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Explorations in Legal Cultures

edited by

Fred Bruinsma and David Nelken

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Introduction

Fred Bruinsma and David Nelken (editors)

The explorations of legal culture in this volume are concerned principally with the potentialities of the idea of legal culture as a 'term of art' in socio-legal enquiry, one which serves both as an topic or object of investigation and a concept that is intended to be helpful for understanding such objects. As the contributions we have included nicely illustrate, law and culture relate to each other in a variety of ways in different national and international settings, and the term legal culture may be used variously as part of claims put forward to describe and explain such relationships. Each of the chapters in this issue has its own story to tell about some aspect of law in relation to culture. Most also make valuable and relevant references to the concept of legal culture, although they do not always find the concept useful in the same way. The task of this introduction is therefore to offer short summaries, contrast their uses of the concept of legal culture, and sketch some lines of connection between them.

The issue opens with an exercise in theoretical ground-clearing by David Nelken. It sets out to examine three of the most important criticisms of the concept of legal culture. If legal cultures need to be explored, so does the concept itself. What units are we referring to when we use this term? What gives them their alleged coherence? And how can we avoid our explanations from being tautologies? In seeking answers to these questions the author offers some suggestions as to why a focus on these problems may help us understand more about what the concept of legal culture can refer to, and what it is good for. This chapter also offers the reader the opportunity to consider how, and to which extent, these three criticisms have been addressed by the authors of the case studies, and how this shapes what they have to tell us about external legal culture, internal legal culture and the relationship between them.[1]

The case studies

Relations between external legal culture and the judiciary are explored in the first two substantive contributions. Helen Keep and Rob Midgley explain how the idea of *ubuntu-botho* has been used by the courts in a transformative sense to express African, and – they add – probably universal, values and to incorporate them into the legal system. In fact, they reconcile Bohannan's theory of

1 Lawrence Friedman, who coined the term legal culture, made a distinction between the external legal culture of the population at large ('attitudes and behavior patterns toward the legal system') and the internal legal culture of 'legal professionals – the values, ideologies, and principles of lawyers, judges and others who work within the magic circle of the legal system' (1987, chs. 8 and 9, quotes on p. 194 and p. 223).

reinstitutionalization with Diamond's criticism (1971). They examine judgments, especially in criminal law, housing law, and delicts, where the term has been explicitly used so as to see what difference it may have made to the outcome. Although the term has this potential they deny that it has become 'politicised'. Their review shows rather that the courts have openly endorsed the need for transforming South African legal culture and, in doing so, for asserting the values of those who were marginalised in the past. What is important about this way of bringing culture reflexively into the law is that it represents a distinctive call to the local value of communality needed for building the nation, a call which can be applied to all its components, not just the black majority.

In a similar vein Wibo van Rossum addresses the way Dutch judges deal with cultural differences. How and when do judges take into account the fact that an increasing number of the litigants are members of cultural minorities, who have different expectations, values and sometimes even competing allegiances? Drawing on a sample of district court cases he goes beyond the normal focus on criminal cases to show how unquestioned cultural assumptions also play a significant role in judge's reasoning about civil cases. He investigates in depth how judges in two cases fill with meaning and sometime stretch the legal concepts available to them. He also offers an explanation for the greater willingness to allow for difference in the labour case compared to the case in family law: judges are probably more willing to accept culture as *fact* than culture as *value*. His analysis has implications for the policy of cultural diversity in multicultural societies.

The next two chapters have in common a focus on the relationship between legal and social change. Marina Kurkchiyan examines the way traditional Russian legal culture still conditions the present, and restricts the impact of the transitional reforms which were entrusted to the self-correcting powers of the free market. She explains that Russia is both inside and outside western legal tradition because Russian history did not see the kind of revolutions that produced the separation of powers characteristic of western states. As against the rule of law, in Russia too often the rule of man prevails, law is used instrumentally and respected only when it is advantageous to do. Informal relationships are all important and many judges are exposed to pressures and are willing to take bribes. Kurkchiyan offers a well-documented account of various features of the emerging legal culture, explaining, for example, why businessmen still do make use of contract law, and why western-educated lawyers are increasingly being marginalised by other members of their profession.

Another contribution deals with the way social change challenges the notary profession in France. Gisela Shaw explains how the profession's national leadership and the government have reached a symbiosis – an intriguing mix of hostility and complicity – which is by and large mutually satisfactory. This situation, however, is now threatened, not only by the shock of globalisation (Garapon 1995) but specifically by European Union directives which promote the common law culture of an open legal services market. She describes how the profession is adapting well to these challenges thanks to the long-standing and close links with a variety of state and economic organisations. A token of the fact that the notary profession is deeply embedded in the country's legal

culture and tradition is the laudation by the Minister of Justice at the annual meeting in 2006: 'Your profession serves the administration of justice and the rule of law. It is based on values which are not primarily economic.'

The two following chapters offer valuable studies of how different jurisdictions have different approaches to the 'same' problem, a type of research which is still not common (Gessner and Nelken 2007). Fred Bruinsma and Matthijs de Blois embark on a comparison between the French legal tradition of *laïcité* and the Dutch legal tradition of pluralism in public education. In a wide-ranging discussion they explain relevant links between general and legal culture, especially with respect to uncertainty avoidance. Unlike in France, where schooling is the main instrument used to create French citizens, in the Netherlands also in public education religious expression is allowed but not active proselytising. The recent ban on Islamic headscarves in public schools in France has no parallel in the Netherlands but a similar moral panic about national identity can be seen in a new Act that obliges in particular Muslim migrants to learn the Dutch language and society.

Martin Klamt also focuses on the way law tries to reconcile conflicting pressures – in this case the need to protect democracy from those who to take advantage of its freedoms so as to undermine it. Karl Loewenstein, a Jewish German constitutional lawyer coined the term Militant Democracy in 1935, and was prepared to accept the consequences of the democratic dilemma: defending democracy by means of restrictions on freedoms 'even at the risk and cost of violating fundamental principles'. Klamt compares the constitutions of a number of countries, including one group that went through a period of rejecting democracy before and during World War Two, and another that experienced periods of dictatorships also since then. He shows how differences in constitutions express and construct different national legal cultures. Each country has its own form of militant democracy, a constitutional core to be defended against anti democratic movements. This constitutionalisation of militant democracy is regarded as a reflex-action to history.

The final contribution takes us from the dictatorships of the past to the all too many bloody conflicts of the present. Barbara Oomen and Iris Marchand discuss the controversial referral of the civil war in Uganda in December 2003 to the crown jewel among the transitional justice institutions, i.e. the International Criminal Court in The Hague. They explain how President Museveni expressed his regret at the referral ('They cannot make us violate our culture') and how many local leaders say court intervention would interfere with attempts to make peace locally. They point to the way institutional remedies can shape people's attitudes towards the law and legal actions, and they discuss the advantages and disadvantages of seeking instead to declare an amnesty or invoke traditional dispute-resolution methods. After describing the difficulties of satisfying the sometimes competing values of telling the truth, doing justice, and making peace they conclude that the people most involved locally should have the main say about which path is taken. The end of the story they tell us is still to be written.

The theory behind the case studies

Looking at the separate contributions as a whole confirms the variety of referents for the term legal culture, ranging from 'culture in law' via 'law as culture' to 'law and culture' (see also Cotterrell 2004). All our authors take the term, at a minimum, as an invitation to explore what Friedman called the 'internal legal culture' of lawyers, legal academics and courts and other legal institutions. Some contributions concentrate specifically on the way internal legal actors develop the *cultural* underpinnings of legal doctrine in trying to re-found a nation (Keep and Midgley), or in dealing with challenges to law posed by other cultures and legal orders (Van Rossum). Others are more interested in external legal culture – in the way that general culture does (Bruinsma and De Blois) or should (Oomen and Marchand) shape internal legal culture. Though there is less explicit analysis of the specificities of legal culture as compared to other types of culture, valuable insights can be found, above all concerning the overlap between legal and political culture (Kurkchiyan, Shaw, Bruinsma and De Blois, Klamt, Oomen and Marchand), as well as hints on the relationship between religion and legal culture (Bruinsma and De Blois), and between legal culture and market economics (Kurkchiyan, Shaw).

All contributions show a preference for qualitative research methods. In the words of Keep and Midgley: 'In numerical terms, the (data) can hardly be termed significant; but, interestingly, courts have resorted to the concept where there is a need to emphasize the Constitution's transformative role.' Klamt refers to the programme of 'constitutional ethnography' (Scheppele 2004), and Bruinsma and De Blois mention Bowen's 'anthropology of public reasoning' (Bowen 2007). In-depth interviews and a round-table discussion with judges (Van Rossum), in-depth interviews and observation of court sessions (Kurkchiyan), personal semi-structured and informal interviews with professional leaders and practitioners (Shaw), focus group discussions and interviews (Oomen and Marchand) – these were the methods used by our authors. For good reasons since in cultural studies facts and figures do not speak for themselves but need the context of meanings and interpretations (Alasuutari 1995).

As suggested in Nelken's introductory chapter, there is ample evidence of variety in what is treated as the 'unit' of legal culture under examination. We learn for example not only about the unit of the nation state, like in the comparative exercises of Bruinsma and De Blois, and Klamt, but also about the unit of the legal profession – like in Shaw's discussion of notaries in France, or in Kurkchiyan's description of the behaviour of commercial lawyers in Russia. In some contributions we find the need to distinguish a number of different units, like in Van Rosssum's discussion of the role specific interpretation of what is in the best interests of the child, used by judges, lawyers and child protection boards. Sometimes these units may be in conflict, like in Shaw's account of notaries and the European Union, or in Kurkchiyan's discussion of western educated versus domestically educated lawyers. It is possible to identify still other types of units such as the groups involved in the international legal initiatives and institutions examined by Oomen and Marchand. Many of the other contributions also show the 'blurring' of local, national and international levels of legal culture that these authors refer to explicitly in their title.

The transnational role of law is ever more important as are common challenges that also transcend any one locality (Bruinsma and De Blois, Klamt).

What about the coherence of these units of legal culture? To a large extent this is just attributed to the branches of law, national jurisdictions, different institutions, social groups, or networks whose attitudes and actions are being described. There is some danger of using the term of legal culture in the confusing ways that Cotterrell has warned about (1997). Oomen and Marchand say that the legal culture concept is needed just because reality – the 'situation' in the terminology of the ICC – is so fragmented. The reason they recommend its use is that the 'notion privileges people's perception (about law and justice) above a merely institutional perspective'. Some authors do seek to spell out what makes for coherence. In conformity with the aims of constitutional ethnography[2] Klamt identifies characteristic patterns of constitutional doctrine regarding militant democracy. A similar 'historically developed constitutional self-understanding of state-church relations' explains *laïcité* in France and religious pluralism in the Netherlands (Bruinsma and De Blois). And inspired by Bohannan's theory of reinstitutionalization Keep and Midgley set out to show us how legal culture is both a historically shaped pattern of behaviour (exerting an influence to consistency over time) and also a matter of reflexively seeking to distil the values which are taken to be immanent in a given legal culture. Coherence between units of legal culture is thus partly a mental construct of internal legal culture.

We also need to ask how far the use of legal culture in these papers escapes the charge of tautology. In the first place it has to be said that not all of our authors are interested in explanation as such. For many the goal is more that of classification or description. The choice between description and explanation correlates roughly with the research methods used. Those who conduct empirical research by means of interviews and observations are more likely to assay explanations, especially where these have to do with the relationship between internal and external legal culture. The problem of tautology is usually resolved – or ducked – by assuming reciprocal influence between legal and general culture, like in the contributions by Van Rossum, Kurkchiyan, and Bruinsma and De Blois. But it should also be borne in mind that legal culture will not always or in all respects mirror the larger culture. Law may do things in one way precisely because in ordinary society things are done differently, for example less formally or more corruptly or because for a variety of possible reasons law and internal legal culture are out of touch with much of civil society and external legal culture.

Some enquiries included here are faithful to the reasons for which Friedman first developed the term, like where Kurkchiyan asks how and why external

2 'While constitutional ethnography emphasizes the particular, it has theoretical ambition. (…) Theory-building in this view, then, comes not from hypothesis testing, but instead from noting complex relationships in one setting and then seeing how far other settings can be understood in those same terms. (…) Constitutional ethnography has as its goal, then, not prediction, but comprehension, not explained variation but thematization.' (Scheppele 2004, p. 391).

pressures are (re)shaping Russian legal institutions. Others, like in the case of those authors who offer us imaginative reconstructions of the development of legal rules and constitutional provisions, or who describe how judges respond to different cultures, may not be using the term exactly as he intended, even though they are certainly not far from his wider interests in the interaction of internal and external legal culture. Moreover, they agree that the concept of legal culture continues to excite interest. For comparative lawyers in particular it seems to fill a void left by the inadequacies of the older notion of 'families of law' (Smits 2007, Varga 2007). One task for socio-legal scholars could be to develop the use of this and other concepts so as to assist those comparative lawyers who wish to enlarge their approach beyond a focus on law in the books into something more like comparative legal studies (Nelken 2007). For many social scientists the stakes are higher, as we have noted. Is legal culture a term we can use to explain legal and/or social change? Or is it just something that in its various manifestations itself needs to be explained? (Nelken 2004).

The topics tackled in this collection bring us up against some of the most difficult of our contemporary dilemmas – how to fight terrorism and the other enemies of democracy without throwing away what we are fighting for; how to build a multi-cultural society which is more than the sum of its parts; how to find a just path in foreign interventions between intervention and indifference. They underline the need for improving those conceptual tools, such as the idea of legal culture, which might help us understand the likely outcomes of our choices. But, however the term is to be used, it would be unwise to reify it by treating it as anything more or anything less than a meaningful way of speaking about how legally related social behaviour fits together.

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Three Problems in Employing the Concept of Legal Culture

David Nelken

Legal culture is a term which can have a variety of different meanings. But, at its broadest, it may be defined as follows. Legal culture is 'one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour, such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are, not just what we do' (Nelken 2004). I shall be concentrating here on the value of this concept for empirical studies of different legal systems.

Social scientists need to ask how well a given concept can be 'operationalised' for the purposes of their research. The difficulties are well posed in Cotterrell's influential, and highly critical, observations on Friedman's use of the term.[1] As Cotterrell notes, Friedman used legal culture in a variety of ways raging from the culture of the individual to that of whole societies. In his work legal culture becomes, 'an immense, multi-textured overlay of levels and regions of culture, varying in content, scope, and influence and in their relation to the institutions, practices and knowledge's of state legal systems' (Cotterrell 1997, pp. 16-17). Cotterrell thinks this makes it implausible to use the concept of legal culture in explanatory inquiry. He admits that 'such a variety of level of super and sub-national units could in theory provide a rich terrain for inquiry', but insists that we must nonetheless reject the idea that legal culture can be reflected in 'diversity and levels' whilst also having a 'unity'.

For Cotterrell, 'if legal culture refers to so many levels and regions of culture (with the scope of each of these ultimately indeterminate because of the indeterminacy of the scope of the idea of legal culture itself) the problem of specifying how to use the concept as a theoretical component in comparative sociology for law remains'. Commentators other than Cotterrell have also questioned the role of legal culture in explanation.[2] These are serious and well argued challenges to the term, but on closer attention we may find that they

1 See Cotterrell 1997, criticising the somewhat changing use of the term by Lawrence Friedman in his many writings since the 1970s. Even though he is now somewhat more willing to use the term, Cotterrell has not retracted the arguments of his 1997 chapter, see e.g. Cotterrell 2004, 2006a, and 2006b.

2 See e.g. Kenney 1996, or Glenn 2004. For a more positive appraisal see Volcansek 1998. For a critique of some of the rival terms see Nelken 2006a.

point as much to the complexities of what needs to be explained as to the weakness of our conceptual tools. In this chapter I shall seek to make progress in operationalising the concept by discussing how units of legal culture can be demarcated, what claims about coherence can be made, and what ways there may be to avoid the danger of circular explanations.

Demarcating the unit

What should we take to be the unit of legal culture? There are still many books and articles which take this to be the boundaries of national jurisdictions, and speak for example of French Criminal Justice (Hodgson 2006), the Japanese Way of Justice (Johnson 2001), or (for the first two editions) Dutch Legal Culture (Blankenburg and Bruinsma 1991, 1994). Likewise, leading scholars currently debate the specificity or even the 'exceptionalism' of the USA's type of legal procedure, such as its degree of 'adversarial legalism' or level of punishment. (Kagan 2001, Chase 2005, Garapon and Papadopoulos 2003, Whitman 2004.) But do books about legal culture have to take the same starting point as those which describe a system's 'law in the books'? Studies using the notion of 'families of law' make uneasy compromises between emphasising the importance of common/civil law or other such contrasts whilst also recognising national differences. The Netherlands and Italy for example are both members of the civil law world, but for many purposes any similarities this may give rise to are dwarfed by similarities between the Netherlands and England and Wales - a common law jurisdiction. These countries are much more alike in their pragmatic approach to law and their openness to the influence of public opinion.

Most importantly, patterns of legal culture must also be sought both at a more micro as well as at a more macro level than that of the nation state. The considerable differences within different areas of a nation state (and amongst groups within it) as well as between one state and another are all the more likely when we study less industrialised and/or less consolidated states. In general, at the sub-national level it will often be of interest to study differences in the 'local legal culture' of the local court, the prosecutor's office, or the lawyer's consulting room. Legal culture is also not necessarily uniform (organisationally and meaningfully) across different branches of law (Bell 2002). Lawyers specialising in some subjects may have less in common with other lawyers in their own jurisdictions, who work outside their field, than they have with colleague professionals abroad.

In advance of empirical investigation it would be wrong to assume any necessary 'fit' between law and its environing national society or culture. But claims about the decline of the nation state can no doubt be taken too far. Given the way it often sets boundaries of jurisdiction, politics, and language, the nation state will often serve as a relevant starting point for comparing legal culture. Where law is deliberately used as a unifying state–building device even practices focusing on law may have more in common than general culture does. The state will often be the main or only source of relevant statistics about such matters as litigation or incarceration rates. There is also some empirical basis

for claimed differences in national traits in the way people relate to each other (Hofstede 2001). And because of such different underlying, historically conditioned, sensibilities even very different branches of law may, in fact, manifest surprising levels of similarity within a given society (Whitman 2005a, Whitman 2005b).[3] A key task of those who study legal culture is to see how and why such sensibilities change, taking care as far as possible to distinguish between short, medium, and long-term trends (Nelken 1994).

On the other hand, there is also a need to consider those processes that transcend the nation state. What of the notion of western legal culture? Is the world moving towards a 'modern legal culture'? (Friedman 1994). It has always been true that regular transfers of legal institutions and ideas make it misleading to try and relate legal culture only to its current national context (Nelken 2003). Those who study the many situations where foreign norms or ideas have been borrowed, imitated, or invoked, have to sort out how far this process necessarily involves importing part of the host culture along with the rules or institutions. Equally, they need to explore how far innovations patterned on foreign practices are affected by prevailing norms and ideas in the places where they applied and interpreted.[4] Similarly, these writers strive to understand how innovations patterned on foreign institutions will be affected by prevailing norms and ideas in the places where they will be applied and interpreted. Often law is designed to change existing contexts rather than reflect them. The hope in many cases of transplants or other forms of legal transference is that law may be a means of resolving current problems by transforming society into one more like the source of such borrowed law; more democratic, more economically successful, more secular - or more religious. In what is almost a species of sympathetic magic borrowed law is deemed capable of bringing about the same conditions of a flourishing economy or a healthy civil society that are found in the social context from which the borrowed law has been taken.

The adoption of dissimilar legal models used to be thought most likely where the legal transfer was imposed by third parties as part of a colonial

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3 Whitman argues 'the pattern that we see in comparative punishment is also the pattern we see in many other areas of the law. Indeed, I would claim it as a virtue of my book that it shows that punishment law cannot be understood in isolation from the rest of the legal culture. For example, American workplace harassment law differs from German and French workplace harassment law in very much the same way. The same is true of comparative privacy law just as it is true of the law of hate speech and everyday civility. I think these studies carry cumulative weight.' (Whitman 2005b, p. 394).

4 For example, commenting on the introduction of U.S. style business governance in Japan, Ohnesorge has recently noted that 'the proper functioning of that institutional framework depends upon what are, in essence, cultural norms, expectations and practices. Truly adopting US-style corporate governance thus becomes a matter of importing US business and professional culture more generally. This would be a much more daunting and controversial prospect than simply adopting a few American-style rules, so one effect of Enron might be to undercut further Americanisation' (Ohnesorge 2006, pp. 118-119).

project and/or insisted on as a condition of trade, aid, alliance or diplomatic recognition. But it has also often been sought by elites concerned to 'modernise' their society or otherwise bring it into the wider family of 'advanced' nations. Japan and Turkey are the most obvious examples (Harding and Orucu (eds.) 2002, and Likosky (ed.) 2002). South Africa modelled its new constitution on the best that Western regimes have to offer rather than on constitutional arrangements found in its nearer neighbours in Africa. Even in Europe some of the laws and legal institutions that people think of as most typically their own are the result of imitation, imposition or borrowing. Much domestic law in the 19th century, such as the law of copyright (Sherman 1997), was mainly invented as a response to its existence elsewhere. There are Dutch disputing mechanisms which are in fact a result of German imposition during the occupation, and which have been abandoned in Germany itself (Jettinghoff 2001). This makes it problematic to assert that any aspect of law (or attitude towards it) is necessarily 'embedded' in a given culture (Nelken 2006b, 2006c).

But current developments leading to the increasing globalisation of markets and communications mean that the role of super-national entities, organisations and networks go well beyond cases of simple legal transfers. The boundaries of the nation state as a unit are regularly traversed as transnational public and semi-public networks substitute, to an increasing extent, for national governments in building a 'real new world order' (Slaughter 1997). The language of transplants is also not well-suited to studying new forms of norm-making, dispute-channelling and regulation such as the growth of the *lex mercatoria*, the use of 'soft law' or other non-binding agreements and persuasive practices by international regulators, nor the private power of multinational companies. The use of *lex mercatoria*, for example, is said to 'break the frame' of national jurisdiction. The multiple orders that grow up produce what Santos calls 'interlegality', a term that describes 'a highly dynamic process' where different legal spaces are 'nonsychronic' and result in 'uneven and unstable combinations of legal codes (codes in a semiotic sense)' (Santos 1995, p. 473).

Rule-formulation and settlement increasingly takes place within new agencies of transnational governance, such as NAFTA, the OECD, and the WTO. Lawyers and accountants also play an increasing role as entrepreneurs of new forms of dispute prevention and settlement (Dezalay and Garth 1996), mainly, though not entirely, so as to service the increasingly important international business community. In turn, the opportunities for such activity transform the legal profession(s). The importance of private actors has also altered as a result of the growth of multinational and international production networks, new technology, and changes in work patterns. All this means that it makes less and less sense to think of 'domestic' norms as forming part of distinct national jurisdictions that then interact with transnational norms (Dezalay and Garth (eds.) 2002). Legal fields are increasingly internationalized, even if this process does not affect all fields to the same extent and varies by different areas of legal and social regulation (Heydebrand 2001). The contrast is often made between, on the one hand, those areas of law that are relatively internationalized, such as international business contracts, antitrust and competition policy, Internet and new technology, labour law, social law, and environment law, and, on the

other, family law and property law. But experts in the latter fields would also find much evidence of international and cross-cultural influences.

All this means that those seeking to mark the limits of culture must recognise the difficulties in setting boundaries to our imaginations and expectations. '(W)e inhabit', Coombe argues, 'a deterritorialised world'. We participate via the media in other communities of others with whom we have no geographical proximity or common history. Hence, 'all totalising accounts of society, tradition and culture are exclusionary and enact a social violence by suppressing contingent and continually emergent differences' (Coombe 2000). Instead, we must face the 'challenges of transnationalism and the politics of global capitalism or multiple overlapping and conflicting juridiscapes' (id.). By contrast, the purported uniformity, coherence, or stability of given national cultures will often be no more than an ideological projection or rhetorical device, manipulated by elements within the culture concerned or by outside observers (Kuper 1999). Many claims of cultural specificity refer only to 'imagined communities' (Anderson 1983) or 'invented traditions' (Hobsbawm and Ranger (eds.) 1983). But even these ideas, as we know, may be all too real in their effects. Paradoxically, increasing homogenization of social and cultural forms is accompanied by a proliferation of claims to specific authenticities and identities (Strathern (ed.) 1995, p. 1). And it is important to bear in mind that even the 'defensive' use of culture can be manipulated not only by those internal to a society but also fomented by external political and economic actors.[5] So, as Merry has recently shown, to keep track of these transnational flows we need to find ways to study 'placeless phenomena in a place' (Merry 2005, p. 44).

Claims about coherence

We have seen so far that, whatever the arguments in favour of still talking about and studying national legal cultures, we also need to apply the term legal culture to a variety of different units, each of which is changing and in a relationship of mutual interaction with the others. These units show the power of culture to shape social life in a variety of ways, by organisational routines and professional socialisation (at both sub-national and transnational levels), in historical memories and traditions, as well as through more general relatively taken for granted types of practices, attitudes, expectations and ways of thinking. Cotterrell is right to warn us against assuming that the various units of legal culture make up a 'unity'. But the fact that a number of different units at different levels of analysis can all be considered examples of legal culture does not show the concept to be otiose. It points rather to the intricacies of lived legal culture.[6]

5 Consider, for example, Likosky's description of the way multinational enterprises from the West offered self-interested support for Malaysia's campaign for 'Asian values'. (Likosky 2002b).

6 This complexity is also encountered when we speak about societies having plural legal orders.

But we still need to ask what is being asserted by describing a given unit as an example of legal culture? I suggest that such claims do not have to be taken at face value. It is an empirical question whether any given unit is in fact coherent and in what this supposed coherence consists. When we speak, for instance, of 'French criminal justice' or of 'Dutch legal culture' we are using a shorthand to refer to a mix of overlapping and potentially competing elements units. In some settings, and for some purposes, even such macro units need to be presented as coherent wholes, especially by those whose legal role (or political office) obliges them to find, assert or presuppose overall coherence. But for most analytical purposes it would be more accurate to speak rather of 'criminal justice in France' or 'legal culture (or cultures) in the Netherlands'. What is more, as with general culture (Swidler 1986), for legal culture to serve as a flexible 'tool-kit' for actors to justify their behaviour it can actually be helpful that it includes a variety of elements that are not necessarily consistent. What pass for consistent bodies of legal doctrine, for example the rules of family law, frequently reveal themselves on careful examination to be far from coherent (Dewar 1998).

More needs to be said, however, about what is meant by the claim that any one or more of these units exhibit(s) coherent identifiable cultural patterns.[7] It may be helpful to examine the alleged 'coherence' of units of legal culture with respect to the following three possibilities:

1 that there is some intrinsic causal link between the elements that make up given units;
2 that there is a 'constructed' association which is bestowed on them by the way they are talked about by participants, whether insiders or outsiders;
3 that there is a connection which is imposed on them by the scholarly observer and commentator, for example through the use of classifications or 'ideal types', or by relying on comparative or other data about patterns of ideas and practices which may even be unknown to the participants themselves.

Although these three types of coherence are not necessarily incompatible, it is important not to confuse them or the type of evidence they require. Consider for example the question whether the Italian juvenile justice system is, as has been claimed, more 'tolerant' than other similar systems. Taken as a claim about legal culture we may seek to base such an evaluation of the system on evidence of the low penalties imposed and the way this ties in with other features of the organisation of juvenile justice or criminal justice more generally. Or we might infer it from what the participants say they are trying to achieve. Or, finally, it could be subject to an observer's appraisal. This might be more sceptical about such a claim once we take into account the fact that there could be less need for official tolerance towards young people in Italy given the comparatively less serious level of their misbehaviour as well as the existence of strong unofficial controls over them (Nelken 2006e, Nelken 2006f).

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7 Cotterrell is, I think, mistaken in assuming that the possibility of coherence depends on the scale of the unit under consideration. Even small-scale settings may be sites of complex and contested culture. See Nelken 2006a.

As this example suggests, a crucial issue is the tension between what the views of participants and that of the observer. Certainly, all students of culture know how important it is to take seriously what participants think they are trying to do (since this is what gives it its meaning and purpose for them). But this has to be balanced against the need for analytic distance (the insider does not and cannot not know everything that the observer would consider relevant to her comparative enquiry). Even well-informed people living in India may think that if the courts are slow this is because theirs is a legal culture which suffers from a particularly high rate of litigiousness. But scholarly comparisons tell us that this is far from being the correct explanation (Galanter and Krishnan 2003). Both American and foreign observers are convinced that the USA is in the middle of an explosion of torts litigation. But it is moot how far this impression is one manufactured by the media (Haltom and McCaan 2004). More generally, those societies where legal professionals express least concern for what Anglo-American writers since Roscoe Pound have called the 'gap' or gulf between the 'law in books' and 'law in action' may not be those where the gap is least problematic but those where the gap is so overwhelming that it is taken for granted. On the other hand, these three types of coherence may also have effects on each other, not least when participants, including legal actors (Webber 2004), or external observers, make claims about the existence of cultural patterns (or constructions of such patterns) which then helps bring them into existence.

A variety of forms of coherence could be candidates for evidence of the existence of cultural patterns, including both relevant consistencies between long-standing and more recent ideas, sensibilities and practices, or else similarities across a range of current ideas and practices. These could be looked for in both the spheres of what Friedman calls 'internal legal culture', the ideas and behaviour of legal actors, and that of 'external legal culture', the ideas, pressures and demands of those outside the legal system. Table 1 offers a simplified framework for comparative enquiries which set out to find such consistencies. It distinguishes between enquiries where the emphasis is on seeking to show 'internal coherence' – what the elements that make up a unit have in common – from those where the effort is more to reveal the 'external coherence' of one unit as compared to another. But these two types of enquiries can and do certainly overlap.

Table 1: Varieties of coherence in studies of legal culture

Internal Coherence	External Coherence
1 That which holds together given units of internal or external legal culture	3 The relationship between legal culture and general culture
2 Legal culture in relation to political culture/economic culture, etc., in the same unit	4 Given units of legal culture as compared to other ones

The first type of coherence (set out in cell 1) concerns the elements that are hypothesized to hold together units of internal or external legal culture. An example of the first – and most common – kind of claim about internal legal culture could be Damaska's well-known attempt to show the 'affinities'

between the rules of criminal procedure in common law as compared to civil law countries (Damska 1986). With respect to external legal culture we could note Friedman's invitation to think about the shape of expectations towards law held by different groups, at different times and places (Friedman 1997, 2006). But we could also include Cotterrell's recent suggestion that we can presuppose 'ideal-types' of community which have different propensities to structure their relationships in terms of law (Cotterrell 2006b).

The second kind of internal coherence (cell 2) invites attention to variability in the connections between legal culture and other aspects of culture such as political or economic culture. As is implied by Damaska's argument, many commentators have suggested that, in civil law, or 'strong state', legal systems, law tend to be more linked to politics, whilst in common law systems it is more linked to the market. It is for this reason that globalisation has been more of a 'shock' for the civilian world (Ferrarese 2001). Autopoietic theorists argue that each of these sub-systems of society are based on evolutionary differentiated logics which make possible the complexity of modern societies (Teubner 1993). But, on the ground, such mutual collaboration may be far from smooth. In some South American countries Chicago trained experts are currently pursuing neo-liberal polices whilst the highest courts elaborate social guarantees more consistent with a social democratic politics.[8]

The third type of coherence (cell 3) invites us to consider the relationship between those ideas and practices that are in some way related to law and those forming part of general social interaction. Insofar as there is a close match we also need to investigate the direction of influence. It is often assumed that this goes mainly from culture in general to legal culture in particular (Chase 2005).[9] But so called 'constitutive' theories of law in society (Hunt 1993) would argue that things can also work the other way round. We should not exaggerate the extent to which attitudes and values common in the general population coincide with those of the legal and political elites. In addition, comparative scholars will want to treat Friedman's central argument about law being primarily shaped by the pressures and demands of general culture as a variable rather than as a constant.

Societies (and social fields) differ in the extent to which homology between legal and other culture exists or, is thought to be, either an ideal or a necessity. In many continental European societies, for example, there is often more insistence on resisting populist pressures than in (what they call) 'Anglo-American' legal culture. Likewise, an insistence on greater 'formalism' and proceduralism in legal matters goes together with the presupposition that there is, and should be, less formalism in the 'life-world' of ordinary social interaction. In looking at specific sectors of social life we could consider for example the relationship between legal approaches to truth-finding and the form this

8 This is one reason why it is difficult to accept the Luhmann-Teubner systems theory of law which tries to posit a constant relationship between the legal and other social sub-systems in all modern societies, see Nelken 2001.

9 See also for example Foster (2007) on the isomorphic relationship between Danish attitude to bankruptcy law and its culture more generally.

takes in other aspects of social life. 'Law' and 'science' often develop a symbiosis by relying on their somewhat different approaches to truth finding (Nelken 1998).

The last type of coherence (cell 4) directs us to familiar terrain concerned with the way given legal cultures are similar or different from each other. If we are to seek the specificities of Dutch internal legal culture as compared to other legal cultures, Bruinsma now tells us, we should look for it in the typically pragmatic way the Dutch handle issues such as drugs, prostitution and euthanasia (Bruinsma 1998). Research here may also seek to show how perceived (or imagined) differences themselves help to reproduce the boundaries of culture.

Overcoming the dangers of tautology

Most attempts to use the concept of legal culture as an explanation of different patterns at the level of national jurisdictions tend to rely on the last sense of coherence that we have analysed. But, as we have seen, this is by no means the only way of using the term. Nonetheless its continued employment points to the major problem noted by Cotterrell in his criticism of the concept legal culture, but also repeatedly aired by those leery of the term culture itself. How are we to avoid falling into the trap of 'essentialism' or 'culturalism' whereby circular arguments are used to show that cultural values cause a given response to events. Why, we ask, do they do things (law) that way in Japan? It adds little to answer that this is because of their (legal) culture. Put differently, when we talk about American or Japanese legal culture are we offering some sort of explanation or only indicating that which needs to be explained?

The first point to make is that we may not always be concerned with (positivist) social science explanations aimed at showing how variables explain outcomes. This may be appropriate where the guiding interest is the possibility of prediction. What legal factors correlate with economic growth? Which conditions are likely to determine whether this transplant takes or not? But these are not the only contexts in which the term is used. Comparative lawyers for example are at least as interested in classification, mapping and description. How should the phenomenon of soft law be categorised? What is there in common between current transnational legal processes? What is happening to *lex mercatoria*?

More important, even for social science, a central task of comparison involves the type of understanding that can only be reached through interpretation. What does this legal institution, procedure or idea mean? What, if anything, is it trying to achieve? How (and how far) can we grasp other people's values? In giving close attention to such questions such work would be more in tune with the many post-positivist schools of social science and cultural theorising who have taken the 'interpretative turn' away from earlier USA-led developments in mainstream behavioural science. Whereas the positivist approach would seek to throw light on legal culture by seeking to assign causal priority between competing hypothetical variables so as to explain variation in levels and types of legally related behaviour, the

interpretative approach, on the other hand, is more interested in providing 'thick descriptions' (Geertz 1973) of law as 'local knowledge' (Geertz 1983).

The interpretative approach sees its task as doing its best to faithfully translate another system's ideas of justice and fairness so as to make proper sense of its web of significance. Scholars ask about the different nuances as between the 'Rule of law', the 'Rechtsstaat', or the 'Stato di diritto'. They seek to bring out the meaning of the allegedly 'almost untranslatable' term 'beleid' as the key to the Dutch way of justifying discretionary action by administrators (Blankenburg and Bruinsma 1994). It tries to understand why litigation is seen as essentially democratic in the USA and as anti-democratic in France (Cohen-Tanugi 1996/1985). In this search for holistic meaning, the insistence, for example, on distinguishing the 'demand' for law from the 'supply' of law, is likely to obscure more than it reveals and to lead to mistaken conclusions (Nelken 1997). Arguably if there are differences in the significance attached to official law and legal institutions in Germany and Holland then, even if Germany had the alternatives that Blankenburg says 'explain' the low litigation rate in Holland (Blankenburg 1997), they would only produce even more work for lawyers in Germany (Nelken 1997).

For this style of work, concepts both reflect and constitute culture; as in the changes undergone by the meaning of 'contract' in a society where the individual is seen as necessarily embodied in wider relationships (Winn 1994), or the way that the Japanese ideogram for the new concept of 'rights' came to settle on a sign associated with self interest rather than morality (Feldman 1997). In order to test its hypotheses the positivist approach is obliged to develop a socio-legal Esperanto which abstracts from the language used by members of different cultures, preferring for example to talk of 'decision-making' rather than 'discretion'. The rival strategy is concerned precisely with grasping linguistic subtleties and cultural packaging. It would ask whether and when the term 'discretion' is used in different legal cultures and what implications the word carries.[10] Not least, the interpretative approach is quick to recognise the reflexivity of (legal) culture as 'an enormous interplay of interpretations in and about a culture' (J. Friedman 1994, p. 73), and thus appreciate that the scholar may also be a (bit) player in the processes of legal culture that she seeks to understand.

This said, explanation and interpretation are often two complimentary parts of the search for understanding culture rather than approaches in competition (Nelken 1994, 2004). Many social scientists do use terms like legal culture with explanatory intent, and any effort to encourage a dialogue between comparative lawyers and social scientists requires us to address the issue of tautology head

10 Legal culture can itself be a term of art with culturally varying meanings. In Italy it is common (especially when referring to the South) to relate it to the prescriptive idea of the 'culture of legality', by which is meant the project of extending 'jurisdiction' and the difficulty of gaining social acceptance of the need to live life within the constraints of legal rules. The same is true for example in Latin America or some of the states that made up the former USSR.

on. Friedman himself recommends the term as helpful in inquiries into why people use or do not use law, for instance why women do or do not turn for help to the police in Italy or France, or why Italian drivers are less likely than the English to wear seat belts (Friedman 1997, 2006). But, as Cotterrell rightly noted (Cotterrell 1997), Friedman applied the term not only to such variables but also to the aggregates of such variables (Friedman 1985, 1999). While, on the one hand, he treats legal culture as a cause of 'legal dynamics', he also uses it to describe the results of such causes, writing for example about the traits of a variety of large aggregates such as American culture, Latin American legal culture, modern legal culture, and even global legal culture. Although what he means by legal culture when speaking of these aggregates has again much to do with people's expectations of the law, the 'traits' he indicates as characterizing modern legal culture are not only about expectations and have as much to do with the results of such expectations as the expectations themselves.

