

THE SUPREME COURT OF NIGER AND POLYNORMATIVISM IN URBAN CENTRES

A COMMENT ON ABDOURAHAMAN CHAÏBOU

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Setting

Niger is an arid, poverty stricken country, twice the size of France but numbering less than ten million inhabitants. Until independence came in 1960, the Hausa, Djerma and other major ethnic groups were subjugated by a colonial French régime. A dual legal system was established allowing local chiefs to administer justice according to custom to the members of their tribes and territories.

Like elsewhere in the Sahel region, over the last decades drought and desertification have uprooted many rural dwellers and driven them into urban centres such as Niamey, the capital. There they have settled down deprived of - or liberated from - the customary rule of their chiefs and the strict social control of traditional communities. Obviously they are now running the risk of becoming footloose as to their normative basis. Traditional village life has been left behind, but these newcomers on the urban scene do not perform many of the roles which the French oriented civil legislation offers, or orders, them.

How then *should* these fresh townsmen marry, divorce, inherit? In many developing countries legal systems are caught in this terrible deadlock: custom does not work well any more but law is not effective either. How do Niger's jurists deal with this socio-legal vacuum?

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Judicial Innovation

Chaïbou's vivid account shows that Niger's legislature has actually done very little to regulate this vast no-man's land. The judiciary, however, has made important steps to link the past to the present, to connect newly evolving community life to the law. In 1983 the Supreme Court of Niger made two land-mark decisions in the delicate area of family matters, in which it did away with old patriarchal custom and affirmed certain individual rights. Two new concepts were introduced: 'general evolution of the country' and 'urban custom'. They enabled the court to arrive at decisions which, according to Chaïbou, were both desirable and innovative.

Application of Custom: The Legislation

Niger's legal system has been constructed mainly by Frenchmen and French-educated jurists. Yet, belying the stereotypes of French law as being laid down in comprehensive codes and other statutes, no legislative drafters have codified Niger's custom into a regulation, as had been done elsewhere, e.g. in British-oriented Tanzania (Mtengeti-Migiro 1991). No judges in Niger sitting in customary cases can lean back and be merely the *bouche de la loi*. In this respect Niger's realities have falsified the grand design of comparative law which distinguishes continental law families from common law families by contrasting codified law with judge-made law.

Shortly after independence, Act 11 of 1962 concerning judicial organisation was promulgated. This act determines when and how courts should apply the custom of the parties: to which areas, under which conditions, through which procedures.

The areas of custom include: matters of personal status, marriage and family relations, inheritance and unregistered lands. The conditions hold that custom should violate neither public order, the liberty of persons nor the law itself; the validity of custom ends where two parties have explicitly denounced it. As for procedure, in each state court sitting in customary cases, the professional judges have to be supplemented with two expert customary assessors who have consultative tasks. The court's verdict must mention, explicitly and completely, the custom which is applied in a particular case "under penalty of nullity". No distinction whatsoever is made by the legislator between urban and rural areas. It is as if the law says 'custom is custom'. But in urbanized Niger this is not necessarily so.

At this point a short terminological excursion may be helpful. For if we have no clarity about words like custom and law, these words may play with us rather than us playing with them.

Terminology: Law, Custom, Customary Law, Legal Pluralism

Many textbooks in comparative law suggest that African legal systems are dominated by 'customary law'. This is in line with what colonial jurisprudence and contemporary legal anthropology maintain; notably that such 'customary law' constitutes a full-fledged legal system in itself with birth-rights that put it more or less on an equal footing with 'state law', as law is sometimes called. According to this jargon Niger would present a fine example of 'legal pluralism'. However, the basic internal assumption of law, as I understand it, is that it is the supreme normative system in a society, consisting of recognizable and lasting rules, and maintained by that society's government. Abandoning this assumption means an effective farewell to current legal discourse. But upholding it leads to the conclusion that 'legal pluralism' is no useful concept. Does that hurt? Would we overlook important social phenomena if we were to stop using ambiguous and confusing terms such as 'customary law' and 'legal pluralism'? I doubt it. And can legal progress in customary matters in a country such as Niger be adequately described without the use of these terms? I think so.

In colloquial speech 'custom' is a behaviour of a certain pattern which is repeated again and again. Individual people have their customs, and groups also have their customs. The behavioural pattern can be vague or precise. The custom may be age-old or a recent phenomenon. When society changes and new lifestyles appear, old customs gradually give way to new customs. Where the changes are radical, new customs can be completely different. A 'norm' is an opinion on how someone in a given situation should behave. A custom can often be related to a corresponding norm. As most African countries host different tribal communities with different customary norms, it makes sense to describe this situation as 'polynormativism', the co-existence of different sets of norms (Riggs 1964). Customary life provides a wealth of norms which can be picked out by a legislator or a court in order to derive a legal rule from it. But, even if 100 per cent of a community follows customary norms rather than legally prescribed norms, this does not force us to change the label from 'custom' into 'law'.

I realize that these terminological and the related theoretical issues are far too complex to be handled in a short paragraph like this. Yet, I feel that time has come for a critical evaluation of the current vocabulary of 'customary law', 'folk law', 'state law' and 'legal pluralism', which I have read and listened to for many years

but which I still find ambiguous, mystifying and therefore hard to work with, both in teaching and in research. And as I will show below, Chaïbou and the judges he describes, have also hardly used concepts like ‘customary law’ or ‘legal pluralism’ to describe the legal and social realities of dispute settlement in changing Niger.

