sustainability? Historical precedence?
- What role should local communities play in managing adjacent resources?
- Where conflicting claims to the same resources are supported by alternative legal conceptions and principles, how can these be adjudicated? Through the court system? Political negotiation? Independent arbitration?
- Can the concept of integrated management address some of the problems of jurisdictional overlap and legal conflict that underlie many resource problems?

Required Reading: Bavinck (2005)

Tuesday September 6, 2011

Legal Empowerment, Gender & Development Agencies

Legal empowerment is the process whereby disadvantaged groups acquire greater control over decisions and processes affecting their lives, through the use of legal processes. It has become a key term in legal development aid. In this field we see a shift towards recognition of the importance of non-state normative system. This session will focus on legal empowerment initiatives, and their attempts to align non-state justice systems with human rights provisions, in particular gender equality and non-discrimination. In the first half of the day, attention will be paid to the gendered dimensions of law, its impact on women's and men's access to resources, including legal institutions. The second half of the day will focus on working methods of international development agencies and the impact of their programming on societal institutions and normative systems.

9:00-12:00 (10:30 TEA BREAK)

Women's Rights, Legal Pluralism and the Role of International Organizations, Laura Turquet

Description: This paper will reflect on the role and experience of international organizations like UN Women in trying to advance women's human rights within legally plural contexts. It will draw primarily upon UN Women's biennial report, *Progress of the World's Women*, which this year focuses on women's access to justice and includes a chapter on legal pluralism. *Progress* has tried to dispel some common myths about legal pluralism that influence access to justice programming, especially in international organizations and often to the detriment of women's rights, and to highlight some promising examples of how international organizations can helpfully support women to be part of shaping justice systems and mechanisms and to claim their rights in legally plural contexts.

Readings: Progress (2011), Intro and Chapter 3; ICHRP (2009), Chapters 1, 2, 5 & 10

Response to the Progress Report by Rashida Manjoo and Julie Stewart

12:00-1:30 PM LUNCH

1:30-4:30 PM (3:00 PM TEA BREAK)

International support for justice and the rule of law: Some development agency political pitfalls for programme and project production, Markus Weilenmann

Description: The two hour session will be subdivided into two time slots of one hour each and a final discussion of about 30 minutes.

1) In the first session, four different development projects on law, conflict regulation and land tenure in Africa will be scrutinized and we shall discuss the relationship between the applied law definition and the extent to which the development goals have been reached.

2) In the second session we focus on the backstage of development project production and I will present the concept of project law. This concept allows analyzing some general modes of operation of the project production and to link these modes with the corresponding outcomes in the form of concrete development projects

Required Reading: Weilenmann (2009)

Wednesday September 7, 2011: Excursion & Rest

8:30 AM- 3:00 PM

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