To avoid circular arguments we therefore need to distinguish between speaking about legal culture as an aggregate and treating it as a variable to do with attitudes towards the law. One way to do this is to give attitudes towards the law a new name such as legal consciousness, as we have done in table 2. But we should also remember that the difference between legal culture as a variable and an aggregate can be slippery. We tend to think of aggregates as large, often national, units of legal culture. But, in practice all variables could also be treated as aggregates, just as aggregates can have a role in explanations. For example, attitudes to law, which Friedman treats mainly as a variable, could, where appropriate, be disaggregated into the different elements that make them up. This is even true at the level of the individual, where a person's 'attitude' could be taken to represent the sum of opinions tested in a survey instrument. Conversely, even large aggregates – such as American legal culture – become variables when they act on or influence something else. It would therefore be a fallacy to assume either that variables always explain - or that aggregates never do. In fact, as table 2 indicates, legal culture as variable and as aggregate can serve both in making explanations, as well as represent matters which themselves need to be explained. The key here is to realise that the term can point to different kinds of relevant investigations.

Table 2: Explanations using the concept legal culture

	Legal Consciousness	Legal Culture
as explanation	1 Feelings about the law, and the choice to use the law, as one factor which shapes the legal system	3 The influence exerted by legal culture, i.e. by given patterns of attitudes, uses, and discourses about law
as needing explanation	2 Why people choose to use or not to use the law	4 Why given units of legal culture have different patterns

Some of these enquiries take up Friedman's original interest in public attitudes towards and the use made of the law. For example, much of the current continuing debate over why the Japanese make relatively little use of the courts, can be summarised (or banalised) as a discussion which has moved on from the question of whether they 'don't like law' or given the barriers, 'they can't like

law'. Now we have rational choice theorists (influenced by 'law and economics') who argue that the Japanese 'do like law, but act in its shadow' because even without bringing lawsuits they succeed in getting law-influenced outcomes (Ramseyer and Nakazato 1999).

And, on the other side, more sociologically-minded scholars carry out qualitative studies of different areas of social life and discover that while there are some areas of life (especially those involving neighbours or work settings) where the courts are not easily invoked there are other situations (blood transfusions which transmitted HIV infections or the resolution of disputed in the tuna fish industry) where Japanese make relatively high use of courts. Japanese, not unlike other people, sometimes do and sometimes do not like law (Feldman 2001, 2006).

It is worth noting that even this topic needs to be seen as one that can serve both as explanation and that which needs to be explained (cells 1 and 2). Friedman's approach tended to merge the topic of people's demands on and expectations of the law with a range of other somewhat different questions, such as how law changed to meet the new needs created by technological change, or how powerful groups were able to bring pressure on law to shape it to suit their ends (Friedman 1985). But studies in the USA over the past twenty years have been especially concerned to probe the role of legality in people's lives as it emerges from their narratives about their lives without begging the question that it should be a priority for them and teasing out its often contradictory force (Silbey and Ewick 1998). More recently there have been some signs of a desire to link up this question with larger macro-social considerations of the way law is presented to consciousness (Silbey 2001, 2005, Hertogh 2004). In fact the best survey research shows that it is possible to distinguish between public belief in the technical efficiency of legal remedies and their views about their social legitimacy (Toharia 2003).

The remaining two cells (3 and 4) have to do with other aspects of legal culture as both a tool of explanation and as something to be explained. A number of difficult theoretical issues arise in using legal culture as itself an explanation. How (and how far) can we mark off 'the cultural' from other types of motivation or aspects of collective life? Is culture something to be related to and contrasted with other aspects of society, for example legal rules, institutional resources or social structure? Or does its influence work through these? Should culture be treated as irrational or at least value-based action rather than purely instrumental social action? If not, how else can we draw a line between culturally shaped behaviour and all other behaviour? Should (legal) culture only be treated as a residual explanation of individual or collective action, to be resorted to after other social, economic or political factors or reasons have been exhausted? (Prosser 1995).

Cell 3 is the one in which the dangers of tautological arguments are greatest. Care is needed to avoid this especially in any effort to show how culture produces individual or group behaviour within a society. But plausible arguments may still be made about the role of culture – these range along a continuum in which culture refers to the implications of taking things for granted to, at the

other extreme, the consequences of giving allegiance to highly dramatised common values.

In addition, the phenomenon of what we might call 'relational legal culture', i.e. the extent to which attitudes and behaviour in one legal culture are influenced by information (or alleged information) about what is happening in legal cultures elsewhere, is increasingly important. There is evidence that when 'league tables' of legally relevant behaviour, such as incarceration rates are published, countries try to come into line so as not to be too distant from the norm or average of other countries. And, as we have already indicated, in a multitude of transnational economic, health, criminal, human rights and other initiatives, governmental and non-governmental agencies, networks of regulators and others exert pressure to change standards through processes of signalling and monitoring conformity (Nelken, 2006d). One of the most pressing tasks of the comparative sociologist of law is to try and capture how far in actual practice what is described as globalisation in fact represents the attempted imposition of a one particular legal culture, in particular the Anglo-American model. This is another way of formulating Friedman's suggestion that we are seeing a convergence towards a type of legal culture suited to the individualism and socio-economic challenges of 'modernity' (Friedman 1994).[11]

Where legal culture is that which needs to be explained, rather than that which does the explaining (see cell 4), the risk of circular argument is less. But we still may find ourselves needing to use one feature of legal culture to 'explain' another, or else risk just elaborating an extended definition of what constitutes a given legal culture. More serious, this sort of enquiry can easily become unwieldy and inconclusive. Almost everything about a society (or other unit) can turn out to be relevant to explaining why its legal culture or even just one aspect of it, differs from another's. But, unwieldly or not, showing the many ways that legal culture is related to general culture can provide accounts will provide much richer insights than enquiries which limit themselves to surveys of why people go to law and what they want from legal institutions (Nelken 2004).

Conclusion

This chapter has examined the question how far the term legal culture can be useful for enquiries that seek to explain differences in patterns of legal attitudes and behaviour. In responding to Cotterrell's criticisms of his work, Friedman argued that legal culture serves as a summary term for various more measurable indicators of attitudes and behaviours (Friedman 1997, 2006). But he has said less about the problems of defining the unit of enquiry, asserting its coherence, and avoiding tautology in our explanations. In discussing these difficulties we showed first that the problem of demarcating the unit of legal culture itself

11 See also Garland (2000) who, in the admittedly restricted area of criminal justice, argues that American legal responses epitomise those required by 'late modern society' and are bound to arrive to other advanced democracies if they have not already done so.

points to a feature of the changing objects that we want to understand. We then went on to show the various types of coherence that are and can be claimed in using the term. Finally, in dealing with the charge that the concept was bound to be tautologous, we suggested that it was important to distinguish the requirements of interpretative and positivist types of explanation. As well as lending itself well to interpretative enquiries, however, we showed that, with care, it could also be employed in a variety of more positivistic type of approaches.

Even though we have defended the potential of the concept of legal culture, however, it is clear that in practice it is most often used in an unsophisticated manner just to point to the distinctiveness of legal actors, institutions or doctrines. But when employed simply as an equivalent for terms such as legal system it is unlikely to have much explanatory power. Even when we start from Friedman's more promising idea of legal culture as embracing the relationship between internal and external legal culture, the concept works mainly as a heuristic tool to get at the relationship between law and its social setting rather than as a suitable replacement for classificatory categories such as 'legal families'. Nor do claims about legal culture provide the ultimate bedrock of any explanation of legal and social change. Any given elements of legal culture which are proposed as explaining given attitudes and practices will usually require further interpretation and explanation in a way that brings in larger national and international contexts.

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The Emerging Role of *ubuntu-botho* in Developing a Consensual South African Legal Culture

Helen Keep and Rob Midgley

Introduction

Legal culture in apartheid South Africa has variously been described as conservative and positivist, with judicial deference to the executive and to parliamentary sovereignty; formalistic, technical and authoritarian; and 'of reasoned argument' and justification.[1] Until 1994, law drew its legitimacy from the very fact that it was state sanctioned, and the material context or the social aftermath of the application of a rule was in many instances deemed irrelevant.[2] However, the adoption, first, of the interim Constitution,[3] and later the final Constitution,[4] saw a desire to transform this legal culture.[5] The Constitution is now more than a formal document regulating public power: it also embodies a normative value system in terms of which judges are called upon to interpret laws and their application.[6]

Like most constitutions, the South African Constitution is a product of its time and of the country's history, and it is designed primarily to avoid a repeat of unacceptable conditions that existed in the past.[7] Although the Bill of Rights

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1 See, amongst others, Mureinik 32; Klare; Chanock 512ff; Pieterse 398; Langa 4.

2 Moseneke 316.

3 The Constitution of the Republic of South Africa Act 200 of 1993.

4 The Constitution of the Republic of South Africa, 1996.

5 Schedule 4 of the interim Constitution contained a set of Constitutional Principles upon which the final Constitution had to be founded. This 'solemn pact' (see the preamble to the interim Constitution) is the first formal indication of what ought to form the basis of a legal culture for a new, fully-democratic South African society.

6 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), [2001] 10 BCLR 995 (CC) par [54]; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA) par [17]; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) par [12].

7 In *The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC), [2000] 10 BCLR 1079 (CC) the Court said at par 21: 'The Constitution is located in a history which involves a transition

in the Constitution is often seen as a document reflecting Western liberal democratic values,[8] it is said to have its roots in the Freedom Charter[9] and to have 'a poignancy and depth of meaning not echoed in any other national constitution'.[10]

At first glance, one might find very little in the Bill of Rights that is ostensibly 'African', or a reflection of African values.[11] One can of course argue that there is no need to look for such characteristics, for the Bill of Rights reflects universal values and ideals, of which African values form an integral part. Thus there is no purpose in classifying universal values as African, Oriental or Western, for example; they are essentially the same, even though they might be expressed in different idiom. In terms of broad brush strokes this might well be true; yet there is no doubt that countries have different legal *cultures* tied in many ways to each country's particular past. So the question remains as to what extent the Constitution reflects, or aspires to mould, a new South African legal culture, and to what extent values of the African population – those that were not recognised in apartheid South Africa – are reflected in South Africa's new constitutional and legal order.

One way of approaching this question is to consider the way in which one of these values, namely *ubuntu-botho*, has been used by the courts in a transformative sense to express African values and to incorporate them into the legal system so as to form a cohesive, plural, South African legal culture. There are many instances in which one can discern an apparent impact of the *ubuntu* philosophy or world view on court decisions, but our focus in this instance is more narrow: we have limited the scope of this enquiry to those instances in which courts have made express use of the term in their judgments.

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from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance'. See also *Holomisa v Khumalo* 2002 (3) SA 38 (T) 55.

8 Nelken 4. In contradistinction, Pieterse comments (at 416) that the South African Constitution 'signifies a departure from the classical liberal foundations of Anglo-Saxon legal culture'.

9 Adopted by the Congress of the People in Kliptown, Soweto, on 26 June 1955.

10 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), [1996] 5 BCLR 658 (CC) at para125-126.

11 See, for example, the comments of Penuell Maduna, at the time Minister of Justice and Constitutional Development, at an African Renaissance Conference on Constitutionalism in Midrand on 16 November 1999, when he lamented the missed opportunity to include *ubuntu* as a value in the South African Constitution. (*Business Day (Johannesburg)* 17 November 1999.)

Ubuntu-botho[12]

Ubuntu is derived from the Zulu saying '*umuntu ngumuntu ngabantu*',[13] meaning 'persons depend on persons to be persons';[14] or '*umuntu ngumtu ngabayne abantu*', translated as 'a person is a person through other people'.[15] The isiXhosa expression is '*ubuntu ungamntu ngabanye abantu*', which Battle translates as 'each individual's humanity is ideally expressed in relationship with others' or 'a person depends on other people to be a person'.[16] The parallel idea in the Sotho languages is *botho*, derived from the saying '*motho ke motho ba batho ba bangwe*'.[17]

Coertze points out that *ubuntu* and *botho* originally meant 'the essence of being human' and denoted both positive and negative qualities found in persons; but the concept narrowly referred to humankind from Africa and its emphasis was primarily on relationships between family and friends.[18] Since then two distinct semantic shifts occurred. The first resulted from South Africa's industrialisation and consequent urbanisation, and was stimulated by the spread of Christianity. The concept was expanded to include those working together or living in the same township neighbourhoods and Coertze discerns a broadening of the concept to become more inclusive, to include 'abstract [Christian] standards of morality, kindness, charity and even benevolence as well as mercifulness' and to place 'duties on the individual to be kind, good, compassionate etc. to all other human beings'.[19] The second semantic shift emphasising human rights is a recent one resulting not only from globalisation, but also from *ubuntu's* chosen role as a vehicle for nation building: '[A] deep-rooted value judgement in African society has been imbued with a new ideological content' which emphasises respect for human rights.[20]

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12 For more detailed expositions of *ubuntu*, see Shutte, Battle and Devenish par 16.

13 See Mokgoro J in *S v Makwanyane* 1995 (3) SA 391 (CC), [1995] 6 BCLR 665 (CC) par 308 and Ngcobo J in *Bhe v Magistrate, Khayelitsha (Commission of Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC); [2005] 1 BCLR 1 (CC) par 163.

14 Shutte 3. See also 12 and 23.

15 See Patel J in *Crossley v The National Commissioner of the South African Police Services* [2004] 3 All SA 436 (T), 2004 JDR 0448 (T), [2004] JOL 12839 (T) par 18.

16 Battle 39. Shutte notes at 23 that African philosophers are fond of the expression, 'I am because we are'. According to Battle (at 195), 'A similar conceptualization of ubuntu may [be] found in the doctrines of African socialism especially expounded by Julius K. Nyerere's *ujamaa*,' and Tutu noted, 'After all, the Arusha Declaration is counterbalance by the concept of "ujamaa" in Tanzania and "harambee" in Kenya'. (Tutu 'Viability' 38, as quoted by Battle 39-40.)

17 Coertze 113-115; Mokgoro *Potchefstroom Electronic Law Journal*.

18 Coertze 113.

19 Coertze 115.

20 Coertze 116. English points out, correctly, in our view, that in the legal sphere *ubuntu* has been used firstly, as 'marketing device' designed to authenticate a bill of rights 'forged largely out of Western instruments'; secondly, as a rationale for separating justice from revenge; and thirdly, 'as a rallying cry to community values'.

In short, *ubuntu-botho* means 'humanity' or 'humaneness'.[21] Its central features are social justice and fairness,[22] and social citizenship aimed at preventing exclusion of poor and marginalised people.[23] Mokgoro J's judgment in *S v Makwanyane* contains a more detailed, oft-quoted, description:[24]

> Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly priced. It is values like these that Section 35[25] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.

In the same case, Langa J emphasised another aspect:[26]

> It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[27]

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21 Shutte (at 31) says, 'UBUNTU is the name for the acquired quality of humanity that is the characteristic of a fully developed person and the community with others that results. It thus comprises values, attitudes, feelings relationships and activities, the full range of expressions of the human spirit'.

22 *S v Makwanyane* par 237.

23 Olivier and Smit par 43.

24 Par 308.

25 Of the interim Constitution. The equivalent section in the final Constitution is s 39.

26 Par 224. See also Mahomed J at par 263. According to Shutte, at 12, 'The idea of community is the heart of traditional African thinking about humanity. … This means that a person depends on personal relations with others to exercise, develop and fulfil those capacities that make one a person…'.

27 The duty aspect is something that is not often emphasised in international human rights jurisprudence, the African Charter for Human and Peoples' Rights being the exception: see Articles 27, 28 and 29 of the Charter for provisions that incorporate principles similar to that of *ubuntu-botho*: see http://www1.umn.edu/humanrts/instree/z1afchar.htm (9 Oct. 2006).

Although we recognise and accept that communalism is not unique to *ubuntu-botho* or to Africa, and that instances of communalism can be found all over the world, a feature of Western legal thought is its use of concepts like rationality, reasonableness and equity and a strong emphasis on individualism and on freedom.[28] These values, with their roots in Greek philosophy and developed during the Age of Enlightenment, have filtered into international human rights jurisprudence. On the other hand, African values have a strong communal base, and often the individual gives way to the communal good.[29] Unlike the Western concept of communalism, in which society is made up of a collection of individuals, African thought holds that the society defines the individual.[30] So, although we might be looking at the same concept, different points of departure may result in different nuances.

Recognition of *ubuntu-botho* as a component of South African legal culture

The epilogue, or post-amble, of the interim Constitution[31] contained a concluding provision on National Unity and Reconciliation that called for 'a need for ubuntu',[32] but no specific mention is made of *ubuntu* in the final Constitution.[33] Instead, the final Constitution sets out the following foundational values:[34]

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Obviously, each of the rights specifically mentioned in the Bill of Rights reflects in some way an aspect of this openly-declared foundation for determining the country's legal culture. However, in grey areas, or in unchartered waters, where courts have to exercise discretion or choose between conflicting

28 Shutte 11-14 and 26.
29 Tutu 'Where Is Now Thy God?' quoted in Battle page v.
30 Battle 37, 38 and 50; Shutte 23, 25-26 and 52; Desmond Tutu 'Viability' 38, quoted in Battle 39.
31 Constitution of the Republic of South Africa Act 200 of 1993.
32 The post-amble states: 'The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'. These provisions were echoed in the Promotion of National Unity and Reconciliation Act 34 of 1995.
33 It contains provisions validating the Truth and Reconciliation process, however (Article 22 of Schedule 6).
34 Section 1 of the Constitution.

courses of conduct, courts will be left to articulate constitutional principles and values, and in so doing, develop a constitutional culture. And here, section 39 of the Constitution is clear: when interpreting the Bill of Rights, 'the values that underlie an open and democratic society based on human dignity, equality and freedom' must be promoted; and similarly, when interpreting legislation, or when developing the common law or customary law, 'the spirit, purport and objects of the Bill of Rights' must be promoted. However, while section 39 also mentions that recourse could be had to international law and foreign law, there is no specific mention of any need to give expression to values that are primarily African. In determining what 'the spirit, purport and objects' might be, reference must be had, amongst others, to the foundational values. Here dignity plays a central role[35] and 'informs constitutional adjudication and interpretation at a range of levels'.[36]

In the Constitutional Court's very first case, *S v Makwanyane*,[37] dealing with the validity of the death penalty, we see the first judicial affirmation that the nation-building role that the *ubuntu* philosophy had played in the Truth and Reconciliation process should be mirrored in developing an overarching jurisprudence for South Africa.[38] The emphasis here was the transformative qualities of *ubuntu-botho*: that it is a shared value around which a new legal culture could be fashioned. The comments in *Makwanyane* were of course made with reference to the interim Constitution, but in the *Port Elizabeth Municipality* case,[39] a case decided under the final Constitution, Sachs J affirmed that the spirit of *ubuntu-botho* 'suffuses the whole constitutional order', combining individual rights with a communitarian philosophy and providing 'a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern'. [40]

It should be remembered, however, that *ubuntu-botho* is not a foundational value expressly mentioned in the Constitution.[41] If it is to be treated as core, or

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35 *S v Makwanyane* 1995 (3) SA 391 (CC), [1995] 6 BCLR 665 (CC) par 144; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), [2000] 10 BCLR 1051 (CC) par 15; *Khumalo v Holomisa* 2002 (5) SA 401 (CC), [2002] 8 BCLR 771 (CC) par 26.

36 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), [2000] 6 BCLR 837 (CC) par 35. Other core values are equality (*City of Pretoria v Walker* 1998 (2) SA 363 (CC), [1998] 3 BCLR 257 (CC) par 73), non-racialism and non-sexism.

37 1995 (3) SA 391 (CC), [1995] 6 BCLR 665 (CC).

38 Mokgoro J has also expanded on this extra-judicially. See Mokgoro *Potchefstroom Electronic Law Journal*.

39 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); [2004] 12 BCLR 1268 (CC).

40 Par 37. Previously, with reference to the interim Constitution, Madala J had expressed similar sentiments. See *S v Makwanyane* par 237.

41 Some judges have incorrectly considered *ubuntu* to be a value expressly enshrined in the Constitution: *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa v Minister of Health* 2005 (3) SA 231 (C) at 237, [2005] 4 All SA 80 (C) at 86; *Kukard v Molapo Technology (Pty) Ltd* [2006] 4 BLLR 334 (LC), [2006] JOL 16376 (LC) par 43.

to have any effect on our jurisprudence, then this can only be done in one of two ways: by treating it as embodying the spirit, purport and objects of the Constitution and so allowing it to permeate the law in an indirect way; or to give it more direct influence by interpreting one of the core values, dignity, as embracing *ubuntu-botho*. These are not mutually-exclusive options, however. In the *Makwanyane* and *Port Elizabeth Municipality* cases, for example, *ubuntu-botho* was used to promote the 'spirit, purport and objects' of the Constitution, yet *ubuntu-botho* also finds a natural home in the value of respect for human dignity, as courts have found on various occasions.[42] It certainly requires no stretch of the imagination to interpret dignity beyond respect in an individualistic sense by incorporating an attitude of communality and inclusiveness: in other words, respect for dignity requires one not only to respect each member of society, but also to behave with dignity in ensuring that every member is given an opportunity to exercise his or her right to dignity to the full.[43] Given its strong links to the expressed foundational values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms' and 'accountability, responsiveness and openness', it could therefore be argued that *ubuntu-botho* forms part of the founding constitutional values.[44]

Reinstitutionalising customary norms

If *ubuntu-botho* is then part of the founding constitutional values, what legal content can be given to *ubuntu-botho*? Paul Bohannan's theory of reinstitutionalisation might provide an answer. Bohannan believes that law is custom recreated by agents of society in institutions specifically meant to deal with legal questions.[45] In his scheme, both custom and law are stages of development. Custom develops when isolated norms in a group become institutionalised to allow society to function in an orderly manner; and law is a later development made necessary by the growing inability of custom (which is underpinned by reciprocity and publicity) to support the customary rules.[46] So legal rights are norms that have been doubly institutionalised, says Bohannan, and they 'have their material origins (either overtly or covertly) in the customs of nonlegal institutions [which have been] *overtly restated* for the specific purpose of enabling the legal institutions to perform their task'.[47] Law reinstitutionalises the customary norms by stating them more exactly and by putting their application

42 See, for example, *Dikoko v Mokhatla* par 68 and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W), [2006] 6 BCLR 728 (W) pars 63-64.

43 Interestingly, the South African Constitution appears to be the only human rights instrument that recognises dignity not only as a value, but also as an enforceable human right. In other instruments dignity is not expressed as a human right.

44 Sachs J points out that the principle of inclusivity underpins various sections in the Constitution: see *S v Makwanyane* par 363. See also Madala J at par 237 and Mokgoro J at par 307. See also Sachs J in *Port Elizabeth Municipality* case par 37.

45 Bohannan 45.

46 Kidder 31, and Bohannan 48.

47 Bohannan 48 and 49.

into the hands of special agents (usually the courts), who then supervise their use. Bohannan tells us that when this happens, 'law may be regarded as a custom that has been restated in order to make it amenable to the activities of the legal institutions' and he charges one to discover (1) which customs are reinstitutionalised into law; (2) under which social, cultural and political situations; and (3) in accordance with which postulates.[48] And of special relevance to this discussion, is Bohannan's following assertion:

> Social catastrophe and social indignation are sources of much law and resultant changes in custom. With technical and moral change, new situations appear that must be 'legalized'.[49]

In what follows, we consider the way in which South African legal institutions (specifically, the courts) have reinstitutionalised the custom of *ubuntu-botho*. The social, cultural and political situation is one of a fledgling democracy with a background of oppression and which underwent fundamental moral and technical restructuring, and the postulate is that transformation of the country's legal culture is required so that it reflects the norms of all its peoples.

Data collected

In what follows the focus is on the explicit use of *ubuntu* or *ubuntu-botho* in reported judgments and the study operates within that constraint. We recognise, however, that there are many instances in which the *ubuntu* philosophy features prominently, even though the term has not been used expressly.[50] A discussion of these cases falls beyond the scope of this enquiry, although reference is made to some of them when certain categories of cases are looked at more closely, where we believe that they assist in illustrating the reinstitutionalisation process in that rubric more effectively.

The data for this section was obtained by conducting an electronic word search in the Constitutional Court and Supreme Court of Appeal websites, and the electronic resources of the two major publishers of law reports in South Africa. While these data bases do not contain the judgments of every case decided in the country, they collectively contain all the cases to which one would normally have access. The selected cases were analysed for frequency of explicit use of the concept in terms of the following categories: date, court, judge (in sub-categories author of judgment, concurring judge, race and gender[51]), the nature of the case (area of law) and the extent to which the concept appeared to impact on the eventual outcome. The statistics were current as at 31 March 2007 and are contained in the table at the end.

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48 Bohannan 56.

49 Bohannan 50.

50 See, for example, *S v Joyce Maluleke* Transvaal High Court 83/04, 13 June 2006, <http://www.restorativejustice.org/editions/2006/oct06/southafrica> 9 Oct. 2006.

51 We have eschewed a race and gender analysis in this article, as the statistical sample is too small for any meaningful conclusions to be drawn. The data is nonetheless reflected in the table at the end, as a matter of interest.

Since the adoption of the interim Constitution in 1993, the word *ubuntu* or *ubuntu-botho* appears in 31 cases, and in 38 separate judgments. Of these, seven references were peripheral to the argument and outcome of the case, often forming no more than part of a quotation from the interim Constitution. The concept was central to the reasoning and outcome in nine instances and played an important, but less significant role in ten others. Its influence in the other five cases is not easy to assess: in three the judges commented on attitudes[52] and in the other two the concept was considered, but not applied. In each of these the concept played some contextual role, but it appears not to have formed a central part of the court's reasoning.

The concept was used in eight cases in the Constitutional Court; two in the Supreme Court of Appeal; seven in the Cape Provincial Division; seven in the Transvaal Provision Division (of which four emanated from the Witwatersrand Local Division); two in each of the Bophuthatswana Provincial Division and the Eastern Cape Division; and one in each of the Venda Provincial Division, the Land Claims Court and the Labour Court. The eight Constitutional Court cases gave rise to 15 separate judgments in which the concept was used explicitly, but the other cases all had one judgment only. The concept has not been mention expressly in any cases in the Free State, Northern Cape and KwaZulu-Natal, as well as the formerly 'homeland' division of the Transkei. (The first explicit mention in the former Ciskei High Court arose in February 2007). Given the country's population distribution, one could perhaps have expected more references from these divisions, and also from the Eastern Cape, Venda and Bophuthatswana Divisions. And, given the nature of the cases they hear, also more from the Land Claims Court and Labour Court.

In numerical terms, the express use of *ubuntu* or *ubuntu-botho* in deciding issues can hardly be termed significant; but, interestingly, courts have resorted to the concept where there is a need to emphasise the Constitution's transformative role – reforming the sentencing and compensation systems by making them more restorative; requiring government to take active steps in providing housing; and integrating customary law into the mainstream legal system.[53] And, as will be seen from further analysis of the concept, the influence of *ubuntu-botho* in fact extends much further than at first meets the eye.

There is no consistent pattern in terms of the concept's use. In the first three years after the adoption of the interim Constitution (1994-1996), there were five peripheral references to the interim Constitution and three instances where *ubuntu* had some influence on the outcome. From 1997 to 1999 there were only two references, but neither was peripheral. An upsurge occurred in 2000, with six cases (two where the concept had significant influence, two with some influence and two peripheral references). Then came a drought – no explicit

52 In two instances the court indicated that the attitude of one of the litigants was not in accordance with the concept, while in the other one reference was made to a respectful attitude that courts should display towards members of society.

53 In *S v Makwanyane* Langa J noted at par 227: 'It has however always been mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for'.

references in 2001 and 2002, and only one reference in 2003 – followed by a peak in 2004: eight references, three significant, three with some influence on the outcome and two containing strong comments on attitudes. In the two-and-a-quarter years since 2005 there were six references – one significant to the result, one a comment in a minority judgment, while in the other cases the concept played some role in the result.

From this it appears that courts have become more relaxed in using the concept. At first, in line with the familiar 'reasoned argument' approach of yesteryear, courts tended to refer formalistically to the interim Constitution's post-amble to indicate the need for transformation of society's ideas and values instead of looking into *ubuntu-botho* itself to inform their decisions. In five of the initial nine cases, the reference was to *ubuntu* as part of the post-amble, and was used peripherally. In three the concept had some influence and in one a significant influence on the outcome.[54] The situation changed at the turn of the century. From 2000 onwards, only two peripheral references can be found, both in 2000. The concept had a major influence in six cases, a direct influence in six and an indirect influence in five others. Reference to the interim Constitution ceased and courts began to use *ubuntu-botho* as a guiding value intrinsic to the concept of dignity. Courts now appear to more at ease with the idea and apply the concept more naturally, as part of their decision-making processes, instead of a mere formal application of authority or precedent. This observation is strengthened if one were to add the cases in which the values of *ubuntu-botho* have surfaced without express reference to the concept.[55]

Of interest also is the extent to which *ubuntu-botho*, essentially an African concept focusing on family and friends, has been used to transcend its origins. In the majority of cases the state, parastatal institutions, large organisations and even the judiciary, were expected to show *ubuntu* in exercising their powers (which is not surprising); and similar expectations were had of 'private' litigants, irrespective of their race. So the nature of the litigants has had no bearing on the concept's application.[56]

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54 The lack of any significant development of the ideas raised in the *Makwanyane* case led Kroeze to conclude (at 252-253 and 260) that, after a brief flirtation with *ubuntu* as a constitutional value, courts had put the concept to rest. See also English 641.While their conclusions are probably valid for the period up to and including 2000, subsequent decisions indicate a revival of the concept's use.

55 A detailed analysis of these cases falls beyond the scope of this article. However, examples could be found in eviction cases, for example, *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), [2000] 11 BCLR 1169 (CC) and *City of Cape Town v Rudolf* [2003] 3 All SA 517 (C); and sentencing cases, for example, *S v Shilubane* [2005] JOL 15671 (T) and *S v Joyce Maluleke* Transvaal High Court 83/04, 13 June 2006, <http://www.restorativejustice.org/editions/2006/oct06/southafrica> 9 Oct. 2006. See also the way in which courts have held government to account in social welfare cases, for example, *Vumazonke v MEC for Social Development* [2004] JOL 1361 (SE) and *Member of the Executive Council: Welfare v Kate* [2006] SCA 46 (RSA).

56 Again, this is not surprising. Extra-judicially, Mokgoro J has been at pains to emphasise that the concept overlaps substantially with values rooted in other societies and could apply to all sectors of society without any difficulty.

Criminal law, and in particular, sentencing, is with eight cases by far the most likely area for using *ubuntu-botho* values, followed by socio-economic issues relating to land, housing and eviction cases and statutory interpretation cases with four each. Reconciliation, family and customary law succession cases each had three instances, while labour each had two. The concept was discussed once in each of the fields of delict, discrimination (the right to equality) and administrative law. Apart from the eight criminal law cases, the concept was used in sixteen cases that could be classified as public law and in seven cases involving private law.

Specific categories

This section contains specific examples of how courts have used *ubuntu-botho* in their judgments. The areas of law – criminal law; administrative law, specifically socio-economic rights; and delict (tort) – have been selected to illustrate that the concept is not restricted to a narrow range of cases.

Criminal law

Ubuntu has featured quite prominently in a number of criminal cases, which we have divided into three sub-categories: substantive issues, procedural issues and sentencing issues.

At issue in *S v Mandela*[57] was the defence of compulsion, otherwise known as necessity. Mandela had been charged with two counts of murder, amongst others. The crux of his defence was that two other persons had intimidated him to the extent that he had no option, in one murder, to be present at the scene, and in the other, to shoot and kill the victim.

In South African law, it is possible for someone to be acquitted of murder where the factual circumstances indicate that the killing was done under compulsion. The leading case here is *S v Goliath*[58] where Goliath had assisted in the killing of the deceased under a dire threat to his own life. However, in the *Mandela* case, the court found that there was no immediate, life-threatening, compulsion where 'the danger of death cannot be averted, save by acts of heroism which extend beyond the capacity that should, and can, be demanded of the reasonable person'. To accept a lesser standard for the defence 'would represent a lowering of regard for life and an undermining of the very fabric of the attempt to build a constitutional community, where each and every person is deserving of equal concern and respect and in which community grows sourced in the principle of *ubuntu*'.[59]

Crossley v The National Commissioner of the South African Police Services[60] was a case that hit world headlines. Crossley and two others, having fed the deceased to a pride of lions, were eventually found guilty of murder. However, the issues relevant to this discussion arose earlier in the proceedings, and involved an urgent application by the accused for the stay of the burial of

57 2001 (1) SACR 156 (C), [2001] 1 All SA 441 (C), [2001] JOL 7754 (C).
58 1972 (3) SA 1 (A).
59 At 167.
60 [2004] 3 All SA 436 (T), 2004 JDR 0448 (T), [2004] JOL 12839 (T).

the deceased's remains so that further pathological tests could be conducted to ascertain the time and cause of death. The deceased's family were not notified of the application, nor joined in the proceedings. The court had to balance the accused persons' right to a fair trial and to challenge evidence effectively with the family's interests in burying the deceased according to their custom.[61] After considering there to be sufficient extraneous evidence to allow the accused to challenge the state's evidence effectively, the court turned to the family's right to dignity and right to conduct their religio-customary practices. It concluded that the burial of the deceased in accordance with African religious custom should prevail: 'It accords credence to the very essence of the dignity, not only to the deceased's immediate family, relatives and community but also to the deceased himself.'[62] Thereafter the court raised a further rationale for finding in the family's favour – *ubuntu*. After setting out dimensions of the concept,[63] the court concluded:[64]

> I am of the considered opinion that in this democratic era the higher constitutional value of the right to dignity, embedded in every international human rights instrument, embraces not only those who are living but also those who have departed. They too, like the deceased, need to rest undisturbed with dignity. Now, at this penultimate hour the applicants chose to come to Court by way of urgency for an order to stop the burial of the deceased. If such an order is granted then that will be the gravest disrespect to the deceased and also violate his family's right to dignity as well as interfere with their religious rights and freedom. It will also result in the gravest injustice to his family and community at large.

It is clear from various passages in this judgment that the court gave substantial weight to the need to take into account the customs and practices of those sectors of the South African society that have retained their religious and social customs. And even though reliance on *ubuntu* appears to have been but a postscript to the main argument, the philosophy underpins the entire judgment. The judgment itself resonates *ubuntu*.

Sentencing is potentially fertile ground for *ubuntu-botho* to take root. In two of the cases under review the concept cropped up merely in a peripheral way[65] and in one, slightly more pertinently, but with no impact.[66] However, in another

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61 Par 9. See also par 10.

62 At par 18.

63 Amongst others, at par 18, '*Ubuntu* embraces humaneness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity, morality and conciliation'.

64 At par 20.

65 *S v Williams and Five Similar Cases* 1994 (4) SA 126 (C); *S v Hlongwane* 2000 (2) SACR 681 (W), [2000] JOL 7618 (W).

66 In *S v Khumalo* 2000 (2) SACR 270 (T), [2000] JOL 7083 (T) the two accused had been found guilty of various crimes, including a count of murder, for which they had been sentenced to death. Given that this penalty had been declared unconstitutional, the court now had to consider an appropriate alternative punishment. Counsel for the accused tentatively argued that *ubuntu* considerations emphasising rehabilitation of

two cases, *S v Makwanyane*[67] and *S v Magadani*,[68] *ubuntu-botho* was central to the judges' reasoning. *Makwanyane* was decided under the interim Constitution. The reasons for declaring the death penalty unconstitutional were multifaceted and each judge gave his or her own reasons, but six of the eleven concluded that the death penalty was inconsistent with the value of *ubuntu*.[69] The tenor of these judgments was that regard should be had to reconciliation and restorative notions, like rehabilitation, that are inherent in *ubuntu*, and not revenge, retaliation and victimisation; and that society's reaction to violence should be humane, and not similarly violent and degrading. Langa J, for example, said:[70]

> An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu.*

Interestingly, contrary to the popular notion that *ubuntu-botho* requires one to be soft on the criminal, this extract also emphasises the other side of the coin: criminal behaviour, in itself, is contrary to *ubuntu-botho*. But overall, in this context, the need for compassion and humaneness – the need for society to maintain its dignity – overrode the aggravating considerations and the death penalty was declared unconstitutional.

The accused in *S v Magadani* had been convicted of four offences, one of which was murder, which the court described as 'not only serious, but brutal and disgusting'.[71] After referring to the above-quoted passage from Langa J's judgment in *Makwanyane*, Makhanya J noted that the Magadani had 'violated this valued and age old traditional precept of ubuntu' by attacking the deceased in a place where she had taken refuge or sanctuary[72] and, to give effect to the

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the offender should cause the court to consider a more lenient sentence than life imprisonment, couching his submissions in *ubuntu* terms so as to use *S v Makwanyane* as authority. But the court considered the perpetrators' record of previous criminal activity to militate against any successful rehabilitation and instead emphasised the aggravating aspects of the case and sentenced them to life imprisonment. In reality, although raised, *ubuntu-botho* had no impact on the outcome and did not alter the reasoning processes normally associated with balancing rehabilitation prospects with aggravating circumstances.

67 1995 (3) SA 391 (CC), [1995] 6 BCLR 665 (CC).

68 *S v Magadani* 2001 JDR 0321 (V).

69 *S v Makwanyane* par 131 (Chaskalson P), pars 224-227 (Langa J), pars 241-244, 250 and 260 (Madala J), pars 264-265 (Mahomed J), pars 307, 311 and 313 (Mokgoro J), par 374 (Sachs J).