Custom and the General Evolution of the Country

The judges of Niger’s Supreme Court seem to have had the same understanding of the concept of custom as I have demonstrated above, when they sat in 1983 to settle a dispute about the financial aftermath of a divorce.

A bridegroom had paid, at the time of marriage, a bride-price and all other costs pertaining to the marriage celebration. After the divorce the husband invoked a custom which allowed him to recover all the money spent. At first instance, the courts decided that only the bride-price had to be reimbursed, not the other costs. The courts of appeal confirmed this decision considering *inter alia* that the custom invoked by the husband was incompatible with an evolution that limited the return of marriage expenses to the amount of the bride-price. The Supreme Court upheld this decision, considering that before any verification or application of a custom, the court “must evaluate its conformity not only with the public order in force, but also taking into account the fundamentally evolutive character of each customary norm, with the general evolution of the country”. This court did not stick to fixed traditional interpretations of a tribe’s customary norms, but instead it ordered that a customary norm’s value must be considered in the light of the country’s general state of development. In fact, the judge says: paying back all marriage costs is indeed an old custom. But a general evolution has taken place in our country that has the effect that the old customary law is no longer valid.

In this way a new condition has been added by the court on top of those already provided by the legislation, in order to liberate today’s citizens from yesterday’s tribal obligations.

Urban Custom

Chaïbou’s analysis draws attention to two problems with law and custom in Niger. In the first place it is quite difficult to ascertain the existence of a custom “because of their oral, plural and very diversified nature”. Hence supplementing the courts with experienced assessors is a requirement, but the difficulty remains. Secondly, in certain urban centres the old customs of rural origin have turned out to be

outmoded and to have outlived their usefulness.

In another court case the example is presented of an old customary rule which states that upon their father's death the children must stay with their mother until the age of seven, and then go to live with the father's lineage. This rule was invoked by a grandmother who claimed guardianship over the three children of her deceased son. But the widow put forward the argument that the "interest of the children" required them to stay with her or with her mother until adulthood. The court of first instance upheld her contention, and this was confirmed by the court of appeal. Finally, the Supreme Court agreed with the lower courts, considering it necessary "to identify the custom that has developed in the towns ... since in the larger towns a reality has appeared of a custom which one could qualify as urban ...". So, according to the Supreme Court new urban customs can now be ascertained so that new legal rules can be distilled from it, and applied.

Stepping Stones

The paper of Chaïbou demonstrates that the jurists in Niger's highest court, in order to keep in touch with changing realities, have shown the courage to leave the beaten track and to come up with new concepts. The search for 'urban custom' may indeed be of historical significance to cross over from the land of traditional local custom to a world of centrally conceived legislation and vice versa. A comparative look into the legal history of Western Europe shows that there too in the 18th and 19th century 'urban customs' were the stepping stones needed for that crossing. I tend to agree with Chaïbou that the land-mark decisions of 1983 were both desirable and admirable. But Chaïbou himself also deserves credit for introducing us to the role of the judiciary in Niger.

The Study of Supreme Courts

Supreme courts in developing countries definitely need more attention as foci of socio-legal research. These institutions fight battles on many fronts simultaneously. Externally, they not only have to bridge a gap with those parts of society that are not law-oriented, but they also struggle with leading politicians who want to control or even interfere, and who do not always obey court orders (Wambali and Peter 1987).

In both situations constitutional review can be of great importance. In Tanzania it was used in the famous *Holaria* case to scrutinize traditional customary rules codified in a Customary Law Order. It was found that those rules were not in

conformity with the principle of non-discrimination which formed part of the Constitution as amended with a new bill of rights, and they were declared unconstitutional and void (Mtengeti-Migiro 1991). In Egypt during the 1980s the Supreme Constitutional Court had to decide whether Sadat's liberalizing Marriage Act of 1979 and the country's Civil Code of 1947 complied with Article 2 of the constitution which states that *shari'a* is the source of Egyptian law. It succeeded in the difficult task of making a decision that kept both the legal system and the social contract intact (Otto 1993). In Indonesia the power of constitutional review has become a symbol of the judiciary's struggle for independence (Pompe 1996).

Supreme courts also have to supervise and correct lower courts, which if done seriously may cause backlogs of many thousands of cases each year (Pompe 1996). Internally, they have to fight too, for efficiency, competence and sometimes against corruption. The outcomes of struggles on all these different fronts should be of major concern to all students of law and development (see Tiruchelvam and Coomaraswamy 1987).

Chaïbou's account thus leads to new questions. Has the case law of 1983 been followed up by similar decisions by lower and higher instances? Has the notion of 'general development of the country' meanwhile been refined? Which new urban customs have been ascertained so far? Has there been any role here for customary assessors, as the law prescribes, and if so, what kind of assessors are needed for detecting new urban customs? Has there been any pressure on the courts from traditional powerholders to roll back from their progressive positions? To what extent is Islam, the religion of the Hausa majority, making inroads into the system of customary norms, in rural or urban areas? Have similar legal developments taken place in the neighbouring countries of Mali and Burkina Faso? I am looking forward to the publication of Chaïbou's doctoral thesis and I trust that it will help in providing some of the answers.

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