70 At par 225. See also Battle 35.

71 At 3.

72 At 5-6.

community's condemnation for the way in which he had dehumanised and defiled the deceased, sentenced Magadani to life imprisonment.[73]

In *Du Plooy v Minister of Correctional Services*[74] Du Plooy had been convicted of armed robbery and sentenced to 15 years' imprisonment. He was terminally ill, however, and was immediately admitted to prison hospital, with a life prognosis of only a few months. He applied to the prison authorities for medical parole, which was refused, and the court had to determine the reasonableness of that decision. Patel J granted Du Plooy parole on the grounds that Du Plooy was in need of 'humanness, empathy and compassion…, values inherently embodied in Ubuntu'. Continued incarceration would violate 'his human dignity and security, and the very punishment itself becomes cruel, inhuman and degrading'.[75]

Although this chapter focuses on the explicit use of *ubuntu* in judgments, it is perhaps appropriate to conclude this section with a reference to a recent case in which *ubuntu-botho* values permeated the court's reasoning without express mention of the term. In *S v Maluleke*[76] Maluleke had been convicted of the murder of a young boy who was a member of her extended family in a close-knit community. She was an unemployed widow with four children and her only income was a child grant. She was a first offender, had shown remorse, and it was unlikely that she would again be involved in similar violent conduct. She was 'not a person against whom society needs to be protected'.[77] Despite the severity of the crime, mitigating circumstances indicated that incarceration was not an appropriate sentence,[78] so the Court took into account traditional practices, specifically the custom in Maluleke's community 'that, in the event of an unlawful killing of a member of the community, the family of the perpetrator send a senior representative to the family of the deceased to apologise and to attempt to mend the relationship between the families disturbed by the death of the deceased'.[79] Maluleke had not followed this practice, but the deceased's mother nonetheless indicated that she would be prepared to receive Maluleke's representatives. Bertelsmann J use the opportunity to involve the community in the sentencing and rehabilitation process and sentenced Maluleke to eight years imprisonment, all of which was suspended, amongst others, on

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73 However, this could perhaps also be an example of one of the negative aspects of *ubuntu* coming to the fore: Shutte (at 32-33) points out that anger and defiance may surface in the face of injustice. Adherents to the *ubuntu* values are sometimes intolerant of gross violations of those values. For other negative aspects – that it is open to abuse because *ubuntu* underplays individual freedom and does not sufficiently accommodate differences of opinion, which results in individuals becoming subservient to the whole and places personality/assertiveness in the background – see Battle 42, 50-53.

74 [2004] 3 All SA 613 (T), [2004] JOL 12850 (T).

75 At par 29.

76 Transvaal High Court 83/04, 13 June 2006. <http://www.restorativejustice.org/editions/2006/oct06/southafrica> 9 Oct. 2006.

77 Par 11.

78 Par 23.

79 Par 14.

condition that she apologised according to custom to the mother of the deceased and her family within a month after the sentence had been imposed.[80]

This review reveals that, although one might expect the *ubuntu-botho* to be applied in a manner that shows compassion towards an accused person, in two instances, at least, it has been used to advance results that were detrimental towards the accused. The use of *ubuntu-botho* in this fashion appears to be in line with its original meaning, noted above. According to Coertze, the emphasis in the past was placed not on the necessity for compassion towards a person, but rather on the necessity to accept the duties entailed by the membership of various social cohesions.[81]

Evictions and the right to have access to adequate housing

A cornerstone of apartheid land law in South Africa was the politically-motivated, legislatively-sanctioned and state-sponsored eviction and forced removal of people.[82] A largely conservative and positivist bench[83] applied the law without taking into account of the life circumstances of those being expelled (inevitably black shack-dwellers), nor the grave assault on their dignity.[84] It is therefore unsurprising that *ubuntu-botho,* with its focus on community and dignity-through-others, should play a significant role in the outcome of two eviction matters.

In *Port Elizabeth Municipality v Various Occupiers*[85] the local authority (responding to a petition of 1600 of its residents) sought an eviction of some sixty-eight people who had set up shacks on private property within its urban area.[86] Most of them had lived there for two to eight years after being evicted from other land. In the pre-Constitution era, the response of the courts to a situation like this would have been simple and drastic – summary eviction and a criminal conviction of the shack dwellers would have followed on the court's technical reading of the invidious Prevention of Illegal Squatting Act.[87] In the post-Constitution era, the matter fell to be decided in terms of s26(3) of the Constitution and the new land reform laws.[88] Sachs J recognised that *ubuntu* 'suffuses the whole constitutional order'[89] and, together with the Prevention of

80 Pars 21-24.

81 Coertze 117. This view seems in line with that adopted by Langa J in *S v Makwanyane* at par 255.

82 Van der Walt 260.

83 Moseneke 316. See also Langa 4.

84 For example, *Vena v George Municipality* 1984 (4) SA 29 (C).

85 2005 (1) SA 217 (CC).

86 The matter came to the Constitutional Court by way of an appeal after the Supreme Court of Appeal set aside an eviction order by the South Eastern Cape Local Division of the High Court.

87 This finding would have been predicated on the Roman Dutch law traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner.

88 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

89 Par 37. In this statement, Sachs J footnotes Mokgoro J's reference to *ubuntu* in *S v Makwanyane* at par 308.

Illegal Eviction from and Unlawful Occupation of Land Act (PIE), 'promotes the constitutional vision of a caring society based on good neighbourliness and shared vision'.[90] *Ubuntu-botho* as a value was integral to Sachs J's suggestion that mediation between the parties in eviction matters should be encouraged as a method of 'enabling parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future'; as well as to the finding against the Municipality on the basis, amongst others, that it had not listened to and considered the problems of that particular group of occupiers.[91] This effectively meant that the eviction was not sanctioned.

City of Johannesburg v Rand Properties (Pty) Ltd[92] followed soon after the *Port Elizabeth Municipality* case. In this matter the local authority sought the eviction of some 300 occupiers from inner city residences in terms of the National Building Standards and Building Regulations Act.[93] The City did not dispute that the eviction was part of the local authority's Inner City Regeneration Strategy.[94] However, the basis of the application was the allegation that the properties were unhygienic and constituted a fire hazard. In a counter application, the occupiers sought an order declaring the local authority's housing policy unconstitutional insofar as it did not cater for those who were economically vulnerable and who would be in a crisis if they were evicted. This counter application was based on the local authority's refusal to offer the occupiers alternative accommodation (although it had informally suggested to the court that they could be relocated to an informal settlement).[95]

Jajbhay J commented that the local authority's suggestion regarding relocation flies in the face of *ubuntu-botho* especially since informal settlements were not safer places than the occupiers' current inner city residences.[96] In the particular circumstances of eviction and housing *ubuntu-botho* requires that 'urbanization and the accumulation of wealth and material possessions [should not] rob us of our warmth, hospitality and genuine interests in each other as human beings'.[97] The court dismissed the local authority's eviction application and declared its housing policy unconstitutional insofar as the policy 'failed to

90 Par 37.

91 Par 59.

92 [2006] 2 All SA 240 (W).

93 103 of 1977.

94 The strategy of the local authority is reported here as intending to transform the inner city's 'sinkholes' (rundown areas) into modern, commercially sustainable and visually attractive 'ripple ponds' (regenerated areas). See Wilson 10. The strategy, Wilson comments, is motivated by the local authority's efforts to mould Johannesburg into an 'African World Class City' which will in turn lead to higher commercial investment in the inner city and contribute to a gradual increase in property prices.

95 Par 64.

96 Par 64. The South African Human Rights Commission (SAHRC) reported (at 14) that the conditions it had observed in informal settlements were 'intolerable'. See SAHRC 5th Economic and Social Rights Report (2002-2003) at 14.

97 Par 63.

provide suitable relief for people … who are in a crisis situation or otherwise in desperate need of accommodation'.[98]

Ubuntu-botho is now firmly entrenched as the guiding philosophy behind eviction cases. Previously a number of judgments reflected the need, amongst others, for 'care and concern', and 'compassion',[99] but in these two cases the judiciary has openly acknowledged the need for 'active judicial management' and 'transformative adjudication', which is substantially different from the ostensible apolitical and neutral adjudication of yore. The result is similarly transformative: unlike those in the past, recent judgments evidence a softer, compassionate legal culture; one in which judges see people, not laws; and one in which people experience in a small, but important way, that the law can be caring.

Delict (Tort)

Ubuntu-botho undoubtedly fits in nicely as a value in the public arena and one can also expect it to feature prominently in customary private law, which has already happened in the law of intestate succession, the principle of primogeniture,[100] and with support and maintenance obligations.[101] However, its relevance has also being felt in what has for long been seen as the preserve of Roman-Dutch private law – the law of delict, and more particularly, its remedies.

Although in Roman law delict had some punitive components, in modern law, a damages award in delict has a compensatory function only: one is compensated for loss suffered; or monetary compensation is used to assuage wounded feelings or to vindicate one's reputation.[102] The court of first instance in *Mogale v Seima*[103] had refused leave to appeal against the size of the damages award for defamation. Counsel had argued that the award was too high and, in line with traditional Roman-Dutch precepts, that damages should 'repair the harm done to a plaintiff's reputation' and should not be imposed for a 'wider purpose'. Motata J is reported to have said[104] that white people do not understand *ubuntu*, that the law should evolve from that which had been im-

98 Par 1 of the court order. Jajbhay J also interdicted the local authority from evicting or seeking to evict the occupiers pending the implementation of a constitutionally valid housing programme.

99 For example, without any mention of the term, the judgment in the *Grootboom* case stands out as one in which *ubuntu-botho* was in the forefront.

100 *Bhe v Magistrate, Khayelitsha (Commission of Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC); [2005] 1 BCLR 1 (CC); *Nzimande v Nzimande* 2005 (1) SA 83 (W).

101 *Fosi v Road Accident Fund* [2007] JOL 98 (E).

102 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 80; *Esselen v Argus Printing and Publishing Co Ltd and others* 1992 (3) SA 764 (T) at 771. See also Van der Walt and Midgley par 142.

103 2005 JDR 1312 (SCA).

104 The remarks were made during counsel's argument on the point: Rickard *Sunday Times* 3 October 2004.

posed on the country and that, with the Constitution as its source, a new law should be derived which does not depend on Roman-Dutch and English law.

The Supreme Court of Appeal eventually granted leave to appeal and reduced the award substantially; and although it declined to comment on the judge's remarks, the Court held that Motata J had erred in believing that a damages award could be used to teach a defendant a lesson.[105] The Court did not refer to *ubuntu-botho*, but it is clear from the following passage that it took note of a wider range of values than those found in Roman-Dutch law, and also had regard to customary law principles:[106]

> It is not, however, without interest to note that since or due to the influence of the Code Napoleon civil law countries such as Germany do not recognise a damages claim for defamation unless the defamation is a criminal defamation. Our own indigenous law also does not in general allow damages claims for defamation unless allegations of witchcraft are involved but our Roman Dutch common law provides for defamation claims for all on the same basis.

That the Supreme Court of Appeal's approach to the issue was clearly correct, is borne out by *Dikoko v Mokhatla*.[107] Two justices, albeit in minority judgments, relied heavily on the concept in advocating for a more restorative remedy in defamation cases – retraction and apology – instead of solely relying on damages awards. Although ultimately these views reflected the expressed views of only three justices,[108] the rest of the court did not decry the idea, but instead found that the matter did not fall to be decided in that instance.[109]

Justices Mokgoro and Sachs called for creative application of the *ubuntu-botho* philosophy in defamation cases. For Mokgoro J the focus of a defamation remedy should be to repair the injury to a person's honour, dignity and reputation, and to restore harmonious human and social relationships instead of enlarging 'the hole in the defendant's pocket': [110]

> The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.

She continued:

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105 At par 12.
106 At 8-9.
107 2006 (6) SA 235 (CC).
108 Mokgoro, Nkabinde and Sachs JJ.
109 At par 86.
110 Par 68. See also pars 69 and 112-121 (per Sachs J).

> Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant.[111]

And so *ubuntu-botho* was used to promote an extension of the remedies available in the modern law of delict.

While the emphasis thus far has been on using *ubuntu-botho* values in finding an appropriate remedy, there is also scope for the philosophy to permeate other areas in the law of delict – the wrongfulness element, for example, an area where norms are prominent and in which the Constitution has already had substantial influence.[112] In future one might possibly find *ubuntu-botho* being used, not only in cases involving bodily integrity, dignity, privacy and reputation, but also to reinforce responsibility – of the state and of private persons – where vulnerable and marginalised sectors of society are harmed.

Conclusions

Even though their points of departure are different, both Shutte and Tutu believe that a synthesis of the fundamental values in Western and African thought could easily be attained.[113] And there is strong indication that the South African judiciary might well agree with such synthesis. In *Dikoko v Mokhatla* Mokgoro J noted that 'the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*',[114] while Sachs J articulated the point more emphatically:[115]

> In present day terms it [*ubuntu-botho*] has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.

For those who contend that there are universal values that transcend origins and boundaries, the welcome aspect stemming from the *Dikoko* case is that it is possible, in practice, to harmonise values that arise from diverse and essentially foreign sources; in this instance, those from Roman and African legal cultures:[116]

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111 Par 69.

112 Van der Walt and Midgley pars 18-22.

113 This is the theme of Shutte's book, *UBUNTU: An Ethic for a New South Africa* (see Shutte 2, 11 and 13-15) and the core aspect of Tutu's '*Ubuntu* Theology': see Battle 35-53.

114 Par 68.

115 Par 113. On a previous occasion Sachs J had expressed similar sentiments, with the concurrence of all the justices, in *Port Elizabeth Municipality v Various Occupiers* at par 37.

116 Per Sachs J par 16.

> Although *ubuntu-botho* and the *amende honorable* [of Roman Law] are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. Both are directed towards promoting face-to-face encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures the centre-piece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted.

This is not an isolated instance of seeking and/or finding compatibility between values emanating from different cultures. Khumalo J engaged in a similar exercise in *Bophuthatswana Broadcasting Corporation v Ramosa*,[117] finding common ground in passages from Confucius,[118] the Bible[119] and Justinian.[120] And as judges become more at ease with going beyond their role as mere declarers of the law, so further attempts at harmonisation are likely to occur.

It appears that harmonisation is possible if one focuses not so much on the cultural origins of a particular value, but on what the value seeks to express or achieve. Clearly some values that originate from Africa are different from those that originate from elsewhere, but there are also commonalities. *Ubuntu-botho* falls within the latter category and is indeed emerging as a cohesive force that can unite cross-cultural values. It may well be argued that since communitarianism is not unique to *ubuntu-botho* there is no need to champion the philosophy. But that ignores the real need in South Africa for legitimating the legal system and to develop a legal culture that expresses values originating in African societies. A break from past domination of one school of thought over another needs to be emphasised and the notion of inclusivity that is inherent in *ubuntu-botho* makes it an ideal overarching vehicle for expressing shared values.[121]

Our review also shows that the courts have openly endorsed the need for transforming South African legal culture and, in doing so, for asserting the values of those who were marginalised in the past. In effecting this objective,

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117 [1997] JOL 283 (B) at 4-5.

118 'Do not do unto others what you would not want others to do unto you'. (*Encyclopaedia Brittanica: Knowledge in Depth* Vol 16 at 656).

119 'Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets'. (Matthew Chapter 7 Verse 12).

120 'Juris praecepta sunt haec: honeste vivere, alterum non laedare, suum cique tribuere', which he translated as 'the precepts (or maxims) of the law are these: to hurt no one, to give everyone his due'. (Institutes of Justinian 1.1.3.).

121 There might also be lessons for the international society: if an emphasis on African values can shape and enhance human rights jurisprudence in South Africa, and give dignity to ideas that emanate from Africa without offending or eroding contributions of other societies, why, in the spirit of *ubuntu-botho*, should African values also not contribute more in the international domain? Already restorative criminal justice expressing values similar to *ubuntu-botho* has been espoused in a number of countries (Tshehla; Klare 169) and there are many similarities between *ubuntu-botho* and the 'poldermodel' of The Netherlands (Bruinsma Chs 4 and 6). Such harmonisation might not be as daunting as it may at first seem.

courts are relying on the founding values of the Constitution in reformulating a number of legal rules. But the reformulation process does not end there: interestingly, *ubuntu-botho* is being used to reinterpret the founding value of dignity, with the concomitant restatement of rules which that value underpins to give effect to aspects of *ubuntu-botho*. It should be noted, however, that *ubuntu-botho* itself has not become a law: it remains no more than one of the values against which laws must be measured. In other words, through the process of reinstitutionalisation, the custom of *ubuntu-botho* has become justiciable.

Some commentators[122] have expressed concern that, in using *ubuntu-botho* to shape legal culture, judges are compromising their judicial independence and in so doing, they are undermining the doctrine of separation of powers. In other words, the judiciary is doing no more than responding to the ruling party's ideological call for nation building, or for an African Renaissance. There are indeed indications that some judges have bought into the African Renaissance, nation-building ideology.[123] We suggest, however, that this does not necessarily compromise their judicial role. The fact that judges' views correspond with a political party policy, or that a political party has adopted a policy that is in line with constitutional values, does not render judges or the courts lackeys of that party.

In recognising *ubuntu-botho* as a constitutional value and reinstitutionalising the custom as a justiciable principle, courts are not implementing political party policy. They are granting legal recognition and authority to some manifestations of *ubuntu-botho*, and may not necessarily do the same in respect of other manifestations. What's more: in reality, despite the ruling party's championing of *ubuntu-botho*, courts have found that government's conduct in some instances contradicted the very custom it is championing, as they did in the *Makwanyane* and *Port Elizabeth Municipality* cases.

One of the aims of this contribution is to use *ubuntu-botho* to gauge the extent to which a collective legal culture could be emerging and whether or not such an objective is viable in a plural society like South Africa. Our conclusion, following this review, is that the judiciary has readily embraced *ubuntu-botho* in a variety of cases involving a variety of litigants, and even though some judges champion the value more readily than others, there appears to be a general acceptance by the courts that *ubuntu-botho* expresses a common South African value applicable to all sectors of society.

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122 For example, Marx 62.

123 See, for example, Mokgoro *Potchefstroom Electronic Law Journal*. Academic reaction to the idea has been mixed, but the critics are in the majority. Mqeke, Van Niekerk, Christians and Cornell support the notion; Coertze, English, Kroeze and Marx are critical. For English, constitutional adjudication is about conflict, not harmony, and *ubuntu* will serve little purpose unless we 'get rid of this idea that it is in some way a balm for the conflict at the heart of society'. She would like *ubuntu* to be used where individual and community interests collide, and to resolve such conflicts (English 648). Kroeze had hoped that the flirtation with *ubuntu* would be brief, and laments 'the continued interest in *ubuntu* within the legal and philosophical context' (Kroeze 252).

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Table: Analysis of cases in which ubuntu *or* ubuntu-botho *was mentioned*

Jun-94	*Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E)	E	Froneman	WM	Kroon	WM	Constitutional interpretation	Quote from IC post-amble – no discussion or express application of concept
Jun-94	*S v Williams and Five Similar Cases* 1994 (4) SA 126 (C)	C	Farlam	WM	Scott Conradie	WM WM	Sentencing – whipping – referral of matter to CC	Quote from IC post-amble – no discussion or express application of concept
Jun-95	*S v Makwanyane and Another* 1995 (3) SA 391 (CC), [1995] 6 BCLR 665 (CC)	CC	Chaskalson Langa Madala Mahomed Mokgoro Sachs	WM BM BM IM BF WM			Sentencing – death penalty	Central to decision – detailed discussion of concept and effect
Jun-95	*Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B)	B	Friedman	WM			Constitutional interpretation – horizontal application of Bill of Rights	Quote from IC post-amble – no discussion or express application of concept
Apr-96	*Williamson v Schoon* 1997 (3) SA 1053 (T)	T	Navsa	CM			Stay of proceedings pending amnesty application	Reference to IC post-amble – no discussion or express application of concept
May-96	*Bophuthatswana Broadcasting Corporation v Ramosa and others* [1997] JOL 283 (B)	B	Khumalo	BM			Interdict – protest outside main gate	Reference to ubuntu in IC – historical comparative discussion of concept – central to decision
Jul-96	*Azanian Peoples Organisation and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC)	CC	Mahomed	IM	Chaskalson Ackermann Kriegler Langa Madala Mokgoro O'Regan Sachs	WM WM WM BM BM BF WF WM	Truth and Reconciliation – constitutionality of amnesty provision in Act	Quote from IC post-amble – no discussion or express application of concept

Aug-96	*Ryland v Edros* 1997 (2) SA 690 (C), [1996] 4 All SA 557 (C)	C	Farlam	WM			Validity of marriage – Muslim rites	Ref to post-amble and Langa J's judgment in *Makwanyane*, amongst others, to support conclusion that equality and tolerance of diversity are constitutional values
Apr-97	*Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC), [1997] 3 All SA 635 (LCC)	LCC	Meer	IM	Gildenhuys	WM	Land Restitution – statutory interpretation	Reference to IC post-amble and reference to Madala's judgment in *Makwanyane* – no further discussion, but concept part of factors taken into account
Dec-99	*Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 (3) SA 119 (C), [2000] JOL 5990 (C)	C	Davis	WM			Reconciliation Commission – access to information	Quote from IC post-amble and peripheral comment regarding purpose of TRC – no discussion but concept part of factors considered
Jun-00	*S v Khumalo en 'n Ander* 2000 (2) SACR 270 (T), [2000] JOL 7083 (T)	T	Swart	WM	Stafford Jooste	WM WM	Sentencing – murder – life imprisonment	Reference to comment as part of counsel's argument – rejected in the circumstances
Aug-00	*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), [2000] JOL 7320 (CC)	CC	Sachs	WM	Chaskalson Langa Goldstone Madala Mokgoro Ngcobo O'Regan Yacoob Cameron	WM BM WM BM BF BM WF IM WM	Corporal punsishment at schools	Quoted Mahomed J in *Makwanyane* in a footnote. Mention of the concept peripheral to the decision.
Sep-00	*Hoffmann v South African Airways* 2001 (1) SA 1 (CC), [2000] JOL 7446 (CC), [2000] 12 BLLR 1365 (CC)	CC	Ngcobo	BM	Chaskalson Langa Ackermann Goldstone Kriegler Mokgoro O'Regan Sachs Yacoob Madlanga	WM BM WM WM WM BF WF WM IM BM	Right to equality – unfair discrimination – HIV/Aids	Concept not discussed – merely mentioned and applied

Sep-00	*S v Hlongwane* 2000 (2) SACR 681 (W), [2000] JOL 7618 (W)	W	Claasen	WM			Sentencing – murder of policeman – life imprisonment	Peripheral reference to article which mentions *ubuntu* workshops for police training.
Oct-00	*S v Mandela* 2001 (1) SACR 156 (C), [2001] JOL 7754 (C)	C	Davis	WM			Murder – defence of compulsion	Concept must be considered in relation to victim's right to life when defence considered
Nov-00	*S v Magadani* 2001 JDR 0321 (V)	V	Makhanya	BM			Sentencing – murder – life imprisonment	Concept central to decision – discussed and applied.
Sep-03	*Bhe and Others v Magistrate, Khayalitsha and Others* 2004 (2) SA 544 (C)	C	Ngwenya	BM	Hlophe	BM	Unfair discrimination – race and gender – statute containing principle of primogeniture in customary law intestate succession declared unconstitutional	Court considered second respondent's attitude not to be in line with concept
Mar-04	*Crossley and Others v The National Commissioner of the South African Police Services and Others* [2004] 3 All SA 436 (T), 2004 JDR 0448 (T), [2004] JOL 12839 (T)	T	Patel	IM			Application for delay of burial to preserve evidence	Concept fully discussed and applied in supporting argument
Mar-04	*Du Plooy v Minister of Correctional Services and others* [2004] 3 All SA 613 (T), [2004] JOL 12850 (T)	T	Patel	IM			Application for release on medical parole – various constitutional rights violated	*Ubuntu* as a value applied as part of right to dignity – some effect on outcome
Jun-04	*Badenhorst v Badenhorst* 2005 (2) SA 253 (C)	C	Ngwenya	BM			Divorce – proprietary rights – redistribution order	Court considered defendant's attitude not to be in line with concept
Sep-04	*Nzimande v Nzimande and Another* 2005 (1) SA 83 (W), [2004] JOL 13167 (W), [2005] 1 All SA 608 (T	W	Jajbhay	IM	Gildenhuys	WM	Ownership of property – intestate succession – principle of primogeniture in customary law unconstitutional	Quotes Ngwenya J in *Bhe* and associates with quote – concept applied

Oct-04	*Port Elizabeth Municipality v Various Others* [2004] JOL 13007 (CC)	CC	Sachs	WM	Chaskalson Langa Madala Mokgoro Mosekene Ngcobo O'Regan Skweyiya V.d.Westhuizen Yacoob	WM BM BM BF BM BM WF BM WM IM	Illegal occupation – eviction	Central to decision – detailed discussion of concept and effect
Oct-04	*Bhe v Magistrate, Khayelitsha (Commission of Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) 580 (CC); (2005) 1 BCLR 1 (CC)	CC	Langa Ngcobo	BM BM	Chaskalson Madala Mokgoro Moseneke O'Regan Sachs Skweyiya V.d. Westhuizen Yacoob	WM BM BF WF WM BM WM IM	Indigenous law of succession	Important aspect of decision – concept discussed
Dec-04	*New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Minister of Health and Another* 2005 (3) SA 231 (C),[2005] 4 All SA 80 (C)	C	Hlophe	BM	Yekiso	BM	Leave to Appeal – interpretation of statutes	Concept mentioned and considered

Dec-04	*Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA), [2005] 1 All SA 326 (SCA)	SCA	Harms	WM	Navsa Mthiyane Brand Cloete	CM BM WM WM	Leave to Appeal – interpretation of statutes	Concept mentioned, discussed briefly in relation to interpretation of statutes and considered in relation to respect courts should have for citizens
Sep-05	*Wormold NO and Others v Kambule* 2006 (3) SA 562 (SCA), [2005] 4 All SA 629 (SCA), [2005] JOL 15547 (SCA)	SCA	Maya	BM	Mpati Zulman Nugent	BM WM WM	Unlawful occupation – eviction – maintenance in customary law	Quotes Sachs J in *PE Municipality* and considers concept indirectly
Dec-05	*Kukard and Others v Molapo Technology (Pty) Ltd* [2006] 4 BLLR 334 (LC), [2006] JOL 16376 (LC)	LC	Ntsebeza	BM			Dismissal – procedural fairness	Conduct of employer tested against values of present day SA and found to be insensitive
Mar-06	*City of Johannesburg v Rand Properties (Pty) Ltd and Others* [2006] 2 All SA 240 (W)	W	Jajbhay	IM			Illegal occupation – eviction	Central to decision – detailed discussion of concept and effect
Aug-06	*Dikoko v Mokhatla* 2006 (6) SA 235 (CC)	CC	Mokgoro Sachs	BF WM	Nkabinde	BM	Remedies in delict	Central to argument in minority judgments; not part of majority decision
Dec-06	*The Union of Refugee Women and Others v The Director: The Private Security Industry Regulatory Authority and Others* unreported	CC	Sachs	WM			Rights of refuges to work in the private security industry	Mentioned, but not an essential part of separate minority concurring judgment; not part of majority decision.
Feb-07	*Fosi v Road Accident Fund* 2007 JOL 98 (E)	E	Dlodlo	BM			Compensation claim – child's duty to support parent – customary law perspectives considered	Comment in judgment, to illustrate its central tenet

Dutch Judges Deciding Multicultural Legal Cases

Wibo van Rossum

A few years ago I started my empirical research on the multiculturalization of law in the Netherlands with a simple observation. Here it is:

> In contrast to criminal law, there doesn't seem to be a big issue with the idea of 'culture' in other areas of law.[1] Not only is there no big issue, there hardly seems to be any 'cultural issue' at all. When we examine the Dutch legal literature in the field of family law, contract law etc., we can come up with maybe 20 to 25 legal cases in the past 40 years where cultural arguments concerning immigrant minorities have been explicitly accepted or rejected as being relevant. How come? Is culture only rarely relevant? Or is it not perceived as relevant? Why is the cultural issue not dealt with more, and more explicitly, in legal decisions?

As a legal anthropologist and sociologist I put my cards on the 'hunch' that there must be much more culture in legal cases than actually transpired in official legal decisions. I decided to focus on actual legal cases in the field of family and labour law. It indeed turned out that there was much more culture than people talked about. Especially much more implicit assumptions about what immigrant minorities' culture consists of.[2] These cultural arguments and factors concerning immigrant minorities are tacitly accepted or rejected as being relevant. One might therefore say that the visible adaptation of Dutch legal culture to recent changes in society is complemented by invisible adaptations.

The legal culture of a country adapts at different levels due to changes in the cultural composition of society. When the focus is on the internal legal culture

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1 In criminal law there is considerable debate as to whether defendants have a right to a 'cultural defence', that is: to bring forward mitigating circumstances, strongly put 'my culture made me do it', in order to attract a lower sentence (Dundes-Renteln 2004). In the Netherlands there is no formal prohibition on a cultural defence. Lawyers and defendants are free to say whatever they like. Informally, however, today it is not thought very wise to do so. 'Culture' in the form of social pressure to revenge honour, for example, is likely to lead to a harsher sentence: 'That part of your culture we don't like, so the higher sentence is a signal to your community you have to stop it'. At least this is the impression of defence lawyers (Siesling 2006).

2 I partly follow up on a paper I have written with André Hoekema as a contribution to a symposion in Brussels, 2006, organized by and in celebration of Marie-Claire Foblets. That paper is entitled: 'Empirical conflict rules in Dutch cases of cultural diversity', to be published in Foblets, Gaudreault-Desbiens and Dundes Renteln (2008). I am grateful to Hoekema for allowing me to draw on our common work. My empirical research was commissioned by the Raad voor de Rechtspraak, the Dutch Council for the Judiciary.

(Friedman 1975), the legislator may change the law to allow or proscribe a specific minority cultural practice or value, or the administration may change its internal policy with regard to a certain minority custom. This article focuses, however, on the behaviour of judges when deciding multicultural legal cases. In the next section 'Context, central question and method' I will distinguish these levels of adaptation, and set out the central question and research method in order to specify the particular focus of the research. In the section 'Two empirical illustrations of Dutch judges deciding on multicultural legal cases' I will present two actual legal cases in which arguments related to the ethnic background of the parties played a role. I present my analysis and conclusions in the last section.

Context, central question and method

Context: levels of adaptation of Dutch law to multicultural society

Migration leads to the fact that every society today harbours many culturally different communities. We now not only have countries with first nations (indigenous peoples) and with national minorities, but also with immigrant communities – and some countries have all of this. In this article I focus on the communities we 'talk about' in the Netherlands these days and who are 'seen as' culturally different. 'Culture' and 'culturally different' in this sense means that they are socially constructed categories. In the routine of daily life the question is not so much whether members of ethnic minorities 'really' differ in values and social behaviour, but that it is perceived as such (Baumann 1999). This perception, of course, is not without consequences, since people also act on perceptions.

When talk in the Netherlands is about cultural differences, the talk is not about originally Dutch orthodox Protestants, but usually about Turkish and Moroccan immigrants. The Dutch Central Bureau of Statistics classifies them as 'non-western allochthonous people' because most of them fall under the definition that one of their parents was born in a non-western country. Considering that the official number of non-western citizens in the Netherlands amounts to around 1.5 million people[3], the law must inevitably deal with the question of the relevance of cultural arguments. At least three levels can be discerned: changes in the law, policy changes in standard interpretations, and court rulings. Although the focus of this article is on the third level of court rulings – actually on the behaviour of judges when deciding – it is informative to clarify what this article is not about. Naturally in the following subsections I will dwell the longest on this third level.

The first level of adaptation is the most visible because it is a change in the law itself.[4] In the Netherlands there have been some cases of a change in statute

3 Connected with Moluccan origin: 35,000, with Moroccan: 320,000, with Turkish: 360,000, with Surinamese: 330,000, with Asian: 200,000, with African: 100,000, and with Antillean and Aruban: 125,000.

4 Another visible change is the recent trend of the legal profession becoming culturally diverse. More and more practising lawyers have their background in

law. One example is the Law on Funerals, which was changed to accommodate the Islamic practice of burials without a coffin. The same is true for the ritual slaughtering of animals (Wiersinga 1997).

The second level is that of officially approved changes in the interpretation of certain legal terms. One example is that of the 'incorporation' of the Islamic 'kafala'. The Child Benefit Act entitles parents to a financial benefit for their own children they effectively raise and pay for. Adopted children and, under certain circumstances, foster children also qualify for this allowance. The Moroccan Mudawwanah, which is Islam-based codified law, does not allow for adoption but has its own legal institution, the kafala contract. The contract obliges a family to take care of children from other parents and to pay for all the expenses, but without the biological parents losing the right to custody. No official family relations must develop between a kafala child and the kafala parents (Wortmann 2006: 189-190). Kafala children, until recently, did not qualify as adopted children within the terms of the Child Benefit Act, and neither as foster children, precisely because biological parents retain custody in the case of kafala. This interpretation of the law changed around 2002, when the Social Security Bank which implements this law informally changed its policy and started to reason more substantially. The Bank started looking at whether the biological parents 'actually' did or did not interfere, and at whether the kafala parents 'in fact raised the children as their own' and did this on a 'durable' basis. Interference by the head of legal affairs of the Social Security Bank led to a codification of the policy (Vonk and Ydema-Gutjahr 2002: 357-367; SVB Beleidsregels & Algemeen Verbindende Voorschriften 2005). In other words: an informal policy of interpretation was followed by formal recognition. The law did not change, but its implementation has changed in a multicultural direction.

The third level is that of court rulings, where 'open legal concepts' or 'open-ended norms' especially attract the attention of lawyers with an interest in multicultural society. Since Wittgenstein, one could say that all words are 'open'. The meaning of words and in particular their connotation, depends on their everyday use. There is no 'definite' answer to what a certain word means. In this sense maybe only mathematical terms like 'square' and 'circle' are closed. But even these terms are open when used in ordinary life. The fact that most concepts are open is thus a truism. The same holds true for the law. Legal philosophers point out that legal words, the words used in legal clauses and legal acts, have no determinate meaning. Legal concepts and terms thus can only to a certain extent provide for legal certainty; legal practice and common interpretations take care of this for another part. Still, lawyers usually contrast 'strict provisions' with 'open legal concepts' or 'open-ended norms', usually referring to terms like 'reasonable' and 'in good faith' (Smits 2007). Especially these open concepts allow judges in actual cases to take multicultural

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Turkey or Morocco (no figures are available, maybe 150 today). The Council for the Judiciary has just appointed a 'diversity manager' in order to promote allochthonous legal professionals to opt for a career as a judge (figures: today maybe 15 allochthonous judges in all; See Böcker & De Groot-van Leeuwen 2006: 118, 121).

arguments into account, because what is 'reasonable' behaviour differs from one context and culture to another. When Max Gluckman analyzed the legal procedure of the Lozi in what is now called Zambia, he discovered that they used the concept of the 'reasonable man' to try cases (Gluckman 1955; Schreiner 1999). Of course, the content of what exactly is considered as the behaviour of a reasonable man differed at that time in Great Britain when compared to Loziland. The term 'reasonable' is culture and context-bound. The same holds true for the concept of 'equality'. Most legal systems prefer to treat like cases alike and all persons the same. What 'like' means and what 'the same' means, however, might differ from the one legal culture to the other.

Some Supreme Court cases deal with culturally different meanings of the open legal concept of 'reasonable', or with conflictingly valued circumstances meaning that the judiciary decide what is 'in the interest' of a party. For example, in 1983 the Dutch Supreme Court ruled in a case of a Dutch/Chinese employer and employee. They had quarrelled over whether there was a labour contract between them or not. In general, people are bound by a contract they have agreed upon. How does one know that they have agreed? For this a judge has to assess whether a party may reasonably have inferred from the behaviour of the other party that they agreed, which is a two-way process. The legal question in the case of the Dutch/Chinese parties was: 'Is it possible that this two-way process of reasonably inferring agreement from behaviour is different among two Dutch/Chinese people?' The lower court said 'no', the Supreme Court said 'yes'. Which means 'agreeing on a contract' in the Netherlands is culture-specific (HR 18 November 1983, NJ 1984, 345; see Nieuwenhuis 2001: 338-339).[5]

Another 'open concept' that allows for the entry of different cultural norms is the term 'irretrievable breach', which is legally the ground for divorce. This criterion is extremely liberal, because it relies entirely on self-definition. If one of the partners alleges such a breach, the breach is already a legal fact. For a long time judges, especially higher court judges, did not want to hear of any 'cultural colouring' of the concept. There was a case in which a woman of Moroccan origin (dual nationality, living in the Netherlands) did not want her Moroccan/Dutch partner to divorce her. The man wanted a divorce because he wanted to marry another woman. She said that in her culture the fact that the man enters into a second marriage does not count as a sign of an irretrievable breach of the marriage. The Supreme Court however ruled 'a court cannot dismiss a request for divorce on grounds unknown to the law'.[6] From my interviews with lawyers and judges it becomes clear, however, that today a sensibility concerning these kinds of arguments seems to be developing. Lawyers mentioned Dutch cases involving Turkish and Moroccan couples, in which

5 This may come as no surprise, since the standard legal interpretation requires taking the professional knowledge and common understanding of the parties, for example businessmen, into account.

6 NJ (Nederlandse Jurisprudentie) 2000, 452. (This is a periodical on legal decisions in civil and criminal law.)

judges stay the divorce and try mediation on the ground that they are unsure if there is an irretrievable breach.

Sometimes we can find court rulings that allow for the entry of different cultural practices even when the legal norm leaves no room for this. Such a case[7] involves an unmarried Moroccan couple where both parents had Moroccan and Dutch nationality. The mother asked the court to officially declare the man to be the father of the child (which was granted) as well as to order that their child should have the father's name. The woman alleged that the fact that her child had her name (which in these cases is the legal rule) suggested that she was not virtuous. The child therefore ran the palpable risk of being mistreated by classmates and would not be accepted by the Moroccan family. A request for such a change of name is legally admissible, provided it comes from both parents. Although the father refused, the lower court nevertheless granted the request, thereby balancing the interests of the child versus the interests of the father. The higher court ruled, however, that the legal rule had a strict character and did not leave any room for a balancing of interests. The legislator's intention being clear, the request had to be turned down.[8]

Apart from 'the clear intention of the legislator', important legal principles may stand in the way of a cultural colouring of legal norms. The Islamic institution of 'repudiation' is not accepted as part of domestic Dutch law for reasons of equality between the marriage partners as well as (other) considerations of public order.[9] The equality principle will also stand in the way of a Roma who asks the court to endorse an inheritance regime according to 'Romaniye' (Roma law) that favours male descendants. A Dutch judge decided[10]:

> A preponderant concern in these matters is the principle of equality, while the Dutch inheritance laws are rather complete and strictly formulated. The legislator has not left us with some meaningful degree of discretionary power and expressed clearly the principle that all children have to obtain equal shares, which in itself follows from the general principle of equality.

Other fundamental principles enter into the legal reasoning in, for instance, a case in which the parents of a child wanted to bar a marriage between partners-to-be who in terms of a typically Moluccan kinship system (based on 'adat') are defined as brother and sister. If the judge had upheld the argument, it would have meant a violation of the human right to marry. The same holds true for persons who want to obey the far stricter Islamic requirements of marriage, for

7 Court of The Hague, 16 February 2005, LJN AS6769.

8 A case like this shows how delicate borderline cases are. Moreover, when there is no appeal in these kinds of cases the rulings of lower courts are binding.

9 In Dutch private international law, repudiation (in view of important changes in the foreign procedures in some countries) is now accepted more readily than before (Rutten 2005b).

10 This is a fictitious case presented to a group of judges in a round-table discussion in which I was present.

example the rule that a Muslim woman cannot marry a non-Muslim man.[11] In these kinds of cases, there is no room whatsoever to interpret or change the law to adapt to the 'new Dutch cultures'.[12]

Central question

The focus in these three levels of the adaptation of Dutch legal culture to immigrant cultural arguments concerns, one might say, the visible part of multiculturalization (or its rejection). As said in the introduction, I suspected that much more cultural arguments and factors play an implicit role on the 'invisible level' of court rulings so to speak.[13]

Not every argument or factor finds its explicit way into the actual wordings of legal decisions.[14] The central question is thus how arguments and factors that judges and other professionals involved in a legal case somehow perceive as

11 In terms of legislation, opposition to deviant regimes is very vociferous. State legal pluralism in the sense of legally recognizing distinct legal systems is rejected. It is widely felt that a regime allowing specific religious/cultural minorities to follow their specific proper personal law, like family law, and on that basis to be recognized as married, divorced, etc. in the Dutch legal order on a par with the dominant family law should not be introduced in the Netherlands, partly for a host of practical reasons, but more fundamentally because then the state would have to define what groups qualify as religious/cultural communities which it is not the function of the secular state to determine (Van der Velden 2004). As is clear, in individual cases and within the boundaries of fundamental principles, legal pluralism is not principally rejected.

12 According to some authors the legislator may change the law in some instances. Van der Velden (2004), does not find much room for the judicial acknowledgement of distinct cultural elements in matters of marriage, divorce and the like, but advocates some legislative amendments, for example the rules for the matrimonial settlement of property (common property or separation of property, the latter being normal in the Muslim world). Why force Muslim couples to go to the notary to contract a special arrangement and not allow them a simple choice? Also in the name of the right to freedom of religion, he asks for some changes in the adoption law. The revocation of adoption is nowadays only possible between the age of 20 and 23 years (plus a judicial test). A 25-year-old adopted person, who recently converted to Islam where adoption is not permitted, should be allowed to have his earlier adoption revoked. Also Susan Rutten (2005a) says that legal institutions unknown to Dutch family law cannot enter our legal order by court decisions and refers explicitly to the kafala. As we have seen, it was the administration that allowed it to enter into Dutch law by way of a change in the standard interpretation of the law.

13 There are more invisible levels. Judges, for example, have the option of attending courses in 'Dutch Multicural Society', of which there are two each year allowing for some 30 judges. One course focuses on Turkish and Moroccan immigrants, the other on people from the Antilles and Surinam. The courses give basic historical information about the largest minority communities in the Netherlands, some very basic concepts of Islamic law are discussed, and attention is largely devoted to criminal behaviour. The availability of these courses could be seen as an 'invisible' (to the external legal culture) adaptation of the internal legal culture to a changing cultural composition of Dutch society.

14 I am not arguing that this should be the case. Court rulings have many different functions and only one of them is to provide a justification for the decision.

being related to ethnic immigrant cultures are dealt with. To answer this question I focus in detail on two cases. The two cases, apart from the legal field, differ in several respects. The family law case concerns the open legal concept of 'the interest of the child', in which there is at least the theoretical possibility that 'interest' can be viewed differently from different cultural perspectives. In this case the focus is on the judge having to deal with conflicting cultural values, while the issue of factual influence of the cultural background on the behaviour of the parties also comes to the fore. The labour law case focuses on the interpretation of evidence, in which the judge takes the Moroccan background of one of the parties into account to weigh a factor in the evidence. The labour law case focuses on the judge having to deal with culture as factually influencing the behaviour of one the parties.

Research method

The empirical research took place in 2005 and 2006. In this research I collected specific cases, which were selected after a time-consuming search of lawyers' offices and a local lower court in one of the larger cities. During 2005 more than twenty lawyers who regularly deal with legal cases with parties from ethnic minorities were extensively interviewed about their own experiences in multicultural cases. Most of them were further interviewed by telephone every month about their latest experiences. I asked specifically for actual cases (preferably not yet 'closed') with a potential for distinct cultural institutions, concepts or practices having an influence on the legal decision or on the legal process. Did the lawyers come across new cases in which they had the idea that cultural issues regarding their client might come to play a role? How did they assess that role, and in which way might culture be juridically relevant? Did they hear of cases from other lawyers that were somehow 'culture-related'? Some lawyers were willing to allow me to browse through all of the previous year's files at the office, and to be interviewed about them. Apart from lawyers' offices, cases were collected at a local court in the family section and the 'sub district' section.[15] At this latter section all the completed files covering the first half of 2005 were analyzed, and when relevant the deciding judge was contacted for an interview. All judges in the family section were interviewed in a round-table discussion, during which several cases came to the fore. The files of these cases were analyzed and the judges who delivered the decisions in these cases were extensively interviewed about the relevance of cultural issues for the decision. Several cases could be reconstructed in detail by means of an in-depth interview with the party or parties, the lawyers, the judge and other officials, and occasionally agencies like the Child Care and Protection Board. The focus on actual cases was to prevent lawyers and judges from becoming too idealistic in the interviews – the well-known problem of 'what people say they would do is not necessarily the same as what people actually do'. The focus on cases not yet 'closed' was because judges interviewed a couple of

15 A subdistrict court has a single judge who is allowed to decide inter alia on all labour law cases, and on cases in which the amount of money which the plaintiff claims does not exceed € 5,000.

months after having taken their decision, often cannot remember the precise ins and outs of the case. Now I could interview them very shortly after their ruling.

Apart from these sources, I was present at several discussion sessions with judges and prosecutors about the relevance of cultural issues. Judgments of Dutch courts are available as well, as are state of the art reviews from the last decade regarding the direction in which Dutch legal culture is heading when it comes to multiculturalization.

In the final report (Van Rossum 2007) that was written for the Dutch judiciary, I reconstruct five cases.[16] I extensively describe and analyze the cases from the different perspectives of the participants, and focus on the way 'culture' is constructed and is seen as juridically relevant (or not).[17] 'Culture' plays a role in all five cases, be it on the level of communication and interpretation or on the level of differences in norms and values. Most of the time the relevance of cultural arguments or factors remains implicit. It plays a role on the level of assumptions and unspoken value judgments. But even when they are implicit, different assumptions about 'culture' add up to and finally influence the legal decision.

Two empirical illustrations of Dutch judges deciding on multicultural legal cases

Family law – the case of Hamid

Hamid's case involves a divorce between a couple of Turkish origin, in which the contested points were the determination of custody and the place of residence of their two children (both wanted to live and raise their children in The Netherlands). Meryem, his wife, had been living in the Netherlands for quite some time, the husband Hamid was 'imported' from Turkey for the wedding. It was an arranged marriage. After six years when her second baby was born, the wife became depressed, the couple started to argue, and finally Meryem left their mutual home without the children for an unknown destination. The report by the Child Care and Protection Board stated that the wife wanted to 'integrate into Dutch culture' while the husband wanted her to 'stay true to Turkish culture'. Meryem did not show up for one and a half years, during which time the children were living with a sister of Hamid and – for over a year – with his parents in Turkey. Hamid commenced divorce proceedings, Dutch law was applicable, and he obtained the divorce in due course. Meanwhile Meryem had claimed custody over the children and wanted to have the children live permanently with her and no longer with the father. Both ex-spouses had found a new partner, Hamid a young woman from Turkey, Meryem a Dutch man of Turkish origin.

16 'Only' five cases means that this is a qualitative empirical research. I rely on Geertz (1983) when it comes to describing and analyzing the 'frames of reference' of the participants in the case, and on Garfinkel (1967) when it comes to the influence of routine like behaviour and general assumptions in social interaction.

17 The description of two of the cases has been greatly reduced for this article.

Regarding the matter of custody and other decisions to be taken, the judge postponed the decision and ordered the Child Care and Protection Board to produce a report on the situation to evaluate how best to serve 'the interests of the children', the major criterion which is decisive in these cases.[18] The Board officer wrote the report after having spoken to Hamid, and after having observed interactions between the two children and their mother and her new partner.

Legally speaking the report and advice of the Board is nothing more than it is: an advice. The judge can accept the advice, reject it, or ask for another report. In most cases judges do follow the advice.

The report said that Hamid had 'mainly looked after his own interests and had neglected the interest of his children'. According to the Board Hamid 'is not able to take on the primary task of raising his children'. The Board attributed Hamid's behaviour to his Turkish cultural background in which 'his honour was damaged'. This damage to Hamid's honour was also the reason, according to the report, for the violent threats to his wife which she accused him of (there were no police reports, however). Hamid had also once written a nasty letter to his wife after her new partner had phoned Hamid's family in Turkey and threatened that they should let the children go. Furthermore, Meryem reported to the Board's officers that she was scared. Moreover, from the behaviour of the children when they were at the Board's premises, the reporting officer 'had the feeling' that the young children did relate very well to the mother (notwithstanding that they had not seen her for years, while the youngest did not even know his mother) and that they were somehow fearful of their father. There were hardly any clear patterns to corroborate this view, especially since Hamid never personally took the children to the Board. Nevertheless, this interpretation of 'damaged honour' and consequent 'possible violent revenge' and even 'the abduction of the children' remained (and later the judge also adopted it). Hamid was apparently not able to provide enough evidence to the Board and in court to create a contrary interpretation, even though 'he behaved correctly' according to the judge.

In the end, custody over the children was awarded to Meryem and their regular place of residence was to be that of the mother. Neither the judge nor the Board's report mentioned any doubt about the mother's years of absence in relation to the children having to switch from the father's home to that of the mother.

I will now focus on the question of the meaning of the open legal concept 'in the interest of the child' when it comes to the decision on custody. While his 'taking care of the children' was not denied, the judge in my interview with her reproached Hamid for his lack of affectionate behaviour. Further, there was no reference to the possibility that in other cultures other patterns of child rearing could be common, like when an aunt or a grandmother cares for children and men go out to earn the necessary money. In the interviews the general tendency

18 The law in article 251 of Book 1 of the Dutch civil code provides legal custody to both parents after a divorce. The judge may deviate from this rule 'in the interest of the child'.

was that pedagogy had objectively sorted out what was in the interest of children. Hamid's lawyer, however, had developed a sense of cultural sensitivity and said in the interview that a pattern of raising children in an 'extended family' is 'quite common' in Turkish culture. She was convinced that Hamid in his own eyes and in the Turkish perspective had acted as a good father and she had also brought these arguments in court. Dominant however was her pragmatic argument that Hamid, because he had to go to work, could not have acted otherwise. According to the judge the interest of the children was not served by moving them back and forth between Turkey and the Netherlands and from one family to another. This amounted to 'a culture shock', said the judge, which would once again be the case if the children were placed in Hamid's household, also because the new wife was a young Turkish woman who was not a biological parent. She did not (yet) speak Dutch, but the judge said that this had no influence on her decision.

The Child Care and Protection Board

Because judges seem to be in some sort of double bind between 'doing justice in the case at hand' and the Board's report that contains 'just an advice' that in practice is 'hard to ignore or evade', I would like to pay special attention to some relational aspects. Regularly, Dutch professional authorities[19] come across children 'at serious risk'. In serious cases, the Board steps in and may order the supervision of the child without divesting parents of their custody or requiring the child to live in a foster parents' home. Usually an employee of the Youth Care Agency (Bureau Jeugdzorg) supervises the upbringing of the child by giving advice, visiting the parents, seeing the child and monitoring specific measure(s) which it suggests to the parents. Each year the Board has to report to the judge about the progress made. If the situation deteriorates, the Board may require the child to be removed from the parents' home and to be fostered.

Dealing with these children sometimes poses problems of how to deal with typical practices in Turkish or Moroccan families living in the Netherlands. Problems are sometimes framed in terms of 'culture'. Practices that professionals report in interviews concern, for example, a mentally handicapped child or a child with severe health problems.[20] The parents are sometimes reported to be 'unwilling' to accept the fact that the child has the handicap or the illness, or 'refusing' to accept treatment. This puts the child at risk. The parents instead want to send the child to their country of origin where there are supposedly really effective remedies. The Board may interpret such cases as one of a general pattern having a cultural connotation. It is 'a typical Turkish/Moroccan habit'. The Board then requires the supervision of the child and the judge has to decide on the merits of the arguments, of which some are 'culturally coloured'.

19 Authorities like physicians, teachers, child-care agencies, specialized police branches, etc.

20 There are also cases in which other specific communities in the Netherlands refuse vaccination for a child or other treatment against some serious illnesses, like the members of a dogmatic Christian denomination. In these cases the child protection agency steps in as well, and often supervision is granted by a judge.

What meaning should be given to the parents' protests and wishes and potential decisions? The juvenile court judge can hardly be expected to know every subcultural situation or to engage in an investigation into these matters. Sometimes when parents do not protest coherently or their lawyer does not raise the specific issues while the Board does, the case is practically settled and the Board's interpretation prevails. But even in cases where a more balanced presentation of the situation is given, judges are not in a position to evaluate the 'typical cultural pattern' method of arguing. A judge is empty-handed, apart from a single optional course on 'multicultural society and law'. Whether or not specific doctors in the country of origin, or specific schools, extended family structures or specific local institutions may deal adequately with children with some specific problem, a judge cannot easily obtain and/or evaluate the knowledge in order to feel comfortable with an alternative, non-routine treatment (and accept it as a serious approach which shows the parents' full responsibility). In one of the interviews, a judge stated this as follows:

> When Moroccan or Turkish parents show no insight whatsoever into the problems and also refuse to cooperate with agencies offering help, and further deny there is even a problem, then you think, 'well, this makes no sense'. Because there will be quite a possibility that things will go wrong, and then you just rely on your discretionary powers to place the child somewhere else. Even if you know you cannot get a grip on cases like these. You don't know what's behind it all, we don't know how to find out. But in case of Dutch families, you talk, you ask, you probe for hidden conflicts, and of course we have a general idea of how such a family works. With these other cultures, we have no clues. We have no idea what the social pressure in these families is like, what social ties there are, what networks. We can't come up to the mark, because we don't know how best to intervene in a strange culture.

So, practically speaking, judges in this kind of case cannot but accept the Board's interpretation, perceive the situation as serious, and order (or prolong) the supervision. As we have seen in Hamid's case, the Board's interpretation in official reports is by and large based on the dominant Dutch culture. It would require empirical research to be able to establish the way the Board comes to define the situation of the child and its family. One research in the field of youth and criminal law was recently carried out by the anthropologist Oude Breuil (2005). She was struck by the contrast between the data from the interviews with employees of the Board, on the one hand, and the written reports she studied. In the interviews these employees often took a liberal and open stance toward taking different cultural practices into account. In the reports, however, 'culture' only came to the fore in the form of 'labels' and 'typologies' re-enforcing a static, deterministic view of cultural backgrounds. The researcher explains this result by referring to the standardised way of Board investigations and reporting, to preconceptions about 'what culture is', to jargon and to preconceived ideas of what judges expect (Oude Breuil 2005: 60-61). Because of these aspects, individual circumstances and cultural patterns specific to a family are not strongly presented. I recognise these factors in my empirical data. It means that 'labels' or 'clichés' of 'typically Turkish/Moroc-

can cultural patterns' circulate and are re-enforced in each case. One family law judge, apparently also speaking for her colleagues ('we'), specifically mentioned this issue in the interview:

> When we consider the role of the Child Care and Protection Board, we don't think they pay a lot of attention to cultural differences. They basically have a quite uniform approach, 'the Dutch way' so to speak. They are scared as hell of one notion, and that is revenge for honour. You see that quite often, like 'oh, gee! Honour!'

The Board's standard way of reporting, and quite routine use of 'the Dutch approach' while also using 'cultural clichés' together with the use of specialized language and anticipation on the perceived expectations of judges, lead to legal advices that lag behind recent cultural changes in society. Dutch judges as far as I know complain about lacking up to date knowledge, and not having enough opportunities to gather new knowledge about different cultures. Taken together this strongly points in one direction: In family law cases in which semi-legal professional organisations are involved, judges follow the Dutch dominant cultural meaning given to legal rules and concepts in the reports and advice given by these professionals.

Labour law – the case of Mohammed

In the case of Mohammed I will focus on the interpretation of evidence in order to show how cultural factors play a role at this level. The case shows how the judge almost routinely tried to take these factors into account. The substantive legal rule states that an employment contract can be annulled if 'it cannot reasonably be expected from the employer to continue the employment contract'. This rule clearly contains an open legal concept, which provides the judge with discretion to decide what is 'reasonable' in the case at hand. The rule, however, has to be interpreted in the context of a body of law that offers a high level of protection to the employee. Judges therefore do not conclude lightly against the employee. The procedural law stipulates that the assessment of evidence is up to the judge, that allegations by parties have to be proven by the respective party, and that 'facts or circumstances of common knowledge' as well as 'general rules of experience' do not need proof. Again, discretion is accorded to the judge.

Mohammed was born in Morocco some 35 years ago, had married a Moroccan wife (15 years ago) in the Netherlands, has a family of four children, and has worked at a Dutch company as a truck driver for over four years 'completely satisfactory'. One evening the police arrest Mohammed. He remains in custody for two days and is not allowed to contact anybody. Upon his arrest, however, he manages to hand over his cell phone to his nephew, telling him 'to call his employer'. That same night the nephew calls the employer to tell him what has happened. After his release, Mohammed talks with the human resources manager of the company, to whom he says that he

was 'accused falsely'.[21] Without going any further, they decide to let the case rest. Mohammed does not receive his salary for the two days he spent at the police station.

Two weeks later Mohammed is half an hour late for work. After working for an hour, he reports himself ill. That same morning the 'control doctor' visits him at his house, but Mohammed is not at home (which is contrary to the rules). The employer calls Mohammed later that day on his cell phone, and it turns out that Mohammed had moved some time before, but forgot to report it. Mohammed receives an 'official warning' from his employer.

After a few weeks in which nothing special happens, Mohammed agreed with his employer to have a three-week holiday. He wanted to visit his hometown in Morocco. Almost at the end of the holiday, Mohammed reports himself ill by telephone. He visits the CNSS, the official Moroccan organisation that deals with these kinds of issues. The doctor at the CNSS reports that Mohammed 'has to rest for three weeks because he is suffering from stomach trouble'. This report is sent to the employer by fax.

The employer sends Mohammed a formal letter to his home address in the Netherlands and asks him to supply more information regarding his illness. Mohammed does not reply. In a letter two weeks later, the employer announces the suspension of his salary. A few days later, Mohammed is back in the Netherlands. He reports to the control doctor, who declares him healthy enough to return to work. Next day Mohammed tries to work, but after half an hour he reports ill. The employer writes a letter to Mohammed that same day asking him to explain 'what is going on'. No reply is forthcoming.

More letters follow, which gradually become more ominous. One day Mohammed contacts his employer saying he has asked for a second opinion concerning his illness. The employer inquires about this with the organisation that has been contacted for this second opinion. They know nothing about it. Thereupon the employer initiates court proceedings in order to have Mohammed's contract annulled. The court dismisses the employer's request. Mohammed (gradually, because of his illness) goes back to work.

Many issues in this case ask for interpretation, some possibly connected with Mohammed's cultural background. Central, however, is the 'common sense notion' of both the judge and Mohammed's legal aid officer[22] that becoming ill on one of the last days of a holiday 'is typically Moroccan'. The judge, for example, said in the interview that Mohammed's case was one of several she saw every autumn: 'It begins with problems at work – then a holiday in Morocco – then reporting ill from Morocco – then the question of whether you can trust official documents from Morocco – then not showing up at work once they're back – it's standard, this whole thing. We see that

21 Nobody else but Mohammed and his family knew what had actually happened. His employer knew that there were 'family related problems'. I only learned afterwards from Mohammed what had actually happened.

22 She worked at one of the labour unions. These legal aid officers may help members of the union on several law related problems, one of which is legal aid in court even though these officers are not appointed lawyers.

regularly'. The legal aid officer confirmed this view in my interview with her. In court she argued very plainly, while trying to make the facts seem less important. The judge followed her example. Against the common sense notion of a 'typically Moroccan report of illness', the judge had to determine the merits of the facts of the case at hand, which pretty much came down to establishing Mohammed's 'trustworthiness'. How did she do that? Did she take into account Mohammed's cultural background, and in what sense? The official verdict (of course) does not say anything on this issue. The verdict merely says that 'all circumstances considered' the employer's request has to be dismissed.

From the interview with the judge it is clear that 'details taken together' led to her interpretation of Mohammed as a man 'to be trusted' and thus to turning down the employer's interpretation of the facts. The judge described this as 'a package' in which the weight of separate factors and interests cannot be singled out. First, there is his arrest, at which moment, the judge says, 'Mohammed thought of his job' because of the instructions to his nephew to call the company. Second, there is the omission of reporting his change of address, about which the judge says that she understood 'there was some family trouble' which probably led to disorientation 'for a man of Moroccan descent like Mohammed, for whom family and honour are of much greater importance than for Dutch people'. Third, there is the issue of Mohammed not reacting to letters from his employer, which in the eyes of the judge is understandable 'because at the court session it became clear that the routine was to just call someone on his cell phone'. Fourth, there is the question of whether Mohammed really did ask for a second opinion. If he did, he might legally still consider himself 'ill'; if he did not, he should have gone back to work. The problem of course was that the form with which Mohammed had asked for the second opinion could not be found at the organisation. During the court session Mohammed replied to the judge's questions concerning this issue, in which he, according to the judge, made the gestures of writing and putting a stamp on the envelope. Moreover, the judge said, Mohammed came across as a 'beaten man' in the courtroom. This led to her interpretation that 'he really did ask for a second opinion'.

Analysis

In Hamid's case affective harmony, radiating from a biological parent who is permanently available in a steady household, is apparently used as the criterion for the decision on custody and in which household the children should be placed.[23] These elements were thought to be better guaranteed by Meryem's new household (with her new partner), rather than by Hamid who at least in the past had not shown that he could provide them. This criterion in my opinion consists of preconceptions that have excluded the possibility of Hamid giving

23 The primary and most important decisive factor to determine 'the interest of the child' is 'continuity', which comes down to the rule 'if the children are okay, then don't change the household they are living in'. In Hamid's case, however, there was doubt about the children being 'okay', which opened the door to a possible change of household.

his meaning to the open legal concept of 'the interest of the child'. Hamid's lawyer was not very clear and straightforward in her argument that Hamid had acted in the interest of his children as well – only seen through the perspective of his Turkish cultural background. But even if she would have been clear and straightforward, I believe it wouldn't have helped Hamid. The dominant view on raising children was in the report of a professional organization, so this would be hard to circumvent or question, both for Hamid and his lawyer as well as for the judge. But if the lawyer had been very straight, this would at least have meant that the judge should have had to be explicit about her assumptions. This does not mean that her decision should have been otherwise, only that it could have been argued more explicitly.

The same goes for the issue of the 'culture shock'. The judge was of the opinion that moving the children between Turkey and the Netherlands amounted to a culture shock. This assessment is problematic for several reasons. The most important is that nobody knew what the social and economic situation of Hamid's parents in Turkey was. Were they rich or poor people? Educated or not? Living in the city or not? The answers to these kinds of questions make a difference. Second is that nobody knew what the social conditions of Hamid living in the Netherlands were. What kind of life did he lead, who were his friends, what sort of newspapers did he read, which television channels did he watch regularly? If Hamid was leading 'a Turkish way of life' while living in the Netherlands and his parents were doing the same in Turkey, should one then speak of a culture shock? The problem is that nobody could even have guessed the answers to the questions; in fact nobody asked them. Further, underlying the assessment of a culture shock is the culturally coloured assumption that 'steadiness' is a normal and desirable state of living. A biological parent preferably being permanently available for the children backs this assumption (gaining weight by means of article 7 of the Convention of the Rights of the Child). Last but not least I would argue that the judge reproaching Hamid for a lack of 'affectionate behaviour' towards his children, forgets that gender roles differ between cultures. To make this assessment, one would at least need to know more about what is normally expected of fathers like Hamid. Again, I am not arguing that the decision to award custody to Meryem was wrong, but that the decision was based at least partly on implicit assumptions. Being aware of these assumptions could make a better-argued decision. Put strongly, I would say that the unquestioned and internalized common sense meaning among the officers of the Board and subsequently the judge effectively prevented the adaptation – multiculturalization or an explicit rejection of a cultural colouring of the open legal concept 'the interest of the child' – of the Dutch internal legal culture to the external legal culture.[24]

From Mohammed's case I infer a way of legal reasoning that is quite different from that in Hamid's case. In Mohammed's case the judge without hesitation asserted that his Moroccan background played a role, while in Hamid's case this seemed to be much more restricted. To assess this difference we have

24 See Friedman 1975. Actually I should refer to 'external legal cultures' because of some differing orientations toward the law among dominant and minority groups.

to take into account that in Hamid's case a cultural value was at stake (how best to raise a child), while in Mohammed's case (and also in Hamid's case) the focus was on the judge interpreting culture as factually influencing Mohammed's (and Hamid's) behaviour (family and honour influencing his psychological stability because of him being Moroccan; honour in Hamid's case possibly leading to violence and influencing his behaviour towards Meryem). Judges are probably more willing to accept 'culture as fact' as compared to 'culture as value'.

A second factor that might explain the difference between the two cases is the position of a weaker party. Dutch labour law in general protects the weak as against the stronger, which is the employee as against the employer. Since 'culture' is more often 'that what employees have', decisions taken could maybe generally be in favour of the allochthonous employee. In Hamid's case, the children could be viewed as the weaker parties in need of protection. The values concerning child-rearing dominant in Dutch society are concerned with guarding the welfare of the child. There is even a professional organization like the Child Care and Protection Board to investigate and guard the interest of children. Their protection apparently requires the application of dominant, not of minority values.

A third factor accounting for the difference between Mohammed's and Hamid's case is that labour law judges are much freer to assess the relevant circumstances of the case at hand, and have much more leeway to take the values and practices of different cultural communities into account. In family law and in case the Child Care and Protection Board reports, their advice practically restricts the freedom of the judge.

Like in Hamid's case, assumptions of the judge eventually build up to the court decision in Mohammed's case. The assumption that for Mohammed family problems impacted harder for example is not supported by facts, and his lawyer did not even hint at it during the court session. How should a judge know in general that among Moroccans this is the case, and how could she know in Mohammed's case? Nobody asked him, and nobody asked what kind of problems he had with his family. The same goes for his 'Moroccan honour'. Why would his honour, in combination with family problems, lead to his forgetting a notice to his employer that he moved? And why did Mohammed in court come across as 'beaten'? Because of the way he sat in his chair? Judges should be careful about these interpretations (Van Rossum 1998).

Compared to ordinary cases, the cases of Hamid and of Mohammed are not very exceptional. Ex-spouses often quarrel over the interest of their children. New is only the possible 'cultural component' of the case. Not only people with a different education, social background, and income may differ over how to raise their children, but also people with a different cultural background. Employer and employee have always differed in court cases whether their contract should be terminated, but today a judge also has to assess a cultural perspective on the facts that 'as a package' should or should not allow for a termination of a contract.

Conclusion

The idea of cultural diversity making its way into Dutch law by means of open legal concepts or open ended norms is appealing at first sight (see section 'Context'), but has to be nuanced. When the law makes use of open legal concepts like 'reasonable' and 'in the interest of X', we may start out with the expectation of the entry into the law of values and practices of distinct cultures. This entry however depends on factors and circumstances like the nature of the specific legal complex (protective towards weaker parties or not), the wish for legal certainty, the interests of third parties, the stereotypes of judges, and the 'interference' of extrajudicial organizations. Further, a tendency towards stereotyped reasoning and producing standard decisions sneaks in the moment judges adhere to the notion that establishing the meaning of open-ended norms is 'a matter of fact'. The circumstances that fill in 'the interest of the child' may be perceived as 'just facts' that 'everybody know', and by the way are 'scientifically proven'. Nowadays, multicultural society makes clear that even these 'facts' are a culture-specific matter of choice.

The basic argument of this contribution is that judges should be aware that even if there is wide agreement in society about what the law entails, people differ culturally in their value attached to common sense notions related to law. I am not arguing that arguments related to minority cultural values and practices, when put forward, should always be accepted. I would say however that when legal professionals are aware of the possibility of there being different cultural values at stake, there is a duty to investigate and to explicitly accept or reject these values. In other words, when the cultural values underlying the law become apparent, there is the duty to adapt: To adjust the law and make room, or to reject different value perspectives and to defend the prevalent ones.

When a legal culture adjusts to new social situations, the words of the law often do not change because they are flexible enough to adapt to and cover new social circumstances (Rosen 2006: 92-93). Legally speaking, this process is not interesting, because 'the law' does not change. Yet sociologically law does change, because social practice and circumstances to which the words of the law refer and reflect do adapt to new circumstances. In both Hamid's case and Mohammed's case none of the judicial reasoning in regard to cultural arguments or factors ended up in the wordings of the court rulings. Their cases did not change Dutch law, but they did change Dutch legal culture.

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The Impact of the Transition on the Role of Law in Russia

Marina Kurkchiyan

The aim of this chapter is to present a discussion of the way in which economic, political and social changes are affecting the legal culture in Russian society.[1] Since the collapse of the Soviet Union, Russia has been undergoing a radical restructuring of all its institutions in an attempt to achieve a rapid 'transition' to a free market, to democracy, and to full integration into the world community.[2] The entire process has been energetically initiated and promoted by the leadership, warmly encouraged by foreign governments, and driven along by the impersonal forces of globalisation. To make far-reaching changes in the law – in content, procedure and institutions – has been both an objective of the transition and an instrument for achieving it. In an explosive set of parallel reforms in the early 1990s, Russia was intended to acquire a western multiparty democracy with a division of powers, combined with a capitalist economic system, strong links to the global economy, and ongoing western involvement to make sure that it all happened.

Now that the new structures are well into their second decade, it is time to consider what progress has been achieved and how far it extends into the legal culture. Were the many simultaneous and radical changes sufficient to push Russian society towards the western form of social organisation widely known as 'the rule of law model'? Can we now observe and measure a genuine convergence between the Russian way of dealing with law and the western way? Or is Russia taking a different path towards the development of its new legal environment? And has there really been, as intended, a transformation of the fundamental principles according to which the society is functioning? Those were the questions that inspired my research in Russia in 2002-2005.[3] Starting with an analysis of the traditional patterns in Russian legal culture, the research was then carried out along three lines of inquiry. First, to find a way to assess whether the institutional reforms have strengthened legality in Russia. Second, to ask whether the free-market interests have supported law-abiding practices for the sake of their expected benefits in the form of risk reduction and legal protection. And third, to examine whether the opening up of the tightly closed communist society has in fact provoked the hoped-for shift towards western

1 For the concept of legal culture see Nelken 2007.

2 On the post-communist transition in general see Aslund 2002.

3 The data were collected by the qualitative method, consisting mainly of in-depth interviews and observation of sessions in the court for economic disputes. 72 Interviews were conducted in total, with lawyers, judges, partners in western-based commercial law firms and business managers. All research was carried out in Moscow. For a full description of the methodology used, see Kurkchiyan 2005.

values and norms. The findings from these inquiries were analysed against an account of the traditional way of dealing with law in Russia.

Traditional Russian Legal Culture

It is beyond the scope of this contribution to present a fully comprehensive analysis of the pre-transitional Russian legal culture.[4] Here I will offer a selection of points on ways in which the legacy of the past determined the societal condition of Russia when it entered the transition, before proceeding to a further discussion of how much of that legacy may still have survived despite the drastic post-1990 socio-economic and political transformations.

To get inside the Russian way of thinking and doing things, it is helpful to bear in mind that although Russian law was based on the Roman Law tradition, it was rooted in the Byzantine soul, and was cultivated throughout the Middle Ages within the spirit of the Russian Orthodox Church.[5] In this sense Russian law was formed both within the western legal tradition and outside it. In Harold Berman's apt metaphor, it was an illegitimate son of western law.[6] Russia is known for its unbroken history of authoritarian rule, its dominance of the political over the legal, its centralised forms of bureaucracy, and the tight interconnections between its institutions of state and church.[7] The country has never experienced anything to parallel the western experience of the Papal Revolution of the eleventh century, so it was never introduced to the concept of a division of power protected by a legal status for canon law distinct from that of civil law.

In the same way, Russian aristocracies never achieved a political confrontation with the sovereign comparable to the one in medieval England that led first to a standoff and then to the treaty of Magna Carta as the first of a series that successfully laid down constraints upon the ruler. Instead the legitimacy of the emperor's will was accepted without question throughout Russian history, right down to the twentieth century. For that reason the Russian tradition was radically different from the continually evolving legal norms and the ongoing interplay between different branches of power that were found in England and in the major countries of the Roman law tradition. In the Byzantine-Russian type of society it has never been law *per se* but the legitimate pre-eminence of a single leader, backed up by a political hierarchy, that keeps the society together and enables it to function.

This configuration of social order based on a rule of man rather than law has led to extreme forms of instrumentalism in Russian legal culture.[8] In traditional Russian society, law was regarded as simply a mechanism to achieve political

4 For the Russian legal tradition see Berman 1974. For the legacy of soviet culture see Hendley 1999.

5 On the Byzantine influence on Russia and Russian Orthodoxy see Obolensky 2000 and Mevendorff 1989.

6 Berman 1970.

7 For a short and comprehensive overview of Russian history see Kochan 1963.

8 Kurkchiyan 2003.

objectives and nothing more. It was regarded as particularly a useful tool whenever government policy called for proactive social engineering because it ensured day-by-day compliance with government decrees. There was no similarity to the western vision of law as an unqualified social good that helps to maintain social order and justice by keeping itself stable, separate and distinct from the changeable government of the day and its policies.[9]

The instrumental role of law was traditionally complemented by a formalistic interpretation of the meaning of law. Formalism in this case is a vision of law as a set of rigid rules, accompanied by an assumption that by its nature any correctly devised law accurately represents reality. That leads on to the belief that once a good law exists, it does not require any 'softening'. Good law by definition provides a single clear answer to a problem, so there is no need to rely on discretion in order to fill the gap between the legal injunction and the practice.[10]

The manner in which a number of attempts have been made to 'westernise' the Russian legal system in successive centuries is a vivid demonstration of the instrumental and formalistic character of the traditional Russian approach to law.[11] The efforts of Peter the Great in the 17th century, followed by those of tsars Catherine II in the 18th century and Alexander I and Nicholas I in the 19th century, and of course in the 20th century by the projects of the early Bolsheviks, all have a common pattern. In each case, legal reforms were initiated for the sake of social engineering. The new system was imposed by power, a commodity of which the state consistently had a generous supply. Because the law had always been directed downward by the ruler towards ordinary people, it was never applied to the rulers themselves. No effort was ever made to 'domesticate' the law by adjusting it to local needs. And at no point in Russian history was there any acceptance of the need for legitimate compromise and negotiation at the point of implementation. It is hardly surprising that although each reform did have a noticeable impact, none succeeded in modifying the fundamental pattern of linkages between law, politics and society.[12]

This brings us to the third prominent characteristic of Russian legal culture along with instrumentalism and formalism: the widespread reliance upon personal contacts and informal relationships. These are the near-universally preferred methods of finding short cuts through bureaucracy, managing the detailed arrangements of everyday life, reaching desirable outcomes of court cases and so forth. It has always been problematic in Russia to meet the formal stipulations of law and regulation.[13] Pervasive corruption had been recorded throughout the country's history. The courts and other legal institutions have not enjoyed the trust and respect of the people despite being used by most

9 On the social value of law in the western context see Galligan 2007; on the rule of law as an unqualified social good see Thompson 1990.

10 On legal formalism see Schauer 1989.

11 On the history of legal reforms in Russia see Smith 1996.

12 Wortman 1978.

13 On the Russian informal economy, see Kurkchiyan 2000.

groups in the society, including the peasantry.[14] As a result problem-solving has come to rely heavily on informal dealings and bribery, even when a case was taken to court. More generally, it is clear that law has never been among the main forces that regulated and stabilised Russia as a state.

Most Russian networking practices can be attributed to two different sources. One is the power hierarchy that has traditionally existed at every level of social and institutional organisation. In this pattern of dominance-and-dependence, it has always been expected that at each level the superior would provide protection in exchange for loyalty from his inferiors. Both 'protection' and 'loyalty' mean providing favours on request, using all available resources including illegal ones.[15]

The second source of informal practices is the pettiness of the legal formalism and bureaucracy that seem to be entrenched in Russian life. Over several centuries, many promises of reform have been held out only to be snatched away later. To deal with their frustration people need to seek out contacts who can help them to get things done. Although this response is logical, it often degenerates into corrupt actions such as bribery, nepotism, patronage and fraud. Such practices have long been pervasive and superficially they appear to be tolerated. Nevertheless they have also long been perceived as crimes. This has led to the contradictory situation in which networking is generally seen as simultaneously necessary and immoral.[16]

Faced with these conflicting perceptions, people commonly tend to rationalise by looking for something or someone to blame. In the soviet period it was 'the system'; more recently it has been the dishonesty of particular individuals. But even though people are outwardly indignant they are inwardly disappointed, and their consequent alienation is deep. Legality is wanted and even expected in Russia, but it is not to be had.[17] The psychological result is that ordinary citizens have formed a profoundly negative image of the state. People refuse to believe that anything can be achieved in Russia by legal means. Such cynicism intensifies the frustrations already induced by the instrumental and formalistic tendencies in the legal culture, and the cumulative effect is widespread dissatisfaction. As an emigrant from Voronez sadly remarked in London in 2007, 'Russia is ill - terribly ill'.

Institutional reforms and legality

There can be no doubt that we are witnessing the building up of new legal institutions in Russia. Their growth has already had a substantial effect on both the demand and supply sides of law. The evidence to demonstrate the scale and importance of that expansion has been assembled and reported by a number of

14 For the importance of the court in the life of ordinary peasants in pre-revolutionary Russia see Burbank 2004.

15 On the tradition of the cliental style of governance in Russia see Rieber 1978.

16 Humphrey 1999.

17 Gibson 2003.

researchers including Kathryn Hendley and Peter Solomon.[18] It is safe to conclude that the perceived value of law has increased in Russian society, meaning that it is much more actively in play today than it was even in the optimistic days of the early 1990s. People no longer have any problem in making the judgment of just when and how to bring law into the game, especially in Moscow.[19]

At the very top, the legislature itself has undergone noticeable improvements in conducting its business. Proposed laws are published and debated so that the entire process has become significantly more transparent. The structure of the body of law as a whole has become more consistent and stable. And with respect to the judiciary in particular, the 1992 Law on the Status of Judges established the principle of life appointment for judges on all existing courts, stipulating that they could be removed only by a judicial qualification committee. There was also an attempt to ensure that they would be adequately paid from public funds so that they could function independently.[20]

Following on from this strengthening of legal institutions, there has been a correspondingly impressive increase in the number of professionals offering legal services. Nowadays one can see the dignified nameplates of newly established law firms and legal consultancies right across downtown Moscow. They do good business; the number of cases in which citizens choose to pursue their disputes in court is growing steadily. There have also been substantial attempts to set up effective regulation of the legal profession and of the activities of its various agencies and organisations, such as the Russian Advocacy Bar.

Now that these changes have taken place, it is appropriate to ask what they amount to in terms of the legal culture. Is there any clear indication that the rapidly expanding legal institutions are successfully liberating themselves from the old ways of getting things done? It is undoubtedly enhancing its status, but is it genuinely expanding its impact?

The assembled data revealed a mix of pointers. Some were positive. For example it was clear that a much higher value is now attributed to understanding the law, displaying legal knowledge and seeking legal advice. Managers, entrepreneurs, journalists and civic leaders all feel the need to be cognizant of the legal dimension of life. Observation of cases in the Arbitration Court[21] suggests that an elaborate legal procedure is now in place, complete with rigorous exchange of arguments, formal requests to gather and present evidence, and continual references to the legal code.

At the same time interviews with disputants and lawyers indicated that many of the old corrosive factors still persist and that despite the reforms direct

18 On Russian legal reforms see Solomon 2000.

19 The aim of the research was to detect the changes that have resulted from the transition, and not to present a full account of contemporary Russian legal culture. For this reason the research was conducted in Moscow, which currently takes the lead in all aspects of economic, political and social development in Russia.

20 Solomon 2000.

21 In Russia, an Arbitration Court is a state-run institution. It should not be confused with private arbitration courts in Russia, which are underdeveloped and as yet play only an insignificant role in resolving business disputes.

corruption is still pervasive.[22] And everyone defers to what is euphemistically called 'administrative resources,' meaning that what the judge is about to decide is fixed outside the court; the judge merely wraps it up in appropriate legal argument. 'Administrative resources' are usually defined as a lever that is often applied high up in the judiciary, by politicians, officials and business managers. The impact of downward manipulation is detectable in many cases, from senior judge to junior judge and from superior court to inferior court. When litigants and their advisers were asked to explain what had caused the outcome of their cases, everyone made reference to the social networks and personal relationships that were thought to influence judgments at every level in the system.

The question then arose why the 'administrative resources' factor did not automatically lose its influence when secure lifelong appointments were introduced for judges. The most frequent answer was that the career prospects of Russian judges, and in some respects also their day-to-day working conditions, are strongly affected by a system of rewards of which some are clearly vulnerable to external influence. A judge's promotion is determined by a qualifications committee, which inevitably causes him or her to be acutely conscious of who the present and prospective members of that committee are. A qualifications committee can even dismiss a judge, though only for cause and under extreme circumstances. By law, a judge is officially entitled to the allocation of an apartment, but suitable apartments are scarce. The realistic chances of getting a good one, or even of getting one at all, depend on the decisions of the regional governor and of the chairman of the particular court structure in which that particular judge holds her or his appointment. Similarly, the distribution of cases between judges is a matter firmly within the jurisdiction of the chairman of that group of courts, and the outcomes of appeals against a judge's decisions depend on people serving in the appropriate court of higher instance.

An appeal system is of course standard practice across the west, and it is not thought likely to diminish the independence of judgment of any particular court. In the Russian context, however, the stress was always on the 'who' and not the 'how'. What matters is the identity and disposition of the individuals who are responsible for determining the outcome of an appeal, not the procedure itself. It was taken for granted that if there is to be a favourable judgment, it must be earned. This assumption was described to me by a judge like this:

> When there are shortcomings in the cases heard in the lower courts, judges at the higher level can always edit them, stretch the law a bit, make corrections,

22 There is always difficulty in conducting accurate research on corruption, for an obvious reason: people do not keep receipts for auditors to check. We therefore have to rely not on observable records but on various forms of indirect evidence. My evidence is drawn from interviews with the people – corporate lawyers, judges, advocates and business managers – who possess an insider's expertise on how they operate. Even if their presentation of the reality happens to be either understated or exaggerated, my findings nevertheless present the image that these professionals have of the institutions that they inhabit. That image is valuable for understanding the social climate within the legal institutions.

> overlook things and in the end approve the judgments. On the other hand if there is a judge in the lower court who is not in favour, his decisions can always be cancelled out by quibbling about procedure. You know, law is a flexible thing.[23]

Another lawyer approached the issue from another angle:

> In most situations, money does not play a major role. The things that are considered to be valuable commodities are social opportunities, things like a well-paid job for one of the children, access to reliable health care for the whole family, or a career promotion.[24]

The significance of this evidence is that the dominant problem of judges being influenced by 'administrative resources' was not a matter of political pressure on them from the state. But in spite of that, the problem is considerable. It seems to be mostly a matter of the traditional pattern of social relationship whereby social institutions, and among them legal ones, are run as relationships between patrons and protégés, with favours being exchanged between them.[25] Naturally, the higher the office a person holds, the more favours she or he is able to grant. More favours generate more influence, and therefore the person eventually moves up to a higher office. I found no significant evidence that the supposedly emancipated judiciary is making any effort to resist this practice.

To make sense of the bigger picture of corruption in the Russian courts, involving both the use of 'administrative resources' and direct bribery, I asked my informants to assess the proportion of cases in which, in their experience, the outcome had been determined by non-legal means. [26] The consensus was: around one quarter of all cases.[27] That figure does of course indicate that three-quarters of court cases are being decided on proper legal criteria and are free of taint. But it also suggests that the question of how to proceed with a case in today's legal environment presents those involved with an almost Shakespearian choice: To bribe, or not to bribe? Everyone confronts this dilemma when they are engaged in a formal dispute. They are likely to have thought about bribery even if they do not resort to it, which might be because they lack the resources, or because they decide that the case is not worth it, or because in that particular instance it would probably not work.

Furthermore, the use that can be made in legal processes of either bribery or the tacit promise of a favour or use of an 'administrative resource' depends on the particular circumstances and on the character of each case. For instance, in

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23 Interview with a judge of a Moscow district court, Moscow, 10 May 2003.

24 Interview with a lawyer, Moscow, 27 October 2002.

25 On the argument that the weaknesses of the restraints on the behaviour of Russian officials are determined by career-related incentives reinforced by cultural predispositions, see Solomon 2006.

26 It is significant that most of the lawyers who were asked this question were practising corporate law.

27 This is about the routine operation of the courts; it does not include cases that are politically motivated and involve high-profile individuals, such as the trial of Mikhael Khodorkovsky.

an Arbitration Court, bribery is most likely to be used in order to speed up the process, rather than in the hope of making a significant impact on the outcome. When the conflicting parties are equal in their capacity to mobilise 'administrative resources' (or as one of the defence lawyers put it, 'when the fight is between equal predators'), the nature of the evidence and the quality of the legal arguments become particularly important. Conversely, when a case is wholly one-sided in that one party's position is all but legally indefensible**,** bribery is not likely to have a decisive effect. Corruption is most pronounced in cases involving disputes about the distribution of natural resources, for instance the issuing of licences in sectors such as fishery or forestry. In defence of the use of non-legal means in his legal practice one of the advocates that I interviewed remarked:

> We cannot live by any rules other than those of the society that we are working in. If the environment is corrupt you cannot defend your client's interests if you do not play according the same rules.[28]

Both the extent of the networks of personal contacts and their impact have had a severely detrimental effect on the strength of the new professional institutions in Russia. The influence of the networks prevents the formation of a non-state civil structure that can be supported and trusted within the profession, such as a self-regulatory society or association of the kind that is necessary to enforce and adjudicate codes of ethics, supervise internal monitoring and control, defend members against outside pressures and provide services such as the training and testing of staff that are crucial to any legal institution.

A good illustration of this point is provided by the problems that were discussed, and which made lawyers anxious, when the law on the Advocacy Bar was passed in 2002.[29] It happened that my fieldwork coincided with the implementation of that law, stipulating that the only people who could represent clients in court are to be members of the Advocacy Bar or company lawyers. If a lawyer wished to become a member of the Bar, he or she would have to pass an examination.

To an outsider this seemed to be a reasonable measure, aimed at bringing order and professional standards to the provision of advocacy service. But that was not how it was seen by the majority of the lawyers whom I spoke to. In their view the new law was the product of successful lobbying by a small group of top advocates, conceived and pushed through the legislature as a way of monopolising and controlling a highly profitable legal practice. The typical reactions were: *'They [the examiners] will just let their own people in and keep the rest of us out'*[30]*; 'I have a PhD, and I have taught and practiced law for years. And now some people with questionable reputations will be given power to judge me. I do not trust them'.*[31] It was not surprising that some lawyers spent

28 Interview with an advocate from a private law firm, Moscow, 2 November 2004.

29 Russian Federal Law No. 63-3, 31 May 2002 (Федеральный Закон 63-ФЗ, от 31 Мая 2002 г).

30 Interview with a practicing lawyer, Moscow, 20 September 2002.

31 Interview with a practicing lawyer, Moscow, 29 September 2002.

much effort in seeking ways to get round the provisions of the new law even before it came into effect. They formed a hostile attitude to the institution-building initiative from the moment they first heard about it.

After questioning lawyers about their relationship with the law I come to the conclusion that although the legal institutions are indeed taking a more sophisticated shape than they have ever had before, the spirit of the law is not yet part of it. Certainly the legal institutions have expanded and the law plays a much more active role than ever before in the social and economic life of the society, but the law has not become a part of the professional identity of the lawyers – of all kinds – who serve it. There was no notion in their responses that once they are trained and endowed with professional standing, they are entrusted with the law and they represent it. An American lawyer, who was well integrated into the local environment after practicing in Russia for many years, described the differences between the professional behaviour of American lawyers and Russian lawyers in this way:

> In the United States, lawyers will not boldly suggest breaking the law. But they might come very close to it, saying: 'I would not suggest doing this, but many people do and get away with it'. Faced with the same problem, a Russian lawyer will have no difficulty in saying: 'Although that action is against the law, the law is not enforced. So it is safe to take that avenue.[32]

Overall, the institutional reforms appear to have had an uneven impact on the traditional pattern of informal practices with respect to legal matters. On the one hand, sophistication is visibly increasing throughout the legal institutions; the judiciary has evidently been freed from direct political pressure; the value placed upon professional expertise is increasing; and today the law cannot be easily dismissed. On the other hand, there is no evidence that the judiciary is acting independently; the law has yet to be internalised by the professionals who serve it; the legal institutions still lack the autonomy that underlies its authority elsewhere; and there is no evidence that the generally more sophisticated way of dealing with law has resulted in a significant change in the role that law plays in determining significant relationships within the society.

Legality in the market economy

There is an argument in economic theory that any market contains a self-correcting mechanism that require firms to act within the rules of law.[33] The law increases market efficiency by reducing the risks of business transactions and by protecting deals from delays and arbitrary interference at the hands of bureaucrats. It is therefore reasonable to expect that once market relationships

32 Interview with an American lawyer practicing in Moscow, Moscow, 23 April 2003.

33 Clearly the self-interest of a private agent is an incentive to break the law or to find a way around it, but the argument is that market efficiency outweighs that factor and must ultimately keep illegal behaviour in check. An example is the Enron scandal of 2001-2002 in the United States, in reaction to which the business community supported the decision to put preventive measures in place.

have been established, economic interests will prevail and the niche that was previously allocated to law will be enlarged automatically. That proposition is often supported by reference to the western experience of 'robber barons' at the beginning of the twentieth century; they evolved into law-abiding businessmen as soon as the wealth they accumulated required legal protection and a low-risk environment for themselves and their families.

In some respect, recent Russian experience is similar. The large-scale privatisation of state-owned land, facilities, industries and services that began in the 1980s meant that privately owned property of all kinds is now secured as such by law.[34] There is a substantial legal framework to enforce contracts and otherwise maintain orderly market relationships. A formal mechanism for the resolution of economic disputes has been introduced. Even though the economy remains relatively small and underdeveloped by G-8 standards, it has nevertheless taken shape. In recent years there have been regular indications that Russia has already generated a capitalist class not only keen to protect its rights and interests but strong enough to resort to law, even against individuals and organisations in the political system. There is statistical evidence that suing the state has become common practice in Russia in the past few years, and that the number of disputes initiated by private companies is increasing.[35]

The turning point in the formation of the Russian market structure and especially the dimension of the legal culture that defines relationships within it, was the financial crisis of 1998.[36] It was a disaster that exerted a strong impact on the psychology of the people, their pattern of behaviour and more generally on the overall structure of businesses. The crisis burst open a thick layer of bubbles that have formed in the Russian business community. Many of the entrepreneurs who had been applying a 'short term/big profit' strategy were painfully hit by the crisis, including those who were simply careless and had not ensured that their crucially important receipts, contracts, accounts and other legal documents were all in order. People learned from the crisis that they had been wrong in the early years of transition to think that they could safely ignore regulation, state policy, and law altogether. The business leaders who survived the Russian shock of 1998 were those who had begun to appreciate the need for commercial prudence, purposive lobbying, legitimate contracts and accurate (or at least accurate-looking) book-keeping. Since 1998 the bulk of Russian business has become more civilised and more legal.[37]

Even so, the research suggests that the approach to law in Russian economic culture is very uneven. There are wide gaps in typical legal behaviour between different kinds of business, such as big firms as distinct from small firms or old-style manufacturing companies as distinct from new activities such as stock market trading.

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34 Butler 2003.

35 Hendley 2002.

36 Brown, 2000.

37 This corresponds with findings by Kathryn Hendley, Peter Murrell and Randi Ryterman 2005.

It is not surprising that big companies have now introduced legal departments and that in-house lawyers have become more prominent in the outward image the companies project. However, when the specific tasks allocated to big-company lawyers were examined, it became clear that what is expected of the legal profession is limited. Broadly, the lawyers had three areas of responsibility. First, they were asked to keep track of legislation and to adapt the operation and reporting of the company so as to fit any new laws. Second, they were required to develop suitable 'tax minimisation' schemes[38] for the company. And third, they draft contracts – but only after a deal has been struck between managers. It was evident that in contrast to common practice in other countries, company lawyers in Russia are not usually invited to share actively in strategy development, decision making or even negotiation.

Interviews with managers confirmed that they regard lawyers as an obstacle to a successful business. At the early stages of planning an operation, to introduce the argument that something is not permitted is regarded as an impediment to a profitable business. Instead, the right strategy is worked out and then lawyers are brought in to find a way to make it happen. The job of company lawyers, as understood in Russian firms, is to be available as trouble-shooters when required. The idea that a lawyer might have a prophylactic role and prevent a crisis has yet to take hold.

Small and middle sized businesses did not employ lawyers as staff members in the company, especially where the company has no operations in hard currency.[39] There was a good economic reason for that; a permanent legal post is expensive to fund, and in a small businesses it is not needed. But this was not the only reason why lawyers were not employed in medium and small businesses. It was also the case that managers are reluctant to involve them because they regard lawyers as being incapable of making useful contribution. This attitude was forcefully stated by one manager:

> I do not need a lawyer in my business. I would not trust his judgment anyway and would still make all the necessary inquiries myself. For instance he or she might tell me that something is not permitted. But there might already have been some changes in the law so that things could go ahead. I prefer to check things myself.[40]

Repeatedly, managers made clear their deep distrust of legal institutions and revealed their inclination to prefer self-help to legal advice and to avoid using legal means of dispute resolution. Even though there is now no problem in Russia about suing the state – and people now do so in such matters as tax disputes – there was still a stigma attached to suing private contractors, especially smaller and mid-sized firms. A typical explanation was:

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38 This is an established term, so much so that it is used casually by the company lawyers who were interviewed.

39 Avoidance of hard-currency transactions is regarded as a way of keeping the business below the radar of the tax collectors.

40 Interview with the manager of a small business (15 employees), Moscow, 11 November 2004.

> Even if one of my contractors breaks the agreement we signed, I would not go to a court over it. If I did that I would acquire a bad reputation among my other contractors, and I might lose them.[41]

How then would the dispute be solved? I was presented with a quieter alternative by another interviewee, who had also expressed the same dubious attitude towards the court:[42]

> No, I would not file a court case. If the issue is about a small sum of money I will keep reminding the debtor, either until he pays it or until the issue dies out. If it is about a big sum, then there are people around who will knock the money out of the debtor for a 50% share of what they get. Actually, many of those people work in the police. It is easy to find such people, but they will do the job only if you have a good contract or an appropriate legal document that proves that the debt is real.[43]

However, when the need arises it has slowly become common practice for small and middle size businesses to consult a lawyer, either in a law firm or more usually in a bank. And it is clear that large and some medium-sized businesses have now reached the point at which they cannot afford to distrust lawyers. They routinely involve a legal professional at what they consider to be the appropriate stage, and also bring law suits to the Arbitration Court[44] in order to determine private contract disputes. The concept of a contract itself – meaning a legally framed and binding agreement – has become well established in Russia since the devastating experience of the 1998 economic crisis.

Yet, the growing legality in terms of using legal methods to do business does not mean that business has become law-abiding generally. Although most firms now routinely draw up contracts even for simple transactions and many of them frequently recognize the value of a court as an arbiter in settling complex disputes, managers point out that they do not feel they are protected by law. The impression is rather that the use made of the law has become quite discriminating. For instance, if companies wish to win economic disputes in the courts, they nowadays tend first to secure a strong legal defence but at the same time to get ready to resort to non-legal means. As one of the company lawyers put it to me: '*When the contract is good it is easier and less costly to bribe a judge than it is with a bad contract.*'[45]

In matters of taxation, arguably the principal manifestation of legal culture,[46] the legitimate-seeming trend has not eliminated the traditional resort to

41 Interview with a manager of a medium-sized company (110 employees), Moscow, 15 September 2003.

42 The methodology of the research did not allow me to discover how widespread this practice is, but a number of managers confirmed that it is a possible option.

43 Interview with a manager of a medium-sized company (200 employees), Moscow, 27 September 2003.

44 In Russia the Arbitration Court is a state court for economic affairs.

45 Interview with a company lawyer, Moscow, 29 September 2002.

46 On the concept of tax culture, and in particular the tax culture of post-communist Russia, see Nerre 2001.

informal deals with tax officers even though companies have started in recent years to treat tax demands seriously and to keep their financial accounts straight. All my informants shared the view that '*if a tax inspector is determined to find a violation, he will*'[47] so they habitually keep a strategy in place to encourage him to overlook any violation that he might find. In most cases companies found it easier to sort out their disagreements with tax officers informally, rather than to fight back formally. My interviews did not reveal any inclination to abandon these traditional practices. There is no evidence that companies are making any serious attempt to replace them with impersonal bureaucratic procedures. As I was told, '*small violations always exist, and it is much better to give a bribe than to get involved in a long dispute'*.[48] And again, '*It is always preferable to pay half of the penalty privately to the official than to pay the full sum to the state*'.[49]

The pattern of solving problems through exchange of favour or direct corruption was commonplace in all the instances of the businesses-bureaucracy relationship that were examined. The broader finding was that the data shows that the market not only fails to eliminate the culture of networking and of non-legal short cuts; it actually supports that culture and enables individual managers to profit from it. In the words of one of the managers interviewed: '*It is good that we have these informal channels available through the bureaucratic machine. If there is a need urgently to solve a problem, why not use them?*' [50]

To demonstrate how the relationship with the bureaucracy works, I was given an example:

> Some of the governors of Moscow's 28 boroughs make a practice of persuading big local firms like property developers to sponsor basic social projects in the boroughs, such as repairs to schools and hospitals. In exchange the companies are granted operating licences, assured of a green light for a desirable project, or promised quick action on a request for a complicated planning approval. Doing it this way I got signatures within one week on all the permissions I needed for one development, whereas it would otherwise have probably taken six months.[51]

The overall conclusion on the role of the market interests in reinterpreting 'the rules of the game' by enhancing the prominence of law is that two distinct tendencies can be identified**.**

First, the free market significantly improves the legality of business operations. Competition requires that costs be minimised, and companies respond to

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47 Interview with a lawyer employed by a major oil company, Moscow, 24 October 2003.

48 Interview with a manager of a medium-sized company (110 employees), Moscow, 15 September 2003.

48 Interview with a corporate lawyer, Moscow. 20 September 2004.

49 Interview with a manager of a medium-sized company (110 employees), Moscow, 15 September 2003.

50 Interview with a corporate lawyer, Moscow, 10 October 2002.

51 Interview with the manager of a property development company, Moscow, 11 November 2004.

that imperative. They attempt both to cut down on payments to corrupt officials and to reduce their transaction risks by raising the quality of their documentation and management procedures. The effect is that they become significantly more law-abiding.

Second, the evidence shows that just like its monolithic predecessor the free market uses, benefits from, and therefore strengthens, the old and well-established practices of using non-legal means to take short cuts and solve problems informally. The market does not resist the traditional network pattern of mutually beneficial relationships between businessmen and bureaucrats. Instead it is adapting to it and is making it work for itself.

At this stage of my research I incline to think that the introduction of the free market is bringing new rules to the private sector of the economy, but it is not by itself capable of eliminating the habitual ways in which things have been done in the past. Informal exchange is beneficial both to the governing bureaucracy and to corporate owners and managers. It does of course distort the market principle of playing on a level field. But those who are already in business are not interested in such a principle; they would much rather use the short cuts to strengthen their competitiveness.

Western involvement in changing the legal culture

The transition also meant opening up the society to the outside world. The new doctrine of open borders and untrammelled communication meant that government officials took advice from international consultants about shaping the legal and institutional reforms and putting them into practice. Domestic companies went into business with overseas partners. Trainees went sent abroad for technical instruction and Russian students enrolled in universities around the world. Western academics and merchant bankers were brought in to orchestrate privatisations, and international collaboration became more noticeable in every field.

Today the ongoing presence of western firms in Russia is considerable. Although some western or jointly owned companies abandoned the country after the financial crisis of 1998, a substantial number persisted. Others later returned and in many cases employed an increased proportion of local staff. Western lawyers arrived together with western companies, and in due course a clutch of specialist multinational law firms set up practices in Moscow. They tend to do their best to follow western procedures in dealing with clients, and they teach their Russian employees to conform. Their local professionals tend already to be either western-educated or at least western-influenced because numerous would-be lawyers either studied abroad in the 1990s or worked for a time in a western environment. Most of the practising lawyers whom I spoke to had some sort of personal western experience: long or short training courses, placement in different legal establishments, or work with western partners. The internalisation of western legal culture was also accelerated by the awareness that it was now possible for Russians to deal with international courts in matters affecting human rights and civil disputes.

Several important questions are posed by this substantial exposure of the Russian business community to western culture. What impact has been made by non-Russian thinking on pre-existing local assumptions and ways of doing things? Are we now witnessing convergence or divergence between the Russian and the western legal environments? Is there observable evidence that Russians have adopted a western approach to law, wholly or in part?

I began to explore this topic by asking my interviewees to describe their attitudes towards the west. It was apparent that many Russians held the west to be mainly responsible for the crisis of 1998, and still resented it. Their views were further cooled by the NATO attack on Serbia (widely regarded as a friendly state) during the Balkan wars, and most of all as a result of the overwhelmingly hostile response to the invasion and continuing occupation of Iraq.

An overview of this downward-sloping perception of the west was provided for me by an American who was a frequent visitor to Russia all the way through the transition in his role as a provider of legal education by means of NGO-sponsored courses.

> Immediately after the collapse of the Soviet Union, westerners were seen in Russia as 'superstars'. After passing through a cool European reception on the way here, it was always such a pleasure for Americans to arrive to a warm welcome in Russia where people were full of affection. Now all that has changed. Many westerners are leaving the country simply because it increasingly feels uncomfortable here.[52]

The uncomfortable feeling that the respondent was referring to can be attributed to the waves of nationalism in Russia in the recent years.[53] The ideological wave is packaged with the reassertion of the view that the west is not in any way better than Russia. In my interviews I was told repeatedly that the west is just as corrupt as Russia and that there is no difference between western and Russian ways of dealing with law; in their view the two legal cultures were broadly similar. Informants offered me numerous examples from their experience of time spent in the west (which was usually brief and often superficial), demonstrating that in their judgment there is no basis for the assumption that whereas a 'rule of law' prevails in the west, lawlessness prevails in Russia.[54] As one young lawyer put it to me:

> Things are done in just the same way over there as they are here. When I was in the States (for a three month placement) I asked lots of people if they would buy a CD cheaply even if they knew that it was an illegal recording. Everyone said

52 Interview with an American professor of law who practises in Moscow, Moscow, 19 October 2002.

53 On rising Russian nationalism, see Parland 2005.

54 It is beyond the scope of this chapter to assess just how strong law is in western 'rule of law' culture, although it is surely not ideal. The significant point in the present context is how strong Russian lawyers perceive it to be.

> yes, without hesitation. So why should I assume that Americans respect law more than we do?[55]

There has been a parallel decline in the perceived value of western legal education, and it been steadily losing its appeal since the late 1990s. Although knowledge of a foreign language, usually English, continues to be required to get a good job even if that job does not involve using it, a western educational certificate is *'regarded as waste paper'*.[56] The prevailing view among legal professionals was that a western law diploma is nothing more than a pretty façade. The main explanation of this view in legal circles was that western legal knowledge has no beneficial implications in Russia. They argued that it is not enough to know the law. A lawyer should also understand how to operate in the distinctive local environment. He or she needs to be able to read between the lines of the law, and most importantly must know people who matter and know how to relate to them. Graduates holding a western legal qualification now find it difficult to get a decent job when they return home. One lawyer with a western education confessed: *'When I go to court to represent a client I do my best not to let my western education show. I have noticed that if I do, it irritates the judge and works against me'*.[57]

Instead of the expected 'westernisation' of the Russian legal culture and a climate of appreciation of the local presence of western legal firms, I found something close to the opposite. There were constant expressions of unconcealed hostility between Russian lawyers and the employees of the multinational law firms that operate in Russia. This can partly be explained by the intensified competition between western and local lawyers as the economy has developed. But the tension was also a result of the clash between the two cultures. The contrast was exhibited in the way in which representatives of western and Russian legal firms see each other. The view of Russian lawyers might be summarised as follows:

> Western companies are not focussed on problem-solving, but on keeping their clients happy. Their staffs spend a lot of time on writing memos, entertaining clients and making up useless reports. The rooms where they meet clients are beautifully furnished and well equipped. But they do not make much effort to get a positive outcome for the client. They work on building up the confidence of the client by using visual effects, but they do not work on delivering results.[58]

In contrast to this, Russian lawyers see themselves as goal-orientated. In their own view they are people who work hard for their clients without need of the showy entourage typically trailed along by their western equivalents.

At the same time employees of the western firms think of their colleagues from the local companies as people who still display the old soviet attitudes

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55 Interview with a corporate lawyer, Moscow, 1 November 2002.

56 Interview with a young corporate lawyer, Moscow, 21 May 2003.

57 Interview with a defence lawyer from a local private law firm, Moscow, 30 September 2002.

58 Interview with a lawyer from a local private law firm, Moscow, 27 October 2003.

towards employment. They are frequently not to be found in their workplaces and they are often not reachable by telephone. Clients can sometimes go for days without succeeding in getting in touch with them. And they '*have not even learned to write a memo*'.[59]

In short, a cultural tension has appeared between western law firms and local law firms. The number of western firms is small; they are not popular among the local lawyers; and they have no potential to affect the local legal culture. It is clear that the interaction between the western and Russian cultures of law and business has not led to their convergence. Russian lawyers and business people firmly reject the idea that the west can offer them something new and valuable in terms of how to deal with law and how to run their businesses. Although it is true that the interactions and contacts have each had a substantial value in themselves and that what has once been learned cannot easily be unlearned, there is evidence that the legal norms transmitted through these globalising processes have not been internalised – which makes the very concept of 'learning' somewhat suspect in this case.

Conclusion

It remains to sum up. After examining the effects of the different social forces generated by the transition on the way in which Russian society is organised and how it functions, I suggest that despite all the intentionally far-reaching reforms there is no strong evidence of tangible success. Law is not transcending the merely instrumental role that it previously occupied in the society in order to become its central organising principle. This is not to say that the legal culture is not changing; it is visibly changing, and significantly. The use of law has become more intensive, more professional, more self-conscious, more prestigious and more aggressive. The number of businesses that practise law is increasing, as is the number of lawyers working within business firms. But I would argue that Russia is not on the way towards a rule of law culture. Something wholly new and quite different is being formed there. The legal culture that emerges seems likely to be one that possesses both the glossy outward trappings of western law and the more cynical inward conniving of the Russian tradition.

I will conclude by quoting the slogan that is displayed in impressively big letters at the entrance to the Moscow Business School: '*We should not bend to the changing world; it is the world that should bend to us*'.

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59 Interview with a Russian lawyer working for a foreign law firm, Moscow, 4 November 2003.

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Civil Law Notaries and the Challenge of Liberalisation: the Case of France

Gisela Shaw

Introduction

Every year at the annual congress of the *Assemblée de liaison des notaires de France*, the President of the National Chamber of Notaries, the *Conseil supérieur du notariat* (CSN), addresses the assembled members and responds to questions from the floor on matters of national and international significance to the profession. At the congress in autumn 2006, the newly elected CSN President Bernard Reynis focused particularly on the challenges arising from liberalisation initiatives. One member asked about the dangers facing *notaires* from the new French government whose leadership and composition were as yet unknown. Should candidates for political office not be asked to take a stand on their position regarding the future of the French notariat? Reynis' response was firm. It is not the French government we should be wary of. It is EU member states in the north of Europe that pose the real danger:

> They do not know us, they do not understand us. [...] If the 100,000 British solicitors are so keen to come and sell property in France, that is simply because, firstly, they are 100,000, and also, because the Blair government has decided to deregulate the legal services market in the UK so as to allow the hypermarket Tesco, the equivalent of our French Carrefour, to get involved in probate and property selling. [...] That is why they are lobbying with Mr McCreevy and Mrs Kroes [the EU Commissioners for DG Internal Market and Competition respectively; GS] to let them take our work. (Reynis 2007, p. 39)

What lies behind this statement? Civil law notaries are amongst the most strictly regulated professions in Continental Europe and are characterised by a particularly close, albeit by no means tension-free, relationship with their respective governments. By international civil law standards, the notariat in France has, over the last 200 years, managed to acquire and retain a relatively high degree of autonomy, status and prosperity. Its relationship with the French government – an intriguing mix of hostility and complicity – has generally worked to the advantage of both sides.

In recent years, one essential premise has changed: the notariat's fate, along with that of liberal professions generally, has ceased to be determined purely within a national framework. Economic globalisation and the liberalising initiatives of the European Commission have introduced a new factor into the equation, moving the issue to a higher and previously unknown level and

requiring a new set of political tools. Or, to draw on the conception and terminology of Pierre Bourdieu (1987), the dynamics of the 'juridical field' in France are undergoing a shift, whose precise nature and consequences are as yet unknown.

This chapter assesses the impact of this shift on the profession of *notaire* in France, brought about by two major external developments: the European Commission's liberalisation project and economic globalisation. I argue that, on the one hand, there do indeed exist serious threats to the profession in its traditional form and the values it claims to stand for. On the other hand, at least in principle, *notaires* in France have an edge over their colleagues in other Western European countries in that a cautious and carefully controlled process of liberalisation from within has been in progress since the 1960s – a process unrivalled in other countries. This has offered the profession opportunities to adjust and prepare for things to come, opportunities which, it has to be said, have not been seized with great enthusiasm by the majority of the profession.

Up-to-date facts and figures on the subject are hard to come by, and sociological analyses of the French notariat do not exist (apart from Ezra Suleiman's very specifically focused study of 1987). My own analysis relies mainly on information available from the profession's journals and websites and on personal semi-structured and informal interviews with professional leaders and practitioners conducted since autumn 2004.[1]

Notaires and State

Professions in the Western World have traditionally enjoyed some degree of freedom from competition within certain defined parts of the professional services market, having persuaded their governments that this is essential to a well-functioning society. In the civil law world, professions have, in return, accepted strict limitations on their self-regulatory powers as well as the condition of loyalty to the state. This is particularly true of the most strictly regulated amongst the legal professions in continental Europe, the profession of notary.

The model for (and often envy of) civil law notaries in the rest of continental Europe has been the French *notaire*. Having been abolished in 1791 as an institution of the hated *ancien régime*, the French notariat was revived in a new guise by Napoleon in 1803 to help ensure political and economic stability (Moreau 1989; Suleiman 1987; Schützeberg 2005). Civil law notaries are defined as public officers operating within the non-contentious branch of the judiciary. They are called upon to receive all acts and contracts to which parties have to or wish to give the character of authenticity. Their function is that of impartial arbiter, counsellor of individuals, businesses and collectives, and guarantor of the morality and legal security of contractual relationships – a corner-stone of civil law systems and their legal culture. Key aspects of the

1 I am grateful to those who have been willing to provide assistance and give up their time for interviews, most particularly in the *Conseil supérieur du Notariat*, the *Mouvement Jeune Notariat*, the *CRIDON de Paris*, as well as in DG Competition and DG Internal Market of the European Commission in Brussels.

profession and its activities, such as training, access, number, fees, business organisation, advertising, have traditionally been subject to strict statutory regulations. However, notaries are also members of a liberal profession, and as such managers of a business and in control of their own finances, office practice and personnel. The balance between these two – some would argue, two mutually exclusive – roles varies greatly from country to country, with notaries in France enjoying a great deal more scope for entrepreneurial initiative and commercial activity than their colleagues in most other civil law countries, particularly those operating within the Germanic tradition.

The 8000 or so *notaires* rank among the top professional earners in France. In June 2005, the periodical *L'Expansion* made headlines with an article on 'the truth about the liberal professions', showing notaries to have the second highest average income of all liberal professions in France, well above that of *avocats*. From 2002-2003 their income rose by 17.1 per cent to a national average net income of 187,000 euros per notary, compared to an increase by 6.3 per cent to 62,605 euros for *avocats* in the same year. *Notaires* were quick to point out that important factors, such as office expenses and loan charges had not been taken into account, and that these figures hide huge discrepancies between the highest earners in Paris and other big cities, and low earners in economically deprived rural areas. However, nobody denied that their financial situation is indeed a very privileged one. Even *notaires* in disadvantaged rural areas are never forced into real financial hardship as the profession collectively funds its own insurance system against serious financial trouble, be it through mismanagement, personal misfortune, or a downturn in the respective region's economy.

The profession's prosperity is owed to two key features. Firstly, to the system of transmission of notarial office that is peculiar to France and a relic of the *ancien régime* reintroduced by the back-door in 1816 under Louis XVIII, when notaries and a number of other professional groups were returned their previous status of *officiers ministériels* and the accompanying *droit de présentation*. That means, they are entitled to choose their own successor and to treat their office as part of their personal assets – a restoration measure that sits uncomfortably with an otherwise modernised professional profile. On retirement, a French notary either leaves his (occasionally her) office to a family member, or sells it (for a not insignificant sum) to an applicant of his (or her) choosing. The official approval and appointment by the Minister of Justice and Keeper of the Seals, who legally exercises *tutelle* over the profession, is a mere formality. In this way, many notarial offices have remained in the same family for generations and have helped to build up solid family fortunes. The second source of prosperity are *notaires*' monopolies in the legal services market, coupled with a system of statutory *ad valorem* fees. Today, by far the most important of these reserved areas of activity is the (quasi-) monopoly in conveyancing, the outcome of a reform of the land registration system in 1955. It accounts for over half of the profession's average annual income and has been enthusiastically celebrated by them as 'the notarial hen of the golden eggs' (Bigot 2005).

The downside to this success story is that *notaires* have become over-reliant on a thriving property market at the expense of most other types of activity, both old and new. Other professions operating in the juridical field have not

been slow to move in. No more than a quarter of notarial income now derives from family law and estate management matters (traditionally key areas for them), the remainder from work concerning loans and mortgages, companies and general counselling.

Over recent years, *notaires* have regularly been warned by their leadership that, although their income prospects currently look healthy given the consistent increase in property prices (which automatically translates into an increase in fees), another aspect of their property market activities actually gives cause for concern. French notaries are free to act as property sales agents, a notion wholly alien to most civil law systems. Having traditionally benefited from the privilege to engage in commercial work, their market share in property sales (*la négociation immobilière*, or *la négo* for short) has, in relative terms, been shrinking from year to year when assessed in the context of an explosion of the property market, of the legal services market overall, and of the number of those providing such services. In urban areas, their share slipped from 9 per cent to a mere 6 per cent between 1998 and 2002. By contrast, property agents managed to increase theirs to 70 per cent, having taken great care to hone their tools (specialist training, a deontological code, dedicated websites, computer technology, research and working networks). Also, private sales have gained in popularity and have further reduced the share left to *notaires*. A sample survey among *notaires* conducted in 2007 has shown that the trend continues. Over 1 in 3 respondents indicated that the sale of property by their office had gone down over the last year. Reasons given ranged from a slowing down in the construction of new homes, at least in some regions, to the underuse of the internet and lack of dynamism on the part of the profession (*Notariat2000* May 2007).

Another prominent example of missed market opportunities is inheritance planning, traditionally a key activity of *notaires*, but now slipping into marginal position in their portfolios. This is only partly due to complacency, as success in this ever more complex field requires specialist expertise and organisational flexibility which most offices find difficult to provide. The slack is being picked up either by independent consultants (frequently *experts comptables*) or by banks and insurance firms. The latter in particular have the great advantage of commanding the means to acquire the latest technological tools, of being able to hire young qualified notaries, and of having access to a wide network of other economic agents. Their one-stop service covers not merely inheritance planning, but also banking services, financial guarantees, insurance, property deals and investment advice.

A close, but by no means tension-free relationship between civil law notariats and governments is by definition a key feature of the profession. In France, this relationship amounts to an intriguing mixture of complicity and hostility, not dissimilar to the 'non-aggression pact' between magistracy and dominant power described by Bourdieu (1987, p. 843). In terms of social history, this is reflected in the fact that *notaires*, or at least those enjoying the position of *notaire royale* in Paris, under the *ancien régime,* belonged to the *noblesse de robe*, just as magistrates did. That is, they became members of the hereditary nobility on the basis of their position, while their counterparts in the provinces

often gained access to nobility by dint of holding public municipal office (*échevinage*). *Notaires* tended to marry into other notarial families, their clients were often recruited from circles of friends and relatives, and until the end of the 19th century they were key agents in French society's financial transactions at all levels (Moreau 1989).

Today, complicity is strong in the symbiotic relationship with the Ministry of Justice. The Ministry of Justice acts in a generally protective role, and its actual control over the profession is extremely limited. No annual meeting of the profession passes without the Minister of Justice and Keeper of the Seals being reminded by professional leaders of his duty to promote the profession's well-being, and the Minister reassuring them of his unwavering continued support and his faith in their important contribution to society. To quote from the Minister's speech at the 2006 congress in Strasbourg:

> As you are assembled here, you project a magnificent image of your profession. That image corresponds to the dynamism that characterizes you and which I have learnt to appreciate during the year of having had the honour of being Keeper of the Seals. Dynamic, active, modern, your profession is turned towards the future [...] Notaries must be defended, not from a sense of protectionism or tradition, but because they represent, in the service of our fellow citizens, an essential pillar of our judicial structure. [...] Your profession serves the administration of justice and the rule of law. It is based on values which are not primarily economic. (Clément 2006, p. 25).

Regular meetings in the Ministry are set up by the leadership to strengthen close relations, often with the aim of suggesting and preparing the ground for new legislation they wish to be brought in.

A different, rather more adversarial relationship exists between *notaires* and the Ministry of Finance which keeps a close eye on the notarial fees system, the *tarif*, and has to approve any changes to the fees régime. However, in financial terms the French state also benefits in at least two very tangible ways from the activity of *notaires*. Firstly, *notaires* calculate and collect state taxes and legal charges (now also including VAT) for each and every transaction performed. This is done without any financial rewards and at considerable risk for themselves. The profession views this arrangement with mixed feelings. On the one hand, it represents an unpaid additional responsibility and, more importantly in today's climate of attention to consumer attitudes, a significant source of suspicion on the part of the public at large which tends to assume that the sums collected by *notaires* all flow into their own pockets (in fact, only around 20 per cent do). On the other hand, tax collecting can come in extremely handy as a bargaining chip in negotiations with the government on other issues.

Another source of considerable financial benefit for the French state from the way this profession functions is the notariat's integration into the banking sector. Since 1890, any funds deposited with notaries by their clients have had to flow through a state bank, the *Caisse des Dépôts et Consignations*. The only exception is made for rural areas where another bank, the *Caisse de Crédit Agricole*, may also be used. Capital accumulated by the former is used for state-

directed projects of public interest, while capital flowing into the latter serves to support agriculture.

No wonder, then, that French governments, however critical of *notaires* in detailed contexts, have continued broadly to support the institution and have shied away from serious reform, preferring not to upset the long-standing intricate power relations between state and profession. In the words of the (then) CSN President Bernard Reynis: 'I can tell you that in both places, the Ministry of Justice and Bercy [Ministry of Finance; GS], they defend notaries, because notaries are useful to the state and to the citizens of this country' (Reynis 2007, p. 39).

The challenge of liberalisation

In recent years one essential premise of this close relationship based on both parties' enlightened self-interest has changed: the fate of the notarial profession has ceased to be determined purely within a national framework (Shaw 2006a, Shaw 2006b). Two major EU directives, the Directive on the Recognition of Professional Qualifications (Directive 2005/36/EC adopted 7 September 2005) and the Directive on Services in the Internal Market (Directive 2006/123/EC adopted 29 December 2006), both aiming to open the services market in Europe, came as a shock to professions in continental Europe. Civil law notaries, too, having over many years come to feel safe from Brussels interference on the grounds of their statutory role within the non-contentious judiciary, were for the first time faced with the prospect of being treated as a liberal profession and therefore included amongst the professions to be subjected to liberalisation and harmonisation measures.

As it happened, notaries ultimately escaped by the skin of their teeth, as their supporters in the European Parliament managed to push through a subtle exemption clause which excludes from the directives' scope any profession connected, even occasionally, with the exercise of official authority. *Notaires* in France breathed a sigh of relief, as did their civil law colleagues all over continental Europe. But this has not been the end of the story. Even if, at least for the time being, the core work of French *notaires* remains unaffected, it is highly improbable, to put it mildly, that there will not be a fallout of significant impact on the profession's future work.

To list five reasons:
Firstly, the juridical field in France and elsewhere has ceased to be defined purely in terms of national boundaries, and close links with the government and national organisations no longer guarantee the profession's identity, relevance and economic prosperity in a world that is swiftly and relentlessly moving into a new era of intensified competition at all levels. But even at national level power relations are shifting. Thus, *notaires*' fiercest competitors, the *avocats*, who already outnumber them at a rate of 10 to 1, are fast learning to embrace the culture of an open legal services market. Having themselves lost most of their traditional regulatory protection, they are keener than ever to see the notariat's *chasse gardée* opened up to competition (Redoutey). Equally, power-

ful banks, insurance companies and accountancy firms, as well as large international Anglo-American law firms, are well prepared to take advantage of any crack in the notarial profession's armour (Anderson; Law Gazette 2006).

A second reason why *notaires* would be ill advised to rest on their laurels or bury their heads in the sand is that it is not at all clear whether the exemption clause shielding them from the application of EU directives covers all their professional activities. In fact, it is still perfectly conceivable that their non-reserved commercial activities will eventually have to comply with EU rather than with national regulations, irrespective of what happens to their official functions – a prospect particularly disturbing for French notaries who, in contrast to their counterparts in neighbouring countries, have always treasured the option of drawing income from work outside the terrain strictly reserved for them.

Thirdly, the European Commission, unexpectedly to most, has recently reopened its campaign to make civil law member states abolish their nationality requirement for the provision of notarial services in their respective country – an initiative due to the lobbying of a minute, economically insignificant, but politically skilled group of notaries from England (Kober-Smith 2006). In November 2006, the Commission issued a reasoned opinion to 16 states, including France, giving them a two month time limit to drop the nationality requirement which, the Commission insists, contravenes the recognition of professional qualifications laid down in Directive 2005/36/EC. While Spain, Portugal and Italy had already undertaken to abolish the requirement (albeit with little practical impact so far) and the Netherlands are planning to drop it in 2007, France, along with Germany, Belgium, Luxembourg and others, is refusing to budge on the grounds that notaries exercise official authority and are therefore exempted from the Directive. The expectation is that the case will soon be taken to the European Court. It is worth noting that it is not the prospect of the odd British notary practising his or her trade in continental Europe that causes governments and notariats concern, but the fear that this is the thin end of a wedge intended to help remove regulatory authority over the professions from national governments.

Fourthly, all national competition authorities in EU member states have been charged by the European Commission to scrutinise and monitor any regulations governing professions in their country with a view to establishing whether they are proportionate and necessary to protect consumers. Already there are a number of EU countries where such scrutiny has resulted in deregulatory government action directed against notaries. This goes particularly for accession countries where, ironically, the liberal regulated professions, including the civil law notariat, had only just been re-instated. For instance, in 2004, the Office of Competition and Consumer Protection in Poland published a report highly critical of the legal professions generally and of notaries in particular. It recommended amendments to key aspects of regulation, such as access to the profession, advertising restrictions, fees scales, and restrictions on business structures available to the profession. The Polish government saw this as an opportunity to boost their electoral support and promptly introduced a number of measures to curtail notaries' powers. Authentication requirements

regarding mortgage credits were relaxed, a ceiling on notarial fees was introduced, and a law removing disciplinary powers from the profession passed. Further drastic measures directed at the profession can be expected (Zolnowski 2005).

In Hungary, the Competition Authority in its annual report of 2004 singled out notarial activities as the most regulated of all and recommended a critical review. In the same year, the regulatory regime for notaries in Slovenia came in for serious criticism. The profession's cause was not helped by the report's reference to highly publicised cases of abuse of their powers amongst its members, coupled with evidence that of the country's 68 notaries (equalling one notary public for 30,000 inhabitants), 22 had, in 2003, ranked among the country's 100 highest income earners (Mehta 2006). In Portugal, where notarial services had only just been privatised, the Competition Authority submitted a study criticising regulations governing the country's newly appointed 543 independent notaries, and recommending the amendment or even removal of restrictions regarding entry, fees, advertising and business structures (OECD 2005). Even in Italy, a country priding itself of being the cradle of the institution of the notariat, deregulation of the legal services market, including notarial services, is underway.

Developments in the Netherlands are being watched in France with particular concern. A dramatic break with traditional regulations applying to civil law notaries occurred in the Netherlands as early as 1999. The *numerus clausus* was abolished, the option of interdisciplinary associations with tax advisers and advocates (even from abroad) was introduced, and the fees scale was relaxed (to be finally abolished in April 2003). (Kuijpers et al. 2005; Nahuis and Noailly 2005). By 2003, around one fifth of notarial firms had taken advantage of the opportunity to join an interdisciplinary partnership. By August 2006, the largest such partnership, Loyens & Loeff, boasted a legal specialist staff of over 700 notaries, advocates and tax advisers operating across seven offices in the Netherlands, Belgium and Luxembourg, as well as ten offices in the world's major financial centres – breath-taking developments in the context of the civil law notariat.

Finally, the very fact that *notaires* in France rely for their income almost wholly on their quasi-monopoly in the conveyancing market represents cause for concern. Should the housing market, which admittedly has been booming for years, ever take a downturn, or, alternatively, should the French government ever decide to restructure or, indeed, abolish the notarial monopoly in this area, notaries would find themselves in great difficulty indeed. Legal history suggests that, like other small groups of legal professionals in France and elsewhere, they would most likely be absorbed into the advocacy. The existence of recent studies by economists disputing the need for involvement of lawyers of any kind in conveyancing proves that the danger is real (Arruñada 2004). A report on 'Conveyancing Services Regulations' in 16 member states, including France, carried out for the European Commission has served as yet another ominous reminder to *notaires* that indefinite continuation of the *status quo* cannot be relied upon (ZERP 2006). One step in the direction of harmonising and liberalising property transfer procedures has been the creation of a

European Land Information System (EULIS) in 2005, with the aim to provide world-wide electronic access to information on property in Europe. Founder members are mainly from northern Europe (Scandinavia, Lithuania and Great Britain), but others, including Germany and Spain (though, it seems not France) are expected soon to join (Ploeger and Van Loenen 2005).

The authority of national governments and hence the position of notariats in their respective countries are under threat not only from European deregulatory measures but also from pressures emanating from the globalisation of the world's economy. Both dynamics mutually overlay and boost each other, and both tend to be portrayed in France as a threat to the French legal system and French legal culture by aggressive common law opponents within and outside Europe.

The latter are exemplified in the World Bank's *Doing Business* reports published annually since 2004. Here the civil law tradition and its notarial system have been singled out as a major obstacle to economic growth, with France being regularly ranked as a country where legal bureaucracy is particularly pronounced. In the report of 2007, France found itself in 35th position out of a total of 175 countries, placed between Armenia and Slovakia, although admittedly well ahead of other Romance EU civil law member states, such as Spain (39th), Italy (69th) and Greece (168th). All top rankings were firmly in the hands of common law countries (World Bank 2007).

A prompt response by the French government and its allies has been the setting up in 2004 of a research group drawn from national ministries (Justice, Economy and Finance, and Foreign Affairs), universities and legal practitioners, under the title of 'Economic Attractiveness of the Law' (*Attractivité économique du droit* (AED)), the notariat being represented by the Vice-President (since 2007 President) of the national chamber, the *Conseil supérieur du Notariat*. Sponsors of the three-year 400,000 euro budget included the *Caisse des dépôts* and the *Banque de France*, both having a direct interest in maintaining the legal status quo. Three publications by the group appeared in 2006, the most important one, *Des indicateurs pour mesurer le droit? Les limites méthodologiques des rapports Doing Business*, carefully timed to coincide with the publication on the same day of the 2006 World Bank report. It sets out to demonstrate in a measured and scientific manner that serious methodological flaws in the reports have distorted their findings regarding the nature and economic role of civil law in general and French civil law in particular (Marais 2006).

A second high-profile response, *Les Droits de Tradition Civiliste en question: A propos des Rapports Doing Business de la Banque Mondiale,* published in the same year, came from the Friends of the Culture and Legal System of France. Once again, the (then) CSN Vice-President Bernard Reynis is listed among the authors. The treatise puts up a spirited defence, accusing the World Bank reports not only of using a flawed methodology and inaccurate data, but also of total ignorance of and disregard for French legal tradition and its humanistic values. Does not the method employed in these reports, it asks, bear an uncanny likeness to that used by Dan Brown in his *Da Vinci Code?*

> The year 2004 was marked by the success of a novel which, at the price of hasty analogies, risky hypotheses and a few untruths, pretended to reveal the key to 2000 years of history. On immersing oneself in the *Doing Business* reports, one cannot help asking oneself whether perhaps this genre can also be found outside the literature of entertainment (p. 33 [my translation; GS]).

As for the notariat, the authors are appalled at what they regard as a staggering lack of understanding of its nature and function. How can a profession whose members are appointed and strictly regulated by the state to provide impartial legal advice and security for consumers be portrayed and judged in purely commercial terms? How can they be criticised for holding a market monopoly if it is the state that has chosen to organise its public service in this way? What sense does it make to attribute the fees system to corporate price-fixing, when it is the government that has decided to put it in place?

Both publications expressly acknowledge that the World Bank reports did have one great merit, i.e. they acted as a wake-up call for civil law countries and forced them to take a hard look at the appropriateness to the modern world of the organisation of their laws and legal systems. The national leadership of the French notariat has seen them as a welcome opportunity to strengthen their own profile and position and to demonstrate the importance of a powerful and pro-active national professional organisation, given that the grass-roots have not always appreciated the need for considerable financial contributions on their part towards the running of the national chamber in Paris (which only recently relocated from modest rented quarters to a splendid and prestigious new building).

In sum, the avalanche of liberalisation initiatives around them has confronted *notaires* in France with a wholly novel constellation of enemies whom most of them are only beginning to identify and size up. A the same time, the profession's long-standing and close links with a variety of state and economic organisations, and its deep embeddedness in the country's legal culture and tradition, have mobilised a powerful national lobby which other civil law notariats in Europe and beyond can only dream of.

Liberalisation from within

If a powerful national lobby is a feature unique to the notariat in France, so is the fact that, for the last 40 years or so, *notaires* have been subject to what can be described as a carefully controlled and limited process of liberalisation from within, based on negotiation and consensus between profession and government. The practical impact which this process has had on the work of individual *notaires* has varied considerably from one to another and across the country in general, with offices in urban regions normally being best placed to turn any modernising opportunities to their advantage, while those in rural and economically disadvantaged regions have tended to see little advantage in moving away from traditional working habits. But at least in principle there has for some time been the incentive to consider and debate the merits or otherwise of reform and modernisation. The relatively generous scope French notaries have always enjoyed (although not always used) for engaging in commercial

activity alongside their work as public officials has acted as an encouragement to appreciate the potential benefits of moving towards a more entrepreneurial approach.

Pressure to consider deregulating the notariat began in the late 1950s when de Gaulle's government commissioned a report to identify obstacles inhibiting economic growth in France and to recommend ways of overcoming them. The so-called Rueff-Armand report, named after its authors (both economists) Jacques Rueff, influential economic adviser to President de Gaulle, and Louis Armand, first President of EURATOM, selected *notaires* as one example of a 'closed profession' whose regulatory system re-enforced the ossification afflicting the French economy (Armand and Rueff 1960). Their observations relating to the notariat focussed particularly on three features requiring reform: limitations to access to the profession, weaknesses in disciplinary procedures, and excessive fees in the context of large projects and of series of identical property transactions. The report's final recommendations on the subject were prefaced by the dry comment that, unfortunately, an abolition of the traditional system of the venality of offices (itself a considerable obstacle to economic growth) could not be recommended, as the cost of indemnifying the 6370 or so current office-holders would exceed the state's financial means. Both Armand and Rueff were convinced Europeans and emphasised the need to extend liberalisation beyond the boundaries of France to all member states of the Common Market in order to comply with the Treaty of Rome's provisions for the right of establishment.

Little action appears to have followed the report in the context of opening up the *professions fermées*. However, foresighted leaders of the notariat read it as a signal that a thorough and comprehensive process of critical self-assessment was required. This revealed serious systemic weaknesses that had left the profession wholly out of step with social and economic developments. An unparalleled project of internal modernisation focusing on quality and efficiency was undertaken. It was fuelled by the conviction that without such modernisation the profession would be doomed. It included countrywide further training measures, the development of dedicated computer programmes, and the setting up of a first of eventually five regional Centres of Research, Information, Documentation and Organisation (*Centres de Recherches, d'Information, de Documentation, et d'Organisation Notariales,* CRIDONs) in Lyon in 1962 (Suleiman 1989).

A second phase of liberalisation initiated by the French government occurred in the 1980s. Professional leaders, supported by the Ministry of Justice (but resisted by the Ministry of Finance), managed to defuse and channel these deregulatory energies by acceding to a number of more marginal reform measures. These started a steady trickle of limited and controlled liberalisation from within, a process unique amongst established civil law notariats in Europe.

As a result, regulations governing access, business structures and notarial practice were gradually relaxed. Access to the profession had already undergone important changes when in 1972 the traditional apprenticeship system and on-the-job training as the normal entry route were replaced by university education. What was specific to France and indicative of the diplomatic skills of

the profession's leaders was the fact that a degree of flexibility was nevertheless retained, thus avoiding upsetting certain sections of the profession. This included the option of entering the profession via the traditional route (*la voie sociale*) based on experience as office clerk, followed by a theoretical examination organised annually by a national training centre *(Centre national d'enseignement professionnel notarial*, CNEPN). Although failure rates in this examination have been high (normally between 85 and 95 per cent), the profession continues to attribute great value to the survival of this route as a way of ensuring a balance between professional unity and diversity, and of motivating office staff.

The system of business structures available to *notaires* was widened first in 1966/67 and then again in 1990 (Assemblée de Liaison 2000). *Notaires* now choose among three types of organisational forms. The number of those working as sole notaries has steadily decreased. By 1999, it was only roughly a quarter (2184), almost half of these in rural areas (which make up some 70 per cent of the country's territory) – a remarkable development, given that in 1970 this still applied to over 95 per cent of the profession. Instead, the majority (6115) were members of groupings of different types and sizes. *Notaires* appointed to office may opt to set up or join one of two types of partnership which is itself a legal person (*société civile professionelle*, SCP) – the choice of the majority since the late 1960s; or (an option available to the notariat since 1990/1993) to join one of three possible forms of an incorporated company (*société d'exercice libérale*, SEL). This last route, although taken by only a small but influential number (50 by 30 June 2003), has helped to fuel internal debates about how best to face the challenge of global and European liberalisation. Pressures to accelerate the move away from the SCP and to replace it by either SEL or even holding structures have increased in recent years and are now receiving support from the CSN. Generally, the average size of notarial firms, though still tiny compared to that of law firms, is rising well beyond the level found anywhere else, with the sole exception of the Netherlands.

The door has thereby been opened to entrepreneurial thinking and management, rationalisation and specialisation, the latter running directly counter to the traditional image of the *notaire* as the all-round generalist and family adviser. The opening-up was facilitated through the creation in 1990 of the post of 'salaried notary' (*notaire salarié*), that is a fully qualified notary employed by an office-holder – a notion that in most civil law systems would be regarded as incompatible with the essential feature of notaries' professional independence and therefore a contradiction in terms. It was initially intended to ease (a) the pressure brought about amongst aspiring notaries by the *numerus clausus* (a standard feature of civil law systems), and (b) the financial constraints surrounding appointment to office (a problem confined to France). It had also been hoped that commercial lawyers (*conseils juridiques*), whose profession was being disbanded in 1990, would opt for the position of *notaire salarié* instead – a move that would have provided the notariat with welcome access to the fields of company and commercial law. However, these hopes were disappointed: take-up for the post of employed notary has been distinctly hesitant (around 400 by the end of 2006, see *Notaires/Vie professionnelle* 2007), and most *con-*

seils juridiques moved straight into the advocacy rather than the notariat (Boigeol and Willemez 2005). In order to sweeten the pill and remove fear on the part of potential candidates that they would be regarded by clients as second-class *notaires*, a decree passed in October 2006 now permits them to draw up authentic acts without use of the word 'salarié'. In any case, the creation of this new position has at least opened up some opportunity to specialise and thereby facilitated the expansion of notarial practices in urban areas. By late 2004, the largest notarial firms counted 8 partners, 8 salaried notaries and c. 100 office staff, of whom some 11 per cent were fully qualified notaries waiting for a vacancy to set up their own offices (*notaires diplômés*) (Dejoie 2004).

An important outcome of regulatory relaxation has been the creation of larger monoprofessional national networks. An outstanding example is *Groupe Monassier*. Established in 1992 by the Parisian *notaire* Bernard Monassier who had read the signs of the times and was determined to keep up with market developments, it currently comprises 28 notarial firms across France with a total of 85 *notaires* and some 650 staff. Its image is that of a modern enterprise, committed to cutting-edge expertise in the whole range of areas open to notaries, supported by training, research and publications. Three-year strategies are agreed at annual general meetings, under the leadership of an elected executive committee of nine. Quality is a prime concern, and 17 of the offices already hold the Iso 9001 certificate – a percentage well above the national average. An international dimension has been added, with a network of partnerships comprising around 1000 jurists in some 15 countries. Other national monoprofessional groupings have sprung up in recent years. They have tended to focus on specific areas previously neglected by the profession and requiring a high degree of specialisation. The best known of these is *Pharmétudes*, a network created to engage with all aspects of legal advice required by pharmacists, thus going beyond the normal notarial act of authenticating the purchase or sale of a pharmacy. Another, *Nôtel*, created in 1998 for the hospitality industry (hotels, bars, restaurants), was modelled on *Pharmétudes*. A third national grouping, *Jurisvin*, caters for all legal needs of winegrowers.

The notarial fees regime, too, has been subjected to gradual reform. In 1986, flexibility of fees arrangements was introduced, with the compulsory application of the statutory fees scale becoming limited to transactions covered by notarial monopolies and to fees not exceeding 80,000 euros. In this way, negotiated fees have become perfectly common in areas where there is competition with other professions, as for instance in company law matters. Today, French notaries are regularly offering rebates, and on occasion fees are waived altogether (Schützeberg 2005). In fact, French notaries have steadily expanded their scope for commercial pricing even in the context of authentication, using the permission to negotiate fees in the exceptional event that a notarial act is not required by law but nevertheless requested by a client as a loophole for a more liberal application of the norm. The CSN's warnings of the political risks of this trend, i.e. the government deciding to abolish the fees scales altogether, do not appear to be widely heeded.

Finally, also in 1986, French notaries' activities ceased to be tied to a particular location. *Notaires* can now work across the whole of France – another marked difference to most of their colleagues in other European countries.

Over the last five years, the profession's national leadership has been particularly keen to be seen as engine of modernisation and as setting its own agenda and terms. A series of reform projects have been launched in areas such as recruitment of young notaries as well as of office staff (a looming problem in the light of mass retirement of baby-boomers), training, quality control, disciplinary matters, technology and office management, and communication with the public (publicity). In addition, the national chamber's organisational structure has been subjected to a critical review and reorganised to suit today's needs, with an emphasis on economic and European issues and lobbying outside France, most particularly in Brussels. Great efforts have been made to strengthen the civil law camp by supporting budding notariats in central and eastern Europe and beyond, the most treasured and advertised prize so far having been China's decision to adopt some version of the civil law notariat.

There remains an intriguing ambiguity in the national chamber's overall strategy, reflecting the Janus-faced nature of the institution of the civil law notariat. On the one hand, it is urging members to accept and hone their role as entrepreneurs and managers. On the other hand, it has been keen to stress notaries' public officer role, in order to drive home the point that European directives aimed at commercial enterprises can have no bearing on their activities. For the more powerful notarial firms in urban areas, most particularly in Paris, the question of which side to come down on, if sitting on the fence should cease to be an option, has acquired central significance. For them, the public officer role, although a welcome source of guaranteed income, has become somewhat more marginal given their considerable interest and activities in the open national and international legal services market.

Conclusion

In 2006, the CSN's Commission for Economic and Social Affairs drew up a report entitled 'A Scenario for a Crisis', based on the hypothesis of a drop in property prices. It concluded that, with careful forward planning and innovative working methods, the impact of any such crisis could be considerably softened. Rather than stressing the need for innovation and improved office management, President Bernard Reynis, in his address at the national annual general meeting of French notaries, reminded his audience of the crucial importance of not charging ahead in commercial terms, but to focus on their role and authority as state officials in the non-contentious jurisdiction. Unity and solidarity, so he emphasised, were the profession's main weapon against external attack. This included strict adherence to the fees scale, an essential backbone to the profession's social and economic mission as well as to its own prosperity. Even if a recent (minor) reform of the fees system had compensated reductions in income in one area by increases in another, there was, he stressed, no guarantee that in future some public authority less well disposed towards the notariat than the

current one might not choose to reduce notarial rates without such compensation or abandon the fees regime altogether.

All in all, then, the organisation of the French notariat has, over time, developed in such a way as to preserve the profession's most treasured regulatory fences while offering scope for diversity and flexibility within them. Neither the French government nor the *notaires* themselves would like to see modernisation equated with deregulation. And for both, the most abhorrent scenario would be deregulation enforced by authority of an agency other than the national government.

The future of the civil law notariat in general and of the French notariat in particular is currently wide open, as economic, rather than narrowly political, and European and global, rather than purely national factors have acquired primary importance and have produced a wholly novel constellation of forces within the juridical field in the civil law world. That said, notaries in France, if they play their cards well, should be in a better position to ride the waves of liberalisation than most of their colleagues in other European countries, given their political and commercial savvy, their strong position within the French juridical and economic system, their historical record of successful crisis management, and their exposure over the last five decades to gradual but consistent modernisation from within (Shaw 2006a).

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Pluralism in the Netherlands and *laïcité* in France: the Islamic Challenge at a Symbolic Level

Fred Bruinsma and Matthijs de Blois

Introduction

'For more than twenty years the place of the Islamic headscarf in State education has been the subject of debate across Europe', so stated the European Court of Human Rights when commencing a section on comparative law in *Sahin v. Turkey* (ECHR, 10/11/2005; §§55-65).[1] The applicant claimed that her freedom of religion embodied in the first paragraph of Article 9 of the European Convention on Human Rights had been infringed by the university directive prohibiting headscarves. Confronted with a patchwork of differences among the member states (see also www.veil-project.eu), the ECHR fell back on the margin of appreciation in the second paragraph.[2] Approaches in Europe regarding Islamic dress in the public sphere vary from the permissive policy of countries such as the United Kingdom[3] and the Netherlands on the one end, and the repressive policy of Turkey and France on the other end. With the ban on wearing headscarves in public schools, enacted in 2004, France clearly adheres to the secular or laic tradition with no room for religious dress symbols in state education.[4] These different approaches are the outcome of a 'historically developed constitutional self-understanding of state-church relations', according to Berghahn and Rostock (2007). They emphasize that the legal debate about the Islamic veil in terms of the *locus classicus* of state-church relations deflects from the more fundamental and cultural issue, i.e. what is the answer to the

1 All cases are published according to the name of the applicant, the respondent State and the judgment date on the Court's website http://echr.coe.int (click hudoc).

2 Article 9 § 1: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
Article 9 § 2: Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

3 See Wiles (2007) for a complacent and British perspective.

4 The legislation inserted a new article in the Education Code that provides: 'In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited.' A circular specifies the target: 'the Islamic headscarf, however named, the kippa or a cross that is manifestly oversized, which make the wearer's religious affiliation immediately identifiable.'

Islamic challenge (Klausen 2005) at a symbolic level? Friedman, who introduced the term legal culture, made a distinction between the external legal culture of the population at large ('attitudes and behavior patterns toward the legal system') and the internal legal culture of 'legal professionals – the values, ideologies, and principles of lawyers, judges and others who work within the magic circle of the legal system' (1987, chs. 8 and 9, quotes on p. 194 and p. 223). Whereas the societal reaction to the visible presence of Muslim migrants is diffuse and variegated the state reaction sets the tone in supposedly unambiguous laws and bylaws. Internal and external legal cultures are connected by means of the political process, a factor that is mostly ignored in the literature about legal culture.

John Bowen wrote a book entitled *Why the French don't like headscarves. Islam, the State, and Public Space* (2007). It has triggered this contribution in more than one sense. After a summary of the historical background of the new French law, we will highlight the counter narrative of the Netherlands, entitled *Why the Dutch do not mind headscarves.* Just as Bowen, we are not satisfied with a historical account of law in the books. While he practised an 'anthropology of public reasoning' (reading texts, and interviewing key persons, p. 3) we try to relate the historical accounts of different laws and different traditions to the cultural dimensions of Hofstede and Hofstede (H&H 2005). One of the cultural dimensions of H&H concerns uncertainty avoidance, varying from 'what is different is dangerous' to 'what is different is curious'. Since the beginning of the 21st century populist politicians in both countries have exploited fears of the unknown in their attempts to cultivate an anti-Islam sentiment. Whereas H&H compare national cultures (France vs. the Netherlands, for example) there is good reason to differentiate between 'mentality groups' in society. The term 'mentality group' was coined in the Netherlands by *Motivaction*, a commercial consultancy firm. Mentality groups differ in value patterns from traditional via modern to postmodern. Motivaction assumes that voting is an aspect of life style, just like shopping. They advised some parties in their election campaign in 2006; for example, the governing Christian democrats were advised to expand their traditional market into modern directions ('not merely family values, but also life style consumerism'). Legal scholars writing about legal traditions (Glenn 2004) and social scientists writing about cultures (H&H) prefer the long term to the short term. We conclude with a corrective to this tendency that belittles human effort in politics and lawmaking.[5] Another mentality group or coalition of mentality groups may assume office, and take over the law machinery. While in power one can make new laws, such as the headscarf ban in France. Whereas the symbolic cleansing of public schools in France has no parallel in the Netherlands, anti Islam populism found another outlet: a new Act initiated in 2006, and enlarged in 2007 obliges in particular the immigrants from Muslim countries to learn the Dutch language and to become familiar with Dutch society. Spijkerboer labels the rhetoric of the new

5 As to a very different topic, i.e. the unification of private law within the European Union, Smits (2007) expresses similar concerns, namely the focus on national legal cultures and the rather static nature of legal culture.

law in terms of assimilation, an evident rupture from the previous period of multiculturalism (1970-2004).

In 1996, thus before 9/11, Huntington announced the clash of the Western and the Islamic civilization.[6] Two core values of Western civilization in particular are not shared by the Islamic civilization: (1) the 'separation of spiritual and temporal authority (…) contributed immeasurably to the development of freedom in the West'; and (2) 'the tradition of the rule of law laid the basis for constitutionalism and the protection of human rights, including property rights, against the exercise of arbitrary power' (Huntington, p. 70). In the case of *Refah Partisi v. Turkey*, the ECHR agrees, saying: '(The) sharia (…) clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts' (13/02/2003, §123). The cartoons figuring the prophet in a Danish newspaper (September 2005) provoked with some delay mass demonstrations against Denmark in the Muslim world (February 2006); the Danish embassies in Damascus and Beyrouth were set on fire while the authorities were looking away, and in Teheran apart from a state organized mass demonstration a counter exhibition of cartoons making a fool of Jews and the holocaust was held.[7] This is the Islamic challenge at the level of a supranational internal legal culture. It is reflected in external legal culture at grass-roots levels of society: exogenous identity symbols make 'us' wonder what is on 'their' mind. Whatever the innocent motives for a Muslim woman to wear a veil, at least some domestic observers associate it with a world of female inferiority, arranged marriages, honour killings, and, last but not least, terrorist attacks.

The Islamic headscarf at public schools brings us to the point of departure of this exploration in the legal cultures of France and the Netherlands. School education is a sensitive area between the private sphere of the family and the public sphere of society. Every state avails itself of regulating powers here: to which extent should the state respect the negative freedom to teach and to learn in accordance with parental convictions?, and to which extent should the state guarantee the positive freedom to finance private schools on an equal footing with public schools?[8] Both of the why questions (why do the French not like headscarves, and why do the Dutch not mind headscarves?) find their answers in the historically rooted demarcation of the grey zone between the public and private sphere.[9]

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6 Civilization defined as 'the biggest "we" within which we feel culturally at home as distinguished from all other "thems" out there. (…) A civilization is thus the highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes human from other species.' (Huntington, p. 43).

7 See 'Bloody Cartoons', documentary made by Karsten Kjaer (2007).

8 Negative or liberal rights require the state not to intervene, whereas positive or welfare rights ask for state intervention.

9 It shouldn't remain unnoticed that speaking about the French dislike and the Dutch indifference assumes that internal and external legal cultures correspond with each other, with the first one taking the lead over the latter one.

Why the French don't like headscarves

The creed of the French Revolution does recognize the freedom of religion, but merely as a species of the freedom of opinion: 'No man may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not disturb the public order established by the law' (Article 10 of the *Declaration of the Rights of Man and the Citizen*, 1789). This 'atheism by establishment'[10] was a reaction to the strong position of the Roman Catholic Church in the previous period of the *Ancien Régime*.[11] Only at home and in their private communities could people cherish and practise religious loyalties and identities. The Constitution of 1795 provided for public primary schools where 'reading, writing, the principles of mathematics and of morality should be taught'. In another article the right to establish private schools was recognized, under state control however to enforce their loyalty to the republican ideals. After the turmoil of the Revolution Napoleon established a state monopoly on education. Since then, state-church relations in France can be characterized as a struggle between Republicanism and Catholicism. In the first two-thirds of the 19th century the Catholics regained most of the grey zone, only to lose it under the Third Republic (1871-1914). A major redress had to wait until the Fifth Republic (since 1958) but public and secular education would remain dominant.

Historical markers were the legal recognition of the negative freedom of education in the Constitution of the Second Republic in 1848, and the victory of Republicanism in the Third Republic.[12] The separation between state and church was officially recognized in a law of 1905. Primary education was made free of charge, compulsory and secular (*laïque*). Religious instruction was removed from the schools and became a private matter. Members of religious orders were explicitly excluded from teaching positions until 1940, even in private schools. Article 1 of the Constitution of 1958 proclaims France to be a 'secular' republic ensuring 'the equality of all citizens before the law without distinction of (…) religion'. The *Debré* Act of 1959 specifies the meaning of neutrality. First of all, the secularisation of the public schools should not be abused to criticise religious beliefs. The *laïcité* principle restricts teachers, in the sense that they are not allowed to manifest their religious beliefs. But it also protects, for example, Catholics against discrimination in the recruitment process. Public education provided for by the state is seen as the rule. As a consequence the majority of the schools in France are public. Only 15 per cent of the primary schools and 20 per cent of the secondary schools are private, predominantly Catholic.

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10 Burke's wording, in *Select Works of Edmund Burke* (Vol. 3) Letters on a Regicide Peace, 1999, p. 125.

11 Protestantism had been a considerable factor, which was recognized in the Edict of Nantes (1589), but after the repeal of this edict in 1685 many Protestants fled to Protestant countries, such as the Dutch Republic.

12 Apart from Bowen another source for France we made use of is Rivero and Moutouh (2003).

The Act of 1959 also recognizes the right to establish private educational institutions, in accordance with one's religious, philosophical and pedagogical convictions. In order to preserve its *charactère propre* (particular identity) the private school is allowed to choose educational programmes and methods of instruction. The freedom extends to the recruitment of teachers and the admission of pupils. However, this negative freedom of education is restricted in several ways. The state preserves the right to grant diplomas for private education with a public equivalent. Moreover, the instruction may not be contrary to morals, the constitution or legislation, and course material may be checked and eventually forbidden. Compliance with these obligations may be controlled by the state, which has the powers to inspect and sanction.

The bottleneck in a system of predominantly state education concerns the positive right to education at private schools. For a long time a law of 1886, which distinguished two types of primary education, i.e. a public school, funded by the public budget, and a private school, privately funded, was interpreted to exclude any subvention of private schools. Only after the Second World War did a law of 1951 reimburse school attendance irrespective of the public or private status of the school. The *Debré* Act introduced a complex system of different contracts with different financial regimes. First of all, a private school can opt for integration into the system of public education. In return for the loss of a separate identity full funding is granted. From a Dutch perspective it is remarkable that already since the State-Church Separation Act of 1905 a considerable number of Protestant schools with the support of their churches have used this opportunity. Short of full integration private schools can preserve their identity and still be eligible for extensive public funding if they provide for education in conformity with the directives of the Ministry of Education. Teachers may be recruited with an eye on the *charactère propre*, but their employer is the state. Private schools that choose this option are not allowed to select pupils according to their special identity. Another option with less strict conditions, but also more limited in public funding, is a contract that merely requires instruction in the preparation of state examinations.

In sum, what might be wrong, according to the French, with Islamic headscarves in public schools? The historical answer is that an Islamic headscarf refers to another identity than is inculcated at public schools. The mission of the public school was worded in the heydays of Republican secularism as making French citizens out of peasants. Such an ambitious programme cannot be fulfilled if pupils do not leave their other identities, regional or religious at the time of the Third Republic, at the school gate. Depending on their identity, private schools are free either to admit or to ban religious dress symbols.

The ban on headscarves fits very well with the legal tradition of *laïcité*. However, the interpretation of the Islamic headscarf as revealing a loyalty incompatible with *laïcité* was not evident at the dawn of the 21st century. In 1989 when Ayatollah Khomeini delivered his 'fatwa' against Salmon Rushdie for his novel *Satanic Verses*, three girls at a secondary school nearby Paris refused to take off their scarves in class, and were expelled on the grounds that wearing the scarves infringed on 'the *laïcité* and neutrality of the school'. While the mass media developed a minor incident into a hot item, the socialist

Minister of Education, Lionel Jospin, asked the State Council for advise. The State Council declared that religious dress symbols were not as such incompatible with the *laïcité* principle, but 'this freedom (of expression and of demonstrating religious beliefs, protected by the French constitution and the ECHR, FB/MdB) does not allow students to display signs that by their nature, by the ways they are worn individually or collectively, or by their character of ostentation or protest would constitute an act of proselytism or propaganda' (Bowen, p.86).[13]

For an adequate explanation of the ban on headscarves enacted some years later one needs Cohen's concept of moral panic when 'a condition, episode, person or groups of persons emerges to become defined as a threat to societal values and interests' (1972:9). On purpose, thus making clear that legal tradition cannot explain the new law adequately, we postpone the discussion of its socio-political origins until the end of this contribution.

Why the Dutch do not mind headscarves

With support from the new French Republic the Batavian Republic was established without bloodshed in 1795. It recognized the equality of citizens whatever their faith. That brought an end to the privileged position of the Dutch Reformed Church. The ideals of the Enlightenment were adopted but also mitigated. Especially the strong anti-clerical and anti-Christian overtones in France were absent in correspondence with the tolerant practices vis-à-vis any kind of belief. Since 1806 education is a state responsibility, delegated to the municipalities. In the beginning the guiding idea was one undivided school for all children irrespective of their parents' religious or other beliefs. The consecutive constitutions did not recognize the freedom of education until 1848, with one exception. A Royal[14] Decree of 1817 granted the right to establish Jewish primary schools, which also received subsidies from public funds (Rietveld-Van Wingerden and Miedema 2003). This exception was made to meet objections against the Christian orientation of public schools, which were expected to promote 'all social and Christian virtues'.

In reaction to the French Revolution a Protestant revival movement developed across Europe, particularly in the Netherlands. On the eve of the constitutional revision in 1848 Groen van Prinsterer published his lectures – *Unbelief and Revolution* can be regarded as the equivalent of Burke's *Reflections on the Revolution in France.* According to him freedom of education was the freedom of religion applied to children. He was in favour of a system of separate denominational *public* schools – Protestant, Roman Catholic or Jewish – as was the case in Prussia and other German states. At a minimum the freedom to establish private schools should be recognized. This is what the Constitution in

13 The two sisters Leila and Fatima with Moroccan parents were readmitted after they gave in, responding to a request of the king of Morocco on Moroccan state television. Samira with Tunesian parents sticked to her refusal and was never readmitted.

14 The Netherlands has been a kingdom since 1814.

1848 actually provided for. According to the constitutional guarantee of respecting everyone's religious beliefs in education, subsequent legislation paved the way for a dual system but shattered the hope of the Protestants that public schools would have denominational identities to the detriment of the republican idea of an undivided public education. In their view a vague mix of Christianity and Enlightenment ideas prevailed in the public schools.

After they had established their own schools the Protestants tried to obtain public funding. It took some time before the Catholics allied with them. In the predominantly Catholic areas in the south of the country, the public school already had a more or less Catholic character thanks to the instruction by nuns; it made the establishment of private schools less urgent. But in 1864 the Pope officially condemned liberalism in the encyclical letter *Quanta Cura*. As a consequence Roman Catholics were expected to send their children to specific Roman Catholic schools. Protestants and Roman Catholics now had a common cause against the liberal political establishment, which thanks to the electoral system (a majority district system) still had a majority. The liberals had strong objections against religious schools, which were seen as undermining the ideal of national unity.

The first political party in the Netherlands, the ARP (the 'Anti-Revolutionary Party'), established in 1879, made no secret of its intentions, and the 'school struggle' became a catalyst for the years to come (Diepenhorst 1927). An electoral victory of the orthodox Protestants and Roman Catholics over the liberals occasioned a new law in 1889, which provided for some public funding for private schools. At the end of the 19th and the early beginning of the 20th century the so-called 'pillarization' (*verzuiling*, see Lijphart 1968) took shape. Political parties and trade unions, schools and universities, broadcasting companies, hospitals and sectors of business life were aligned with the Protestant, the Catholic, the Liberal or the Socialist 'pillar'. Each pillar had its own elite that maintained moral and social control within, and contact at grass-roots level was restricted to a minimum.[15] The package deal with lasting effects that was concluded in 1917 (the so-called Pacification) consisted of the following exchange of issues: universal suffrage in exchange for a change in the electoral system (from a 'first past the post' system into proportional representation) and state funding for private schools on an equal footing with public schools in return for quality control on behalf of the state. The liberal stronghold based on limited suffrage in conjunction with the district majority system in elections collapsed.

It is worthwhile discussing key aspects of religious pluralism by taking a closer look at relevant sections of Article 23 of the Dutch Constitution,[16] the main result of the Pacification:

15 Still in 1954 an episcopal letter warned Catholics not to join the socialist trade union, and in general to keep away from the socialist pillar.

16 Source: htpp://confinder.richmond.edu (official translation).

1. (…)
2. All persons shall be free to provide education, without prejudice to the authorities' right of supervision, and with regard to forms of education designated by law, their right to examine the competence and moral integrity of teachers, to be regulated by Act of Parliament.
3. Education provided by public authorities shall be regulated by Act of Parliament, paying due respect to everyone's religion or belief.
4. The authorities shall ensure that primary education is provided in a sufficient number of public authority schools in every municipality. (…)
5. The standards required of schools financed either in part or in full from public funds shall be regulated by Act of Parliament, with due regard, in the case of private schools, to the freedom to provide education according to religious or other belief.
6. The requirements for private education shall be such that the standards both of private schools fully financed from public funds and of public authority schools are fully guaranteed. The relevant provisions shall respect in particular the freedom of private schools to choose their teaching aids and to appoint teachers as they see fit.
7. Private primary schools that satisfy the conditions laid down by Act of Parliament shall be financed from public funds according to the same standards as public-authority schools. (…)

The clause 'due respect to everyone's religion or belief' in section 3 of Article 23 prohibits the imposition of a state religion or republican ideology in public education – the opposite of the French situation. Moreover, the interpretation of the clause 'due respect to everyone's religion or belief' has developed from passive neutrality into active pluralism: schools are obliged to pay attention to the religions and belief systems in Dutch society. Public schools may even allow religious practices, such as praying, at school. It goes without saying that wearing the Islamic headscarf falls within the scope of this clause. Public schools are also obliged to allow teachers to wear a headscarf. But teachers at public schools have to respect the public character redefined as the pluralism of religions and other world views, in other words they are not supposed to proselytise, a ground for dismissal. Like in France, public schools in the Netherlands are not allowed to discriminate according to religion in the selection of teachers.

Whereas public schools have to admit all pupils who are qualified regardless of parental convictions, private schools are allowed to have their own admission policy in accordance with their particular identity. In the *Maimonides* case the Supreme Court upheld the freedom of the board of an orthodox Jewish secondary school to refuse to admit a boy who, according to the Jewish religion, could not be qualified as Jewish.[17] Section 6 allows private educational institutions to select their employees on the basis of their religion or belief. They may require, for example, the active membership of a specific denomination or church. If teachers change their religion private schools are free to dismiss them. Section 5 is the triumph of the Christian parties and in

17 Hoge Raad (Supreme Court) 22 January 1988, NJ 1988, 891, *Netherlands Yearbook of International Law* Vol. XXII (1991) 410-415.

connection with section 7 a bone of contention with the liberals. Private schools fully financed by the public budget, for example, are free to teach pupils the biblical account of creation as truth and the Darwinian evolution theory as false. The former Member of Parliament, Ms Ayaan Hirsi Ali, and other liberals, think that Article 23 makes the Netherlands vulnerable to the Islamic challenge: the State has almost no rights to intervene when Muslims start establishing their own schools with their own teachings (and prescribing that their female pupils must wear a headscarf).[18] A prominent participant in this debate is the philosopher (and atheist) Philipse, who refers to the French *laïcité* as the ideal situation.[19]

What is on paper a dual system (Zoontjens 2003) is in reality a preponderantly private system financed by the public budget. Up to the university level – only three of the twelve universities are private institutions – the private schools outnumber the public schools by two thirds to one third. A recent development is a so-called cooperation school, a mix of public and private status. Compared to France the situation in the Netherlands can be summarized as – almost – anything goes.

The foregoing has ascertained two different legal traditions, *laïcité* for France and religious pluralism for the Netherlands. In the next section we try to corroborate them in a non-historical way, namely by making use of the culture studies of Hofstede and Hofstede (2005).

Cultures and identities, institutions and traditions

When Bowen's interviewees 'justify the contemporary by reference to the past' (p. 13) they confirm that 'culture reproduces itself' (H&H, p. 9). After the subtitle culture is the 'software of the mind'. Culture works as a self-fulfilling prophesy.

> Within nations that have existed for some time there are strong forces toward further integration: (usually) one dominant national language, common mass media, a national education system, a national army, a national political system, national representation in sports events with a strong symbolic and emotional appeal, a national market for certain skills, products, and services. (H&H, p. 18).

In their view the dominant national culture becomes institutionalised in the organization of society, the polity, and the legal system, thus creating path dependence which makes some outcomes more probable than others. Legal traditions and specific laws are culturally embedded in society. According to

18 In 2007 40 elementary and two secondary schools with an Islamic identity are fully financed.

19 H. Philipse, 'Pleidooi voor een nieuwe schoolstrijd', *NRC Handelsblad* 18-12-2003. He was consulted by the French State Committee, which prepared the way for the new law.

the data of Hofstede and Hofstede France and the Netherlands are both individualist[20] countries but on all other cultural accounts they are very different.

An empirically substantiated cultural framework is thus added to the historical account of opposite legal traditions. In the following we comment on the relevance of the four cultural dimensions regarding the Muslim immigration.

Table 1: Cultural Profile of France and the Netherlands

Index	France	Netherlands
Power Distance Index (PDI)	68	38
Individualism (IDV)	71	80
Masculinity Index (MAS)	43	14
Uncertainty Avoidance Index (UAI)	86	53

- 'Power distance can be defined as the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally. Institutions are the basic elements of society, such as the family, the school, and the community (and the state, MdB/FB); organizations are the places where people work'. (H&H, p.46).

  Whereas France with a high PDI has protected the values of republicanism and secularism in Article 1 of the Constitution, the Netherlands with a low PDI has protected the freedom of education as a fundamental aspect of the parental freedom of religion in Article 23 of the Constitution. Bowen raises the question why the French have opted for the top-down instrument of a statute. His answer corresponds with the high PDI of France (Bowen, p. 243): '(O)nly a law would send a powerful message to Islamists. French political thinkers and actors long have conceived of laws as ways to teach the French people moral lessons.' Corresponding with the low PDI of the Netherlands the Dutch Ministry of Education has published a non-binding guideline concerning symbolic clothing on its website.[21]
- 'A society is called feminine when emotional gender roles overlap: both men and women are supposed to be modest, tender, and concerned with the quality of life' (H&H, p. 120). After Sweden (MAS index of 5) and Norway (MAS index of 8) the Netherlands follow suit.

  Loenen (2007) wonders why 'notions of female inferiority and inequality never have played a major role in Dutch case law' in contrast to the debate in France and in the case law of the ECHR. The answer in line with the findings of H&H might be that a feminine culture is a permissive, not a corrective culture. Immigrants should integrate, but there is no need for them to assimilate. Schools are key institutions in this integration process, and a feminine culture strongly believes that pupils need their identity symbols to feel safe and

20 'Individualism pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family' (H&H, p.76).

21 *Leidraad Kleding op scholen*, see www.minocw.nl. Article 1 of the Dutch Constitution concerns the equal treatment of everybody, which also reflects a low PDI index.

secure. A feminine culture draws the line elsewhere, namely if identity symbols could be taken as hate acts or if they make non-verbal communication impossible, as is the case with the *niqab* or *burqa*, covering the entire body except for a slit and gauze to see, respectively.

- 'Uncertainty avoidance can be defined as the extent to which the members of a culture feel threatened by ambiguous or unknown situations. This feeling is, among other things, expressed (…) in a need for predictability: a need for written and unwritten rules'. (H&H, p.167). Some relevant statements in the tables 5.2-5.6 of H&H are repeated in table 2. The proverbial taxi driver who informs foreign journalists all over the world connects the French ban on wearing headscarves in schools with a high UAI, as follows:

> The taxi driver railed against the politicians: 'It is what the French always do: if there is a problem they pass laws, even if no one respects it. They did that to ban pit bulls, but no one cares! What idiocy! If they come to school with their voile let them leave and take correspondence courses: that's all, what idiocy!' (Bowen, p.136).

Table 2: Key Differences between Weak and Strong Uncertainty Avoidance Societies

Weak Uncertainty Avoidance	Strong Uncertainty Avoidance
There should be no more rules than strictly necessary	There is an emotional need for rules, even if these will not work
If laws cannot be respected, they should be changed	Laws are necessary, even if they cannot be respected
There is a tolerance for ambiguity and chaos	There is a need for precision and formalization
Focus on decision process	Focus on decision content
Citizens trust politicians, civil servants, and the legal system	Citizens are negative toward politicians, civil servants, and the legal system
Similar modes of address for different others	Different modes of address for different others
Lenient rules for children on what is dirty and taboo	Firm rules for children on what is dirty and taboo
Tolerance, even of extreme ideas	Conservatism, law and order
More ethnic tolerance	More ethnic prejudice
Positive or neutral toward foreigners	Xenophobia
One religion's truth should not be imposed on others	In religion, there is only one Truth and we have it

What happens to people who leave their native country and move to a completely different environment? 'They have to learn a new language, but a much larger problem is that they have to function in a new culture' (H&H, p.335). Migrant workers, and the ensuing chain migration of their extended families and entire villages in the rural areas in the Mediterranean countries come from collectivist cultures, defined as communities 'in which people from birth onward are integrated into strong, cohesive in-groups, which throughout people's life times continue to protect them in exchange for unquestioning loyalty' (H&H, p. 76). They cannot but experience a culture shock in individualist countries such as France and the Netherlands. At first sight and with the issue of the Islamic headscarf in public schools in mind, the Netherlands might seem more hospitable to the Muslim religion than France, but the feminine society

rejects masculine attitudes and practices associated with it.[22] A prize-winning article, entitled 'The Reluctant Acceptance of Muslims in the Netherlands', reveals on the basis of a sophisticated statistical analysis of surveys among Dutch respondents as well as among Turkish and Moroccan Muslims that both groups agree that they disagree on attitudes and practices regarding relations between husband and wife, and parents and children. 'Our results (among the Dutch respondents, MdB/FB) show that taking exception to Muslim immigrants is a major impetus, in and of itself, to support for a strict immigration policy' (Sniderman 2003, p.199).

Whereas the dominant culture is expressed in national institutions and legal traditions subcultures are reflected in lifestyles of mentality or identity groups. In the words of Hofstede and Hofstede:

> Identity answers the question 'To which group do I belong?'. It is often rooted in language and/or religious affiliation, and it is perceived and felt both by the holders of the identity and by the environment that does not share it. (…) Identities can shift over a person's lifetime, as happens to many successful migrants. (H&H, p.322).

Given the visible presence of Muslim migrants and their families, preponderantly in the suburbs and run-down city quarters, national identity has become an issue in both France and the Netherlands. If identity is about group loyalty and if group loyalties are reflected in lifestyles, symbols such as the Islamic headscarf are taken seriously. The French ban on headscarves is a ban on a symbol that reveals an identity and a concomitant loyalty considered incompatible with secularism. In a similar vein, in 2007 the PVV, an anti-Islam party[23], openly questioned the loyalty to the Netherlands of two deputy ministers of the new administration because they had, apart from a Dutch passport, also a Moroccan and a Turkish passport respectively. Loyalties might be inferred from symbols revealing identities in various ways but there is only one nationalist and populist interpretation.

The Islamic challenge and the populist rejection

The electorate in the established democracies of Europe consists of three distinct parts. The conservative voter sees society as a community of values, preferably constrained by a paternalist and moralist state. The cultural profile is masculine with a great need for uncertainty avoidance. The liberal voter adheres to limited government, individualism, competition and the market. 'There is no such thing as society', Mrs Thatcher, the UK's Prime Minister from 1979 until 1990, is supposed to have said. The cultural profile is mascu-

22 H&H provide the following scores for Morocco and Turkey – the only two Mediterranean countries on which they have data: *Morocco*: PDI:70; IDV:46; MAS:53; UAI:68; *Turkey*: PDI:66; IDV: 37; MAS:45; UAI:85.

23 The PVV (Freedom Party, a split-off from the liberal VVD (People's Party for Freedom and Democracy) obtained nine of the 150 seats in Parliament after the elections in 2006.

line, and uncertainty is seen as a fact of life (low UAI). The socialist voter prefers social solidarity to market competition, and a welfare state to limited government. The cultural profile is feminine with a great need for uncertainty avoidance.

When the dark horse of nationalism and populism enters the scene, everything changes. The electoral strategy of nationalist and populist politicians is a mix of masculine law and order with an appeal to national identity in order to fulfil the need of uncertainty avoidance. Large parts of the conservative electorate are persuaded by the assertive rephrasing of traditional values, many liberal voters easily substitute the simple message of law and order for the more complicated twins of the rule of law and individual rights, and quite a few socialist voters think that job security is better preserved when migrants are kept out. Populism relies on the charisma of the leader, the so-called X-factor, bypassing procedures and laws.[24] Against this background the 'no' vote against the draft constitution of the European Union in France and the Netherlands in 2005 did not come as a surprise after all. The trump card of uncertainty about Turkey's candidacy to the EU, officially a secular state but a Muslim society, was successfully played, and embarrassed the liberal and the socialist politicians.

Our account of the recent history of nationalist and populist politics in both countries begins a few years earlier, in 2002. Socio-legal scholars should take an interest in politics because politicians decide about the laws to be made. The ban on wearing headscarves in France and the compulsory course of Dutch language and culture can only be explained as a moral panic created by nationalist and populist politicians. In order to remain in power other politicians feel forced to pay attention to the 'emotional need for rules even if these will not work' (see table 2, supra).

The shock of April 21st

Not the socialist candidate Jospin (16%), but the nationalist Le Pen (16,8%) of the *Front National* was the opponent of the conservative Chirac in the second round of the presidential elections on April 21st 2002. It shocked the French, and almost on the same date one year later, Nicolas Sarkozy, the Minister of the Interior at the time, addressed a huge annual meeting of Muslims. In 'my reply to April 21st', he pleaded for French-speaking imams, 'perfectly integrated into the Republic', and took a firm position regarding identity card photographs of Muslim women, with their heads uncovered, of course, adding: 'nothing would justify women of the Muslim confession enjoying a different law' (Bowen, p.102).[25] Later that year President Chirac appointed a commission of 19 members to report on *laïcité* issues. At one of its hearings Sarkozy, as a newborn

24 Agreement with the statement 'We need strong leaders and less rules' decreased in the Netherlands from 65% in 1970 to about 30% in 1996 and 2000, only to increase very quickly to almost 60% in 2004. This finding in particular made Motivaction predict the success of Fortuyn.

25 A Dutch by-law requires a photograph with 'the head uncovered except for religious or medical reasons. The face should be visible, however.'

Frenchman fully socialized into republican values, expressed his amazement about the Islamic garments at the gathering in April: 'I was struck by the fact that many of these young women with scarves were at university, were born in France, and why then the need to caricature their identity?' (p.120). But he was opposed to a ban because he feared adverse consequences, and upholding *laïcité* did not require a dress code. The commission, however, thought otherwise. With one abstention all other 18 members recommended a ban on the Islamic headscarf at public schools.[26] Why?

> Both in their public comments and in discussions with me, they tended to converge on one major reason: that those who had testified had agreed that things had gotten terribly out of hand in some of France's schools, and that something had to be done. (…) In its very choice of persons to hear and questions to pose, the commissioners suggested – in the manner of television hosts assembling topics and people for a talk show – a set of causal links among the voile, Islam, violence against women, and a breakdown of order in schools. (Bowen, p.113 and p.116).

A moral panic took hold, and with the testimony of Judge Costa, the French judge at the European Court of Human Rights, in mind ('only an Act of Parliament will do'), President Chirac had the final say in December 2003: wearing the voile is 'a kind of aggression that is difficult for the French to accept', a more outspoken reply to the April 21st shock than the Interior Minister, his political rival at the time, had uttered. Despite three major demonstrations on the streets the legislative process went on smoothly: left and right agreed that republican values were at stake. The new law has rooted very well: one year after the enactment the Ministry of Education reported that only 47 pupils had been expelled from school because of their refusal to remove religious signs, and 96 pupils had left public schools because of the ban, but 550 incidents had been resolved through dialogue (Bowen, p.151).

The Interior Minister Sarkozy was given another chance to prove his presidential capacities when ethnic-related violence occurred in the suburbs of the big cities in October 2005. His tough law and order position was highly appreciated by the conservative and nationalist electorate. He won the presidential elections in 2007, and invited prominent politicians from the left, and Muslims – heads uncovered of course – to take part in his project to modernize France along Anglo-American lines. Moreover, a new Ministry of Immigration, Integration and National Identity has been established, headed by a political friend of his.

The Fortuyn revolt

After eight years of purple cabinets (1994-2002, a merger of – red – socialism and – blue – liberalism) an outsider by the name of Pim Fortuyn sensed it was time for a radical change. Two book titles set the tone: 'De islamisering van onze cultuur' (2001, The Islamization of our Culture) and 'De puinhopen van

26 Commision de réflexion sur l'application du principe de laïcité dans la République, *Rapport au Président de la République,* 2003 (Stasi-report).

acht jaar paars' (2002, The Debris of Eight Years of Purple Administration). He had joined forces with a new party but was kicked out after his derogatory remarks about the Islam ('a backward religion') in an interview with a daily newspaper (February 2002). Concomitant with the increasing popularity of his controversial and libertarian statements, the established political parties became nervous, especially after his success in the elections for the municipality council of Rotterdam (17 of the 45 seats, March). Fortuyn was assassinated on the 6th of May 2002 by an animal rights activist who thought he was too much of a risk to stay alive. Fortuyn's party, starting from scratch and now without a leader, won a landslide victory on May 15 (26 seats in Parliament, corresponding to 17 per cent of the electorate). The electoral support came from mainly two sources: the Dutch lower classes in the destitute quarters of the larger cities who find a scapegoat in Muslim migrants and the middle classes in the suburban areas who, despite their material well-being, feel insecure and anxious about the future. The communication firm Motivaction, mentioned above, has suggested a new explanatory variable of voting behaviour, namely mentality groups with corresponding lifestyles, at the expense of – time-honoured in political sociology – socio-economic status. Motivaction discovered an overrepresentation of rebellious conservatism (36%) among the Fortuyn voters. They are status-concerned consumers in an uneasy balance between tradition and hedonism. With his explicit libertarian and exhibitionist life style (gay, two puppies, a chauffeur and a butler) Fortuyn appealed to them.

Balkenende, the young and inexperienced party leader of the Christian democrats, became the Prime Minister of a coalition with the new party (LPF, the Pim Fortuyn List) and the liberal-conservative VVD. The new party imploded shortly afterwards, and new elections (22/01/2003) reduced the LPF to 8 seats in Parliament. At first sight the familiar pattern of consensus building was restored with a new coalition of Christian democrats (44 seats) with the VVD (28 seats) and the neo-liberal party D66 (6 seats).[27] The nationalist and populist niche was now taken by the new VVD Minister of Integration and Alien Affairs, Mrs Verdonk, a former prison director. Her nickname, Iron Rita, is a token of an intransigent approach to asylum seekers, the fuss she made when an imam of a mosque she visited refused to shake hands, and her speech after the assassination of the film director Theo van Gogh by a Muslim fundamentalist.[28]

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27 Efforts to build a more evident coalition of Christian democrats with the Labour party (PvdA, 42 seats) failed because the new generation of Christian politicians want something more than power. After the no-nonsense and pragmatic administrations of Prime Minister Lubbers (Christian democrat as well, 1982-1994), a new generation worded their mission while in opposition during the purple coalition. They want to change Dutch society into a community of (Christian) values. In these circumstances it is better to make coalitions with weak partners who cannot spoil the project than with a strong partner who can (see for this analysis Leijnse, in Becker et al., 2006, pp.78-100).

28 Van Gogh had made a short film about the subordinate position of women in the Muslim religion, entitled *Submission*, in close concert with Ms Ayaan Hirsi Ali, at the time a MP of Somali origin.

Because the neo-liberals retreated from the coalition due to the diffuse and slippery involvement of the Netherlands in Iraq, new elections were needed, and they took place in November 2006. A new coalition of Christian democrats (41 seats), Labour (33 seats), and the small orthodox Christian Union (6 seats) has assumed power with a communitarian and paternalistic mission. A minister from the Labour party has been assigned with integration affairs in the context of housing and city quarters, and so a meaningful reframing of the issue of integration in terms of communitarianism is back again. After her speculation in an interview with a newspaper that in 'another two centuries or so' Dutch culture might consist of Jewish, Christian *and* Islamic traditions, the MP Wilders called her 'completely crazy', and provoked the VVD to reproach her for a 'cultural relativism unheard of'.[29]

The Islamic headscarf in schools is not an issue in the Netherlands because of the constitutional protection. However, a veiled law student who applied for a position as clerk to the court passed the test of the Commission on Equal Treatment but the advisory opinion of the Commission was rejected by the Minister of Justice (just before 9/11), thus making clear that court officials in their contacts with the public are required to radiate absolute neutrality. In a dispute about visiting rights in October 2003 a district court denied access to a woman wearing a *niqab*, reasoning that non-verbal communication is a necessary part of the administration of justice. And in December 2005 Parliament adopted the recommendation by the MP Wilders to prohibit the wearing of the *burqa* in public. Despite the legal objections of a state commission, he took the initiative to propose a bill in 2007.[30]

The easy going and pragmatic way of dealing with other life styles has lost terrain. The best example is a discriminatory and leaky law that requires immigrants from Muslim countries to pass an exam in Dutch language and culture. Despite their lack of the Dutch language citizens of other EU member states are exempted, and the law neither does apply to citizens of Switzerland, Norway, Iceland, Canada, the USA, Australia, New Zealand and Japan, who ask for a permanent residence permit. The law assumes apparently that citizens from the triple A category of nation states have been immersed enough in the civics of the rule of law, individual rights, democracy, and the separation between church and state, in order to master the conduct codes in Dutch society on their own. As Iron Rita explained the rationale of the bill:

> The risks of cultivating one's own identity for the social cohesion of society have been underestimated. Instead of acceptance of cultural diversity the emphasis must be on what we share: the Dutch language, the core values and the social norms we think everybody should respect. (…) A lack of integration may lead to marginalisation and segregation, which consequently may make people

29 Mrs Verdonk, number 2 on the list of the VVD, obtained more votes than the party leader, and the ensuing contest with her putting pressure on the party leader by direct appeals to the public ended in September 2007 when she was removed from the parliamentary party group. At the moment of writing she is an independent MP. In an interview she mentioned Sarkozy as her role model, by the way.

30 See Loenen (2007) for an extensive review of Islamic dress in Dutch law.

> turn their back to modern society and adhere to traditional values. Non-integrated migrants may develop anti western attitudes. (Paraphrase of original source in Spijkerboer, p.30; FB/MdB).

All statements in the second column of table 2 signalling a high UAI are relevant here.[31] Only one MP disagreed, thus revealing an almost unanimous concern in Parliament about the Islamic challenge to Dutch society. One year after the enactment, in Fall 2007, it turned out however that the implementation and the enforcement of the new requirement have failed completely. In a typical Dutch style the migrants have adapted, in wait of a less masculine (the threat of sanctions if you fail the exam) and more paternalistic approach of the new administration.

We are now in the position to assess the consequences of the nationalist and populist wave, in itself a vulgar reaction to the influx of Muslim migrants. As the parliamentary support for stable coalitions is diminishing and a 'cordon sanitaire' like in Belgium for controlling the nationalist party groups in Parliament is controversial, consensual policymaking ('Beleid in de polder', Bruinsma 2003, ch.6) has become difficult in the Netherlands. In France the presidential system amplifies the power base of policymaking. In addition, it was a clever move by the new President to take not only political friends on board, thus suggesting a mission of national urgency. The programme is similar to the programme of the Dutch purple coalition, reorganizing state and society according to the neo-liberal precepts of law and economics. Its masculinity fits very well with a law and order approach, satisfying the need for uncertainty avoidance. The labels of the new ministries that deal with integration issues make clear that President Sarkozy believes that migrants should adopt a new national identity compatible with all kinds of religions, and that the Balkenende IV administration does not believe that loyalties can be enforced. One can only hope for the best if migrants feel happy in Dutch society; some basic knowledge of the language and the culture might help.

Conclusion

'Law cannot be understood without its context, but law is not reducible to that context' (Bottomley and Bronitt 2006:v). Legal scholars and legal historians prefer the historical context, which is nearest to law in the books. The different approach to the Islamic headscarf at public schools corresponds with the historically developed constitutional self-understanding of church-state relations: pluralism in the Netherlands and *laïcité* in France. This shortcut might do in constitutional law and legal history, but it ignores the fact that the Islamic headscarf is seen in both countries as an exogenous identity symbol of the Muslim immigrant. The wider context appeals to socio-legal scholars. The Islamic challenge at the all but symbolic level of the 9/11 attacks in 2001, and the subsequent bombings in Bali in 2002, in Madrid in 2004, and in London in 2005

31 Inclusive of the last one considering that the constitutional values of western civilization are a kind of secular religion.

are part of that context, just like the *fatwa* against Rushdie in 1989, the assassination of Van Gogh in 2004, and the cartoon war in 2006. Anti terrorism legislation and the moral panics in France and the Netherlands resulting in restrictive legislation vis-à-vis the Muslim immigrants are in the same category of localized globalism. 'Localized globalism occurs when laws, structures and practices within a local system change or adapt in response to influences from outside that nation state' (Bottomley and Bronitt, p.400). Since the world has changed in a global village the nation state is no longer in charge of its own law-making agenda. Domestic elites are very well aware of this fact and embrace a postmodern cosmopolitism. When the WRR, the think tank of the Dutch government, emphasized the personal choice in loyalties and corresponding identity symbols, Princess Máxima, the wife of the heir of the throne, delivered a speech. 'I found out that there is no such thing as a Dutch identity', she said, 'National identities do not exist. People identify themselves in different settings with different loyalties.' She referred to a small signpost in front of the palace with the distances to her identities: Buenos Aires (her country of origin, she still has a passport of Argentina), New York and Brussels (cities where she worked), and Den Haag (administrative centre of her second nationality).[32] Leaving aside that most people do not have a palace and a personal signpost, nor working experience abroad, coping with different identities and loyalties asks for a certain level of individual autonomy, which is not widespread among the population at large. They are lured by the nationalist and populist voice of rebellious conservatism.

Last but not least we conclude that socio-legal scholars with an interest in comparative legal cultures might enrich their research by paying attention to the political parameters of the law-making process as well as to cultural dimensions less focused on the legal system – even if one thinks like the authors do that path dependent legal traditions and national institutions are strong enough to hold off volatile movements of mentality groups.

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Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions

Martin Klamt

Introduction

Si vis pacem, para bellum,[1] a Roman aphorism says. In a way, it is the key to the concept of Militant Democracy: if democracy is to be upheld, it has to be defended. And an effective defence is not possible without proper weapons, instruments, strategies, and without knowing what exactly is to be defended. Such instruments are often legally based on the constitution of a country. Although militancy and war are more likely to be associated with autocratic systems, a true, substantive (and not only formal) constitutional democracy actually seeks to prevent these by means of the attributes of Militant Democracy.

A first basic constitutional distinction concerns the characterisation either as an *autocratic regime* by 'the existence of a single power holder who […] is beyond effective controls' or as a *constitutional democracy* by 'several independent power holders among whom the exercise of political power is constitutionally distributed and who are required to co-operate' (Loewenstein 1957: 53, 70). Not only constitutional democracies may obtain different forms, autocracy is also further specifiable. Under an *authoritarian regime*, political power is monopolised and excludes the power addressees from participation, but formalises the power configuration often in a written constitution (ibid.: 56). In contrast to that, *totalitarian regimes* operate by techniques of command and obedience and try to penetrate the whole state society by their ideology (ibid.: 58).

The main question is therefore the following: In a democratic system, should fire be fought with fire? 'Yes, and it must be fought with fire', would be the answer according to Karl Loewenstein (1891-1973), a Jewish German constitutional lawyer. In 1935 he coined the term of Militant Democracy (Loewenstein 1935: 593).[2] He received much more attention with another essay, published in 1937 under the title *Militant Democracy and Fundamental Rights* (Loewenstein 1937: 417ff., 638ff.). Since then Loewenstein's work has become acknowledged as the theoretical foundation of the concept of Militant Democracy.

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1 If you want peace, prepare for war.

2 It should be mentioned that the German terms 'Streitbare' or 'Wehrhafte Demokratie' are semantically different from the English word 'militant' as they rather express a defensive than a militant or aggressive meaning. Nevertheless, the English term 'Militant Democracy' is nowadays used as a standard.

His conception was strongly influenced by the upsurge in fascism and dictatorships not only in Germany but all across inter-war Europe, and finally the outbreak of the Second World War of the 'free world' against totalitarianism. The young scholar, with a thesis on constitutional amendment procedures, was also personally affected by the political success of the Nazis due to his Jewish origin and had to emigrate to the USA in 1933. After teaching at Yale and Amherst and being the advisor of the US military government in Germany after World War Two he returned to Munich University as a professor in 1956 where he after a short period of time retired.

Moved by these political and personal events, his concept of Militant Democracy aimed at an effective defence of democracy. In his two-part essay on *Militant Democracy and Fundamental Rights*, Loewenstein referred to the problem of democratic relativism. He criticised the tolerance towards abolishing democracy by its own means for the purpose of avoiding a self-denial or in his own words 'self-abnegation' of democracy (1937: 423). In his opinion, such practice resulted in the situation where 'under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally' (ibid.). This accurate analysis leads to the consequence that democracy had to disavow its democratic fundamentalism and had to effectively resist its enemies: 'fire is fought with fire' (ibid.: 656). For this reason, democracy had to become militant. Its weapons should be the consistent implementation of criminal law, restrictions on the freedom of opinion, on the freedom of association and assembly of anti-democratic movements, the prohibition of anti-constitutional political parties, uniforms and paramilitary structures, exclusion from access to public offices and, finally, even the loss of citizenship (cf. Papier and Durner 2003: 346). Despite the fact that the implementation of these instruments could end up in the loss of the liberal heritage of constitutional democracy (Pfersmann 2004: 53), Loewenstein argues for not only a defending kind of democracy but for a really militant one, 'even at the risk and cost of violating fundamental principles' (1937: 432).

Karl Loewenstein has especially contributed to the theoretical and empirical foundation of the concept of Militant Democracy[3]: a constitutional core that had to be upheld and defended against antidemocratic movements by legal instruments as well as by the people's attitude towards democracy and its liberties. It especially seeks to limit the power of the enemy *within* the democratic constitutional order so that democracy could not be overthrown by using democratic means. In other words, there should be no 'Trojan horse' for the enemies of the democratic constitution (Loewenstein 1937: 424). Ever since the concept has been challenged not only by the (potential) enemies of democracy, but also by adherents to the concept of liberal democracy itself: if democracy is a concept of freedom that guarantees the rights of the individual, then how can it restrict these rights in the name of freedom, even if it is challenged existentially by enemies? This question is generally called the *democratic dilemma*.

3 Other theoretical precursors we find mainly in the first half of the 20th century in Germany, the USA and Great Britain (Boventer 1985: 45ff.).

Some of the legal instruments of Militant Democracy surely restrict fundamental rights.[4] But, these restrictions only serve to guarantee a democratic constitution: *Militant Democracy* does not tolerate its own abolition. The 'militancy' of this kind of democracy only serves as an instrument and ought never to be abused to limit fundamental rights for other, e.g. ideological, purposes.[5] Still, and despite a series of present challenges that indicate the current relevance of Militant Democracy (see Capoccia 2001: 452ff.; McKlem 2005), the concept in its European development is 'largely understudied in a comparative perspective' (Capoccia 2001: 435). The purpose of this chapter is therefore to focus on a comparison of the elements of Militant Democracy in six different democratic constitutions in European countries that have experienced a similar historical background with dictatorship.

The case of Germany will be the starting point of the comparison as it is known to have implemented a fairly explicit conception of Militant Democracy in its constitution. For this reason, the German author does *not* 'take for granted that [his] own constitution is the theoretical pivot point of the legal world' (Scheppele 2004: 392). Choosing German constitutional law and the corresponding jurisdiction as an introduction for the comparison is rather deliberately based on the specific relationship between the site and the questions asked of it (ibid.: 394) as the German case is appropriate to exemplify the concept as a current constitutional crystallization.

After this start the comparison will then concentrate on the constitutions of two groups of countries, each with a similar historical experience of an autocratic regime. The original idea of the constitution was to provide an order for the political sphere, and later on, to organise and tame the state powers and to strengthen the rights of the individual. But of course the development of a constitution in its specific form depends on and is influenced by a whole series of factors, which cannot all truly be examined. There are (at least) three main factors that affect the creation of a modern constitution, i.e. history, the cultural and political context, and the constellation of actors having an effect on the 'design' of the constitution (cf. Kimmel 2005: IX). This chapter focuses on constitutional history and its influence on constitutional outcomes referring to Militant Democracy. Therefore, the constitutional history of the countries has also to be taken into account.

The constitutional comparison will focus on two aspects: firstly, on the constitutional protection of a democratic core, and secondly, on the constitutional possibilities to restrict political parties and movements and to restrict fundamental rights. I thereby introduce the term of 'democratic identity' to indicate the specific ways in which democratic constitutions can be protected: identity informs about the character of constitutive essentials (i.e. the constitutional core) as well as by defining and demarcating them from others (i.e. constitutional provisions for defending democracy against its enemies). For this reason,

4 The concept has also been criticised as serving as an ideological instrument of the political elite in power to arbitrarily pursue a policy of restraining opponents.

5 In a sense, of course, the proclaimed duty to defend und uphold democracy is also quite close to an ideology.

I think that a concept of Militant Democracy is a typical feature of the 'identity' of a democracy and its constitutional order, in other words of the democratic legal culture. On this basis, the role of history, the constitutional differences of the countries and the influence that the constitutions exerted on each other shall be discussed. At the end, I suggest how an updated approach of Militant Democracy could be useful for current challenges and the appraisal of antiterrorism legislation.

Following upon the previous remarks, the concept of Militant Democracy and especially its legal manifestation is not acknowledged everywhere. This relates to different legal cultures in Europe concerning the very character of democracy and how it should be protected by constitutional law.[6] If even litigation is seen as essentially democratic in the USA and as antidemocratic in France (Nelken 2007) it is very probable indeed that a restriction of fundamental rights by a militant form of democracy is a controversial issue.

Against this theoretical background, questions asked are, what were the consequences for German constitutional law and how did other European constitutions react to a history of dictatorship and the idea of Militant Democracy? After Loewenstein's comparative analysis of different European constitutions, democracy has been faced with another 70 turbulent years. Mirroring these changes we might ask what the situation of Militant Democracy is today, we might ask whether fire has been fought with fire in fact and, more fundamentally, whether according to European constitutions it has to be fought with fire now and in the future. As Pfersmann put it: 'democracies are always *more or less* militant' (2004: 53), but then it has to be examined whether and to what extent different constitutional orders have installed a Militant Democracy.

Constitutional outcomes in Germany

Loewenstein and others had developed their thoughts in reaction to the political developments in Germany. Although there were some legal instruments to protect the democratic constitution,[7] the Weimar Republic could not effectively prevent the Nazis from seizing political power and turning democracy into a dictatorship. This occurred because of a series of reasons, a relevant one in this context was that that there had *deliberately* been no specific instruments to defend democracy on a constitutional level (Papier and Durner 2003: 340). Hence, that kind of 'democratic legal culture'[8] aimed at a quite open liberal system of constitutional law, which actually precluded an effective defence or even a militant kind of democracy. Instead, it promoted deep relativism.

The German constitution of 1949, the *German Basic Law* ('Grundgesetz'), and, as we will see other European constitutions as well, were in a way reactions to the experience of dictatorship. Against the background of that history,

6 It also closely relates to the topic of a *geography of law*.

7 For instance, the Nazi party (NSDAP) had been prohibited by law in Prussia in 1922 and throughout the German Reich in November 1923, but was allowed to be refounded in February 1925. From then onwards, the Prussian political police kept an eye on the activities of the party until 1932.

8 Capoccia uses the term 'democratic culture and practices' (2001: 452).

the Federal Republic of Germany included a concept of Militant Democracy in its constitution. Also the power constellation strongly influenced the creation of the new German constitution. In fact, Germany, Austria and partly also Italy were countries under military rule of the Allied Powers. In particular the USA influenced the democratic development in Germany, e.g. by measures of 'de-nazification' and 're-education' of the German population. Regarding the constitutional process, the Western allies promoted the establishment of a federal and democratic constitution. German political actors tried to avoid a definitive separation of the occupied military sectors Germany had been divided in. To that end the draft constitution was called a temporary solution: 'Grundgesetz', Basic Law – not constitution (*Verfassung*). The founding fathers[9] of the new German Basic Law were convinced that there had to be consensus on certain foundations of the constitutional order. These foundations, i.e. among others especially the democratic principle, were to be protected by constitutional law. Accordingly the German Grundgesetz of 1949 shows a clear rejection of totalitarianism as well as of democratic relativism, which was regarded as one of the main reasons for the success of the Nazis. A minimum consensus as to the democratic order had to be guaranteed. At the same time an open pluralistic political debate had to be accepted and promoted. Consequently, two key points of German constitutional law were established:

Firstly, the central principles of the constitution are excluded from any modification. According to Arts. 79 (3), 1, 20, there is no possibility to abolish the constitutionally guaranteed protection of human dignity nor of democracy, federalism, the republican form of government, the separation of powers, or the rule of law.[10] This commitment to certain principles that cannot be legally modified[11] is called a guarantee in perpetuity ('*Ewigkeitsgarantie*') – a deeply symbolic decision for all time. According to the German constitution only an unconstitutional and violent but no legal revolution is possible.[12]

The second main factor of the above-mentioned consensus is the *liberal democratic basic order* ('freiheitliche demokratische Grundordnung'). Constitutionally, it is a key term (Arts. 10 (2), 11 (2), 18, 21 (2) and others) that points to an inseparable connection between democratic decision-making and the legally guaranteed freedom of the individual (cf. Papier and Durner 2003: 356). The liberal democratic basic order should be protected not only against consti-

9 Only four women (compared to 61 men) participated in the proceedings of the new German constitution and, for instance, had to face strong reluctance but in the end succeeded when providing for equal constitutional rights of men and women, Art. 3 (2).

10 The right to resist (Art. 20 (4)) against anyone who seeks to destroy this democratic order and the crucial principles of the state means another commitment to Militant democracy, but it is not to be 'guaranteed in perpetuity' like the principles mentioned.

11 See also the jurisdiction of the German Federal Constitutional Court (Decisions BVerfGE 39: 349).

12 Carl Schmitt is said to have regarded the taking of power by the national socialists not as a *legal* but rather as a *successful* revolution (cf. Fox and Nolte 2000: 404, with further references).

tutional amendment but should also not be a subject of debate and controversy (cf. the decisions of the German Federal Constitutional Court, BVerfGE 5: 139). The Federal Constitutional Court specified the term of the liberal democratic basic order in its decision on the prohibition of the extreme right-wing movement and successor of the Nazi-party, the Sozialistische Reichspartei (SRP), in 1952: required by the rule of law on the basis of the self-determination of the people as well as on freedom and equality that rejects any violence and despotic rule (cf. BVerfGE 2: 1, 12f.). Therefore the constitutionalisation of political parties including the possibility of their prohibition (Art. 21) was important to secure the political process.

The jurisdiction of the Federal Constitutional Court also clarifies the German constitutional concept of Militant Democracy. The court has consistently and explicitly stated that the concept that was established in the German constitution is to be seen in the light of the bitter experience of the doomed Weimar Republic (BVerfGE 39: 368ff.). It is thus the reflection of the constitutional legislator on the historical experiences (BVerfGE 5: 139). The German Basic Law adopted a constitutional system of Militant Democracy as it purposively protects foundational values, e.g. human dignity. It is in this sense not a neutral constitution and consequently institutionalises specific instruments to defend the constitutional order against threats. As the court stated in a decision on the duty of public servants to remain loyal to the constitution, 'the liberal democratic constitutional state must not be surrendered to those who are seeking to destroy it' (BVerfGE 39: 349).

In 1956 the Federal Constitutional Court decided to ban another political party. The court banned the German Communist Party and tackled the difficult issue of the democratic dilemma that is protecting democratic freedom by restricting political freedom. It stated that the German constitution practiced tolerance towards all political opinions and consequently had a commitment towards certain inviolable basic values of the constitutional order (BVerfGE 5: 139). The prohibition of political parties did not therefore contradict a principle of the constitution. As an instrument of Militant Democracy it was rather an expression of the will to solve a key problem of the liberal democratic order, and at the same time of a result of the historical experiences of the constitutional legislator, as well as an expression of the commitment to a Militant Democracy that also binds the court itself by constitutional law (BVerfGE 5: 139).

Only these two of the five actions against political parties taken to the Federal Constitutional Court have been successful: the banning of a right-wing party related to National Socialism in 1952 (BVerfGE 2: 1ff.) and the banning of the German Communist Party in 1956 (BVerfGE 5: 85ff.). The instrument in Art. 21 (2) is often criticised because of its (maybe too) high obstacles to ban a party, but of course, high obstacles are essential in a liberal democracy, which remains faithful to its own principles.

Concerning the restriction of fundamental rights for the purpose of protecting the democratic constitutional system, Germany's *Grundgesetz* contains a comparatively unusual and symbolic 'anomaly': the forfeiture of certain politi-

cal fundamental rights according to Art. 18.[13] This far-reaching instrument is seen as an explicit element of German Militant Democracy as it is consequently mentioned in cases heard by the Federal Constitutional Court.[14] Political fundamental rights, e.g. the freedom of expression (Art. 5) or the freedom of assembly and association (Arts. 8, 9), can be forfeited if they are aggressively abused to fight the liberal democratic basic order of the German constitution. Only the Federal Constitutional Court can decide in cases of forfeiture of fundamental rights of the individual. At first glance, this seems to be quite a militant instrument of Militant Democracy. And, indeed, in theory and in comparison with other countries it is.

However, two qualifying remarks put this militant instrument in perspective. The 'enemy of the constitution' who abuses certain fundamental rights will not be deprived of all his rights for the rest of his life. Instead, one is not allowed to abuse a certain fundamental right for a determined period of time. Any further or even arbitrary deprivation of rights by the state is not allowed. Therefore the restriction of fundamental rights, according to Art. 18 itself, contains a restriction of its militancy in favour of democracy. And, secondly, the practical relevance of this norm is marginal: since 1949 there have been no more than four applications to the Federal Constitutional Court, all of which were rejected by the court. So the criticism that forfeiture of fundamental rights is a repressive element to silence ideological opponents is not justified (cf. Papier and Durner 2003: 362). In this respect, the instrument is more a symbol than of practical relevance.

Regarding political groups the German constitution also includes two specific norms of Militant Democracy that authorise the prohibition and dissolution of both associations and political parties. Both kinds of groups cannot be prohibited arbitrarily and they must especially be actively and aggressively threatening the constitutional liberal democratic basic order to meet the requirements (BVerfGE 5: 141). According to Art. 9 (2) unconstitutional associations are prohibited and can be dissolved by the Ministry of Interior. Under Art. 21 (2) the Federal Constitutional Court has, subject to certain conditions, the competence to find a political party unconstitutional. This norm includes the two aspects of the possibility to *dissolve* a party as well as a *forum privilegiatum* of political parties as they are only to be dissolved by the highest court of the state. As an instrument of Militant Democracy this is a comparatively

13 Art. 18 of the German constitution is the central norm regarding the relationship between fundamental rights and the German concept of Militant Democracy. Moreover, certain fundamental rights are statutorily reserved, i.e. these rights can only be restricted on the basis of a law. There are different forms of statutory reservations and of other legal constraints, of course. For this comparison I will not focus on these differences, but rather on the question of whether or not fundamental rights are reserved in any form by constitutional law concerning a form of Militant Democracy.

14 See the decisions BVerfGE 13: 49f.; 25: 52, 58; 28: 48ff.; 30: 19ff., 45f.; 39: 349; 80: 253.

spoken unique phenomenon (cf. Schefold, Tsatsos and Morlok 1990: 826).[15] Not only German jurisdiction acknowledged the historically developed constitutional concept of Militant Democracy. Also in the legal literature, the 'constitutionalisation' of Militant Democracy is generally seen as a *reflex-action to history* (cf. Funk 1990: 53; Papier and Durner 2003: 343ff.; Ridola 1990: 87; critically Frankenberg 2004: 118ff.). Militant Democracy in the new German constitution is even regarded as a 'Copernican turn'.

In sum, the German constitution is based on a substantial core that includes democracy itself. This core is protected against any legal change. Consequently, Germany's legal culture regarding its 'democratic identity' can correctly be called a 'militant substantive democracy' (Fox and Nolte 2000: 415ff.; Jesse 1993: 144) that 'reveals its restraint as 'militant' quite openly and institutionally' (Frankenberg 2004: 121).

Against this background I will now draw on a comparison of other European constitutions with similar historical experiences. As in constitutional ethnography, the goal of the comparison is not prediction but comprehension, and more thematization than variation (Scheppele 2004: 391). It aims at 'noting complex relationships in one setting and then seeing how far other settings can be understood in those same terms' (ibid.).

The comparison firstly focuses on the question whether democracy as a value and as a form of government is essentially protected by the constitution: in short, whether there is a substantial democratic core of the constitution. As a second aspect, it will be compared in what constitutional ways these countries deal with potential enemies of democracy.

All of the countries compared can undoubtedly be considered as constitutional democracies.[16] For this purpose I have chosen three European countries that experienced a fascist dictatorship before and during World War Two and that have drawn constitutional consequences from history: Germany, Austria and Italy. In these countries there has been a change from democracy to dictatorship and back again to democracy. Has democracy consequently become part of a constitutional core that *cannot* or simply *should not* be modified and how is this core defended?

As a second group of countries Spain, Portugal and Greece are analysed since they also experienced a (military) dictatorship. In contrast to the first group their autocratic regimes only came to an end many years after the Second World War, namely in the 1970s. We should take a look at how these even younger democracies have built up democratic constitutions as they might mirror specific reactions to autocracy and their democratic legal culture concerning the concept of Militant Democracy. The role of history in forming constitu-

15 In contrast to the younger constitutional democracies of Eastern European countries like Bulgaria, the Czech Republic, or Poland, having constitutionalised a similar provision.

16 Fox and Nolte refer to the fact that democratic countries 'at a minimum hold regular elections comporting with international standards of fairness' (2000: 406).

tional law will be introduced by an abstract of constitutional history and its effects on the status of political parties in these countries.

Comparing Constitutions

Austria

Quite different from the German situation is the case of Austria. After the First World War the Treaty of St. Germain prohibited a federation of Austria with Germany. Hans Kelsen, a well-known legal scholar of the 20th century, exerted the main influence on the Austrian Federal Constitution of 1920, which was amended in 1929. Like Germany, the country also transformed from a monarchy to a democratic republic (see Art. 1 of the Constitution). And, like in other European Countries in the 1930s, the fascist movement also became stronger in Austria. In 1933 the Austrian chancellor Dollfuß had established an authoritarian kind of government. He was killed one year later in a failed attempt of a Nazi coup. His successor, Schuschnigg, was completely dependent on the German and Italian power holders Hitler and Mussolini. In 1938 he yielded to Hitler's will and lifted the ban on the Nazi movement in Austria. One day prior to a referendum on a free and independent Austria, Hitler's troops 'invaded' the country. The federation of Austria and the German Reich was factually accomplished by this turn of events.

After World War Two, Austria as the only country in this comparison, did not draft a whole new constitution but preferred to restore its constitution from 1920/29, under the provisional government of the social democrat Karl Renner (cf. Funk 1990: 53ff.). So there was no new constitution-making process comparable to Germany and the other countries, quite a rare development from an international and historical perspective. Factors that explain this exceptional development are the will to cooperate of political leaders who were imprisoned during the times of dictatorship, the Austrian identity and experience of a functioning Austrian state from 1919 to 1933 as well as the confidence of the Allied Powers in the former democratic constitution (Schäffer 1990: 45). Yet, the Federal Constitution of Austria does not encompass the whole body of constitutional law. There are newer constitutional laws that regulate certain matters parallel to the Federal Constitution. For instance, there is a special Federal Constitutional Law of 1988 on the protection of the freedom of the person and there is a series of federal laws concerning special fundamental rights. According to Art. 149 of the Federal Constitution, the norms of the State Basic Law (*Staatsgrundgesetz*) of 1867, which includes the key civil fundamental rights, are still in effect.

As political parties are the main actors in the political process their status is also important. In this respect the Austrian State Basic Law also includes the freedom of association and the Federal Constitution provides a series of norms that *mention* political parties but do not *define* their status. Although these constitutional provisions of 1867 and of 1920/29/45 at first sight seem to be progressive for their time, in fact the integration of political parties in constitutional law was not implemented until 1975: § 1 (1-3) of the Law on Political

Parties, which has a constitutional law status, now defines the status of political parties.

Indeed, in accordance with its history, the Austrian Constitution does not protect democracy (or other substantial elements) against selfdestruction. On the contrary, the legitimacy of a partial or a complete revision is explicitly mentioned (Art. 44 (3)).[17] Consequently, the Austrian constitution lacks apparently any material constraints on a potential abolition of the democratic form of government (Boventer 1985: 199). On the other hand, high procedural obstacles contribute to the constitution's defensive qualities. A fundamental revision of the Austrian constitution must pass the ordinary legislative process first (Art. 42). Moreover, before the President of the Republic can sign the revised draft, it needs the approval of the population by means of an absolute majority of the valid votes in a referendum (Art. 45 (1)).

Like all the other states in this comparison apart from Germany, Austria does not have any provision for a forfeiture of fundamental rights by the constitution.[18] The freedom of association is legislatively reserved at the level of federal but not constitutional laws (§ 29 (1) of the Austrian law on associations). These reservations are not inspired by the idea to protect democracy. They rather establish the constraints on legality and criminal law. As the freedom of association in Austria is statutory reserved in conjunction with Art. 11 (2) of the European Convention on Human Rights, the dissolution of an association must fulfil criteria of European standard, in particular the dissolution has to be 'necessary in a democratic society'.[19]

The case law of the European Court of Human Rights shows reluctance to allow *any* restriction on and the dissolution of an association by a national government, especially if it is a political party (see e.g. the Court's Reports 1999-VIII, No. 44 – Freedom and Democracy Party). Since the participation of political parties in free political discussions is considered to be an essential element of democracy, the restriction of this right is itself restricted by the Convention. It is only considered legal if the political actor concerned behaves evidently anti-democratically. If so, this actor is not allowed to rely on the rights guaranteed by the Convention (cf. Meyer-Ladewig 2003: 184f.).[20]

Finally, Austria has a special feature of Militant Democracy: all National Socialist associations had to be dissolved and banned from politics, the economy and cultural life.[21] Correspondingly, all laws and decrees enacted after

17 Cf. also Jesse (1993: 139, note 16). Jesse, however, incorrectly assumes that the Austrian constitution was originally set up in its form *after* 1945 whereas in fact it was decided to restore it (cf. Funk 1990: 54ff.).

18 Art. 20 of the State Basic Law of 1867 concerned the competence of the government to *suspend* certain fundamental rights. But this (older) provision was overruled by Art. 149 (2) of the Federal Constitution of 1920.

19 Of course, the other member states accepting the European Convention of Human Rights have to respect its criteria as well. However, the Austrian constitution demonstrates that more explicitly than other countries.

20 Cf. also the Prohibition of abuse of rights, Art. 17 ECHR.

21 See Art. 9 of the Treaty concerning the restitution of an independent and democratic Austria of 1955 (Staatsvertrag vom 15. Mai 1955 betreffend die Wiederherstellung

March 13th 1938 were suspended after 1945, especially if they were incompatible with the principles of a true democracy.[22]

In sum, Austria uses mainly general statutory reservations for fundamental rights that do not specifically refer to the idea of Militant Democracy or to historical experiences of dictatorship, with one exception: National Socialist movements and their legal heritage are not accepted by Austrian (constitutional) law.

Italy

Italy is known as the place that gave birth to fascism in its original form during the rule of Mussolini. In the crisis after the First World War Mussolini's paramilitary troops were engaged in street fights with their opponents and the state lost control of the situation. Partly supported by the population, Mussolini formed a fascist political association and marched on Rome in 1922. Afterwards he put in practice the totalitarian dictatorship he had promised, and later on he waged war allying the country with Nazi Germany. When Mussolini's fascist government had militarily collapsed, Italy established a new democratic and republican constitution (Art. 1) in 1948. Till then the Albertinian Statute of 1848 had served as constitution. The new constitution on the one hand 'modernised' this older statute regarding the provisions on state organisation, and on the other hand resembles the constitution of the Weimar Republic of 1919 concerning fundamental rights. Italy was the first of the (Western) European countries to institutionalise political parties in its new constitution (Art. 49), but adopted a slightly relativistic notion of political party pluralism.

Compared to the inflexibly protected constitutional core of Germany on the one end of a continuum and to the apparently unprotected democratic form of government in Austria on the other end, Italy's constitution at first glance is somewhere in between. There is a protected core consisting of the republican form of government, which cannot be changed (Art. 139). The *republican principle* indirectly protects democracy, and is connected with fundamental principles of the Italian constitution (Arts. 1-12). Furthermore, a symbolic provision expressing the democratic culture is to be found in Art. 54: every citizen is obliged to be loyal to the *republic* and to respect the *constitution and the law* (see Boventer 1985: 184). However, every other element of the constitution is open to modification. Compared to Germany, Italy's constitution expresses an integration of a wider range of political pluralism (Ridola 1990: 88, 90). That might indicate the lack of any historical experience concerning a 'failed' open constitutional democracy as strong as the example of the Weimar Republic. As a consequence, the potential constitutional changes might appear to be relatively extensive compared to Germany, but are in the end and especially compared with Austria substantively restricted (cf. Boventer 1985: 199).

The fundamental rights and their possible restrictions are according to Italian constitutional law, liberally regulated. The freedom of association (Art. 18)

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eines unabhängigen und demokratischen Österreich (Staatsvertrag von Wien), B.G.Bl. 152/1955).

22 See § 1 (1) of the Constitutional Law of May 1st 1945.

is legislatively limited to 'ends which are not forbidden to individuals by criminal law'. In addition, there is another special restriction as 'secret associations and those which pursue, even indirectly, political ends by means of organisations of a military character are forbidden'. This restriction appears to be a reaction to the danger of an emerging military-like movement like the fascists under Mussolini had been. Moreover, it is interesting to note that the legal construction connecting the restriction of a fundamental right to certain *ends* represents an explicit 'teleological' restraint of the use of fundamental rights.

According to Art. 49 the freedom of association of political parties is limited in a similar teleological or purposive way as the citizens should thereby contribute towards determining national policies through 'democratic processes'. That regulation may (at least theoretically) exclude undemocratic *processes* from constitutional protection as it – remember Loewenstein – may keep the 'Trojan horse outside the city'. At the same time the provision does not (according to the prevailing opinion) include the prohibition of political parties and therefore is not sufficient to 'burn the Trojan horse'.[23] The institutionalisation of political parties in Italy is strongly related to the 'originally republican' search for an agreement of opinions in a pluralistic system (Ridola 1990: 89f.) which again seems to reflect an idea of democracy that appears to be more similar to a liberally inspired (Weimar?) system than to a Militant Democracy. However, like in Austria there is a special norm provided by the Italian Transitory Provision XII. Under this law, any reorganisation of the dissolved fascist party is forbidden and a special law restricting neo-fascist activities[24] has been enacted. Yet, in practice extremist right-wing parties have been admitted to elections and on several occasions have won seats in parliament (cf. Jesse 1993: 140; Schefold, Tsatsos and Morlok 1990: 755).

Like Austria's constitutional law, the Italian constitution does not include an aggressive kind of Militant Democracy but at the same time clearly shows some corresponding elements of a reaction to its history. The fascist movement is particularly forbidden. Due to that, the constitutions of Austria and Italy could be called anti-fascist whereas Germany's concept of Militant Democracy should be regarded as anti-totalitarian in general rather than merely anti-fascist.[25]

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23 And still, it remains rather vague what measures might be taken on the basis of this norm. The prevailing opinion interprets Art. 49 restrictively and rejects any ideological control of a party by the state, whereas others interpret the norm as protecting the constitution and the democratic republic (Art. 1) from antidemocratic movements (for both see Boventer 1985: 186ff., with further references).

24 Law 93/1952.

25 The prevailing opinion regards the German Grundgesetz as generally anti-totalitarian and rejects the restriction of fundamental rights of a *specific* political opinion, even if it might be an extremist one. But even in case law there are other examples, too: the Higher Administrative Court of North Rhine-Westphalia argues that demonstrations of extremist right-wing groups did not meet the requirements of appealing to the fundamental right of assembly as the historically based order of values of the German constitution was excluding such opinions from the democratic process of decision-making. This opinion has been rejected by the Federal Constitutional Court of Germany (see Papier and Durner 2003: 366ff., with further references).

Spain

Spain, Portugal and Greece, forming the second country group, have in common a history of military dictatorships *after* the Second World War. Not until the 1970s did they obtain democratic constitutions up to modern standards.

Spain's road towards a modern democratic constitution has been a road strewn with obstacles. The first republic ended in dictatorship after only eleven months and a time of restoration in 1874. The crisis experienced by European democracies in the 1920s struck Spain particularly hard (Puente Egidio 1990: 643). After the First World War the unstable situation helped the dictatorship of General Primo de Rivera to seize power, which was accepted by the monarch in 1923. This period ended in 1931 with the proclamation of the Second Republic and the King leaving the country. Although a new constitution had been passed, stability could not be guaranteed. The struggle of radicalised conservative and socialist movements led to the Spanish Civil War (1936-39). General Franco succeeded and established a military dictatorship with totalitarian restrictions on civil rights and the suppression of any opposition. Though not unchallenged, Franco managed to remain in power until his death in November 1975.

His 'successor', King Juan Carlos initiated a peaceful transition to democracy and to a new constitution, which was accepted by an 88 per cent majority of the Spanish people in 1978. Trying to re-establish a military regime, General Milans del Bosch and Antonio Tejero led a coup in 1981, holding Members of Parliament as hostages. But the King argued for democracy and won the support of the military forces, and the coup failed. Spain thus looks back on a relatively short period of a democratically constituted political system and on a much longer time (one might even say a 'tradition') of military dictatorships.

As a result of this history and reflecting the turn towards democracy, political parties gained constitutional status under Art. 6 of the constitution of 1978. The prominent position of that provision in the preliminary title of the constitution expresses a fundamental decision. In addition Spain also enacted a specific law on political parties in 1978, just a few weeks before the constitution came into effect. This law is quite brief and has an open regulatory character that was consciously chosen to give political parties full play.

Despite the autocratic history, the Spanish constitution of 1978 refrains from substantive restrictions (cf. Boventer 1985: 199). In the proceeding protocols we read that the constitutional legislators by using both Spanish and traditions of other European countries as sources tried to tie in with the culture of the contemporary constitutional democracy (Cruz Villalón 1990b). The German constitution played a role in the discussions, but in the end the German instruments of the forfeiture of fundamental rights and the prohibition of political parties by the constitutional court have been rejected. For this reason, it is arguable whether Spain really wanted to accept a concept of Militant Democracy (cf. ibid.). But again it has to be pointed out that there are different ways of protecting democratic constitutions. Similar to the Austrian constitution, Spain secures its constitution by formal regulations rather than by substantive law. Compared to the Austrian system there are even higher formal obstacles which have to be surpassed for a revision of the constitution.

For a conventional amendment a qualified majority of three-fifths of both chambers is necessary (Art. 167). But this is not sufficient if the constitution is to be revised *totally* or if certain *core parts* of the Spanish constitution are to be modified: Art. 168 (1) prescribes a necessary majority of two-thirds in both chambers for the acceptance of the modification. Within this scope democracy is especially protected (Art. 1 (1, 2)), as well as fundamental rights (Arts. 15ff.) and the norms concerning the Crown (Arts. 56ff.). After acceptance, both chambers have to be dissolved immediately (Art. 168 (1)). The then re-elected chambers have to confirm the decision and have to draft a new constitution which again needs to be accepted by two-thirds of both chambers (Art. 168 (2)). Finally, the modification of the constitution has to be ratified by a referendum (Art. 168 (3)). In addition, initiatives for modifications to the constitution are barred in times of war and during a state of alarm, emergency and occupation (Arts. 169, 116).

The openness of the Spanish constitution for even a total revision (cf. Ferreres Comella 2004: 141) and for modifications that could potentially (or rather hypothetically) also include the principle of democracy is therefore restricted by procedural obstacles that are quite difficult to pass. Repeated checks and the involvement of different political actors make the democratic abolition of democracy quite unlikely. In this context, an interesting fact is that the people in this case would have to vote twice to end the sovereignty of the people – firstly by re-electing the dissolved chambers and then by a referendum. For these reasons the Spanish constitution represents the remarkable example of a legal culture and 'democratic identity' that solves the problem of potential self-denial and of the democratic dilemma in a specific way: although there is a principal openness for any decision of the people, there are extensive procedural constraints and checks. But it is not only the law in the books that guarantees the stability of the constitution: there is a strong conviction in Spain that the constitution in its 1978 form protects the country as a state which is subject to the social and democratic rule of law. Accordingly, the only modification to the Spanish constitution in the first 25 years of its existence was in 1992 preparing the way to further integration in Europe.

Compared to Germany and as we shall see Greece, substantive core principles are not *a priori* guaranteed in the Spanish constitution, but they are also fairly well protected, and in any case better than in the older constitution of Austria which principally follows a similar system for protecting democracy. Spanish 'citizens and public authorities are bound by the Constitution' (Art. 9 (1)). Specified fundamental rights like the right to freedom and security (Art. 17) may be suspended in a state of emergency or during a siege (martial law) according to Art. 55 (1).[26] The instrument of *suspending* fundamental rights

26 To prevent the abuse of this power, a specific act is necessary to determine the manner and the circumstances in which - on an individual basis and with the necessary participation of the courts and proper parliamentary control - these rights may be suspended for specific persons in connection with investigations into the activities of armed gangs or terrorist groups (Art. 55 (2)). Any abuse of this power will also result in criminal liability.

replaced the instrument of the *forfeiture* of fundamental rights which had been discussed and rejected in the drafts of the Spanish constitution, and is strongly influenced by German constitutional law (cf. Cruz Villalón 1990a: 97).

In contrast to Greece, Portugal, and Italy, Art. 6 of the Spanish constitution guarantees the freedom of political parties concerning their creation *and* their activities subject to the condition: 'Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law.' Respect for the constitution must obviously include the democratic state (Art. 1 (1, 2)). However, the issue of whether the law (the legislature), which has to be respected by the political parties could impose limitations on these parties is a controversial matter (see Ferreres Comella 2004: 137, with further references).

Although the influence of the German constitution's provision about political parties on the Spanish provision is remarkable, the prohibition of political parties has only legal validity at the sub-constitutional level (see Tardi 2004: 94ff.; Ferreres Comella 2004: 138). A prohibition in Spain furthermore depends on two conditions, i.e. firstly the activities of the political party are regarded as criminal, and secondly they do not respect democratic principles (Puente Egidio 1990: 681). It is a bone of contention whether the constitution of Spain can be regarded as a Militant Democracy. Although some agree to such a qualification, according to other scholars the Spanish regulation as to whether and how a party could be banned is rather unsatisfactory and unclear to say the least (Puente Egido 1990: 682). Indeed, recent practice reflects these problems, which are highlightened by the Batasuna case (see Ferreres Comella 2004; Tardi 2004, 95ff.).

Portugal

The first Portuguese republic was proclaimed in October 1910 and the monarchy thereby came to an end after more than 700 years. Although this republic only lasted until 1926, it produced nine presidents and 45 different governments in merely 16 years. The fragmented system of political parties caused an increasing instability as was the case in several other young republics in Europe (cf. Capoccia 2001: 433ff.). The republican constitution was abolished by a military coup by General Carmona in 1926. António de Oliveira Salazar, who had been Minister of Finance since 1928, was appointed prime minister in 1932 and his government enacted a new constitution in 1933 prescribing a one-party state. In the 'Estado Nuovo' (new state) opponents were systematically oppressed by torture and by censorship of the press, while Salazar ruled by a dictatorship-like government. After Salazar was unable to rule due to an apoplectic stroke in 1968, his successor Marcello Caetano followed his dictatorial rule of government.

Political parties always had exerted considerable influence on the form of the constitution, except during the time of the dictatorship when political parties were prohibited. During that time, even the National Union, which in fact was the leading and only political party, had officially and ironically the status of a civil association. The clear rejection of dictatorship, followed by a brief transition period of militarily dominated political parties evolved into the wish

to define political parties by constitutional law in 1976 (de Sousa 1990b: 603). The Portuguese constitution therefore today includes a series of provisions on political parties, especially the freedom of association (Art. 51 (1)).[27]

The case of Portugal is different compared to Spain (and to Greece). The dissolution of a party can only be based on its activities and must be justified by law. By means of an *actio popularis* every citizen is according to de Sousa (1990b: 625) entitled to apply to a court or to the public prosecution authority to prohibit a party, whereas Fascist parties are especially mentioned as the target of state prosecution.[28]

Despite a historical experience of military dictatorship similar to neighbouring Spain,[29] Portugal has adopted a different kind of democratic identity clearly showing elements of Militant Democracy. By a series of norms, anti-democratic actors are to be controlled and restricted in order to uphold democratic liberties and to prevent democracy from turning in dictatorship. Regarding the question whether there is a substantive democratic core that is specifically protected on a constitutional level the Portuguese constitution gives a distinct answer: Art. 290 catalogues the material constraints on a revision of the constitution. The republican form of government (sub b), the rights and liberties of the citizens (sub d) and the pluralism of opinions as well as the right of democratic opposition (sub i) have to be respected if the constitution is to be revised. Like in Spain, revisions are not allowed during a state of emergency (Art. 289).

Therefore the Portuguese constitution seeks to protect its substantial democratic core, offering a wide range of instruments. It is considered to take a radical stance with regard to its values which has an even stronger character than the Militant Democracy of the German constitution (cf. Boventer 1985: 198f.; Jesse 1993: 138). The Portuguese constitution also shows relatively extensive guarantees of fundamental rights and in some cases 'abandons' even commonly acknowledged forms of restrictions and statutory reservations. Similar to Spain, Portuguese constitutional law includes the possibility to suspend the *exercise* of rights, freedoms and guarantees, only in case of a state of emergency or martial law (Art. 19 (1)).

Greece

After the occupation by Italian and German troops in World War Two, the Greek central government fought and won a civil war against the communist-controlled National Liberation Army from 1946 to 1949. But until the 1960s civil liberties were still restricted. As a reaction to liberal tendencies in 1967 a

27 Boventer (1985: 200) recognises this as a 'moment of tension' by conceding that the Portuguese constitution tolerates the existence of even a party which aims to eliminate every democratic opposition. But, at the same time there is no right to achieve this aim in a legal way.

28 In other words, regarding Art. 223 (2, sub e) Jesse (1993: 140) is wrong in stating that besides the prohibition of fascist associations there is no instrument at all to prohibit political parties.

29 These were kinds of dictatorships different from the more fascist ones of Italy and Germany, and they were also different from the military dictatorship of Greece.

military regime led by Papadopoulus took over, and in fact suspended the constitution of 1952 by which Greece had been politically organised as a parliamentary monarchy, and severely persecuted political opponents. This dictatorship ended in 1974 and the 'government of national unity' under Konstantin Karamanlis re-enacted the constitution of 1952 with the exception of the provision on the form of government. In the same year elections as well as a referendum were held resulting in the republican form of government. Greece, known as the classic birthplace of democracy, turned to democracy again and enacted a new constitution in 1975. It shows the effort to combine liberal ideas and pluralism with the search for stability and rejection of relativism and autocracy. It has therefore been created in a situation similar to Germany after World War Two.

The Greek constitution of 1927 had already mentioned political parties. But only after the end of military dictatorship did the newer constitution of 1975 grant political parties constitutional status. Under Art. 29 (1) political parties are explicitly declared to be institutions of the constitution (Papadimitriou 1990b: 271) and therefore an important element of modern democracy. With an eye on Greek constitutional history, it comes as no surprise that the constitution includes material constraints and explicitly protects certain key matters against change. The Greek constitution exempts from any revision those norms that form the basis of the state and regulate the form of the state as a parliamentary republic as well as a series of specific norms (Art. 110 (1)).[30] Noticeably, in the very first article of the constitution it is stated that Greece is a republican parliamentary democracy and the constitutional core is therefore referred to in a deeply symbolic way.

As a result, without doubt the Greek constitution explicitly protects democracy and certain fundamental rights. In this form the substantial democratic core of the Greek constitution and its protection is quite similar to the German constitution.[31] But there is a difference; the Greek constitution extends the protection to a series of specific fundamental rights.

A special feature of the Greek constitution concerning fundamental rights is provided by Art. 25 (3). Under this article an *abuse* of rights is explicitly forbidden for the first time in Greek constitutional history (Dagtoglou 1989: 103): 'The abusive exercise of rights is not permitted.' Corresponding norms are not often found in national constitutional orders, but are contained, for example, in the European Convention on Human Rights (Art. 17). The forfeiture of rights according to German constitutional law served as basis for the discussions on that provision. Though being rejected, it pointed the way to the prohibition of abusing fundamental rights, which is a direct parallel to the discussions in Spain.

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30 These include Part 1 Section I and Part 3 of the constitution and furthermore e.g. the protection of human dignity (Art. 2 (1)), the equality before the law (Art. 4 (1)), the freedom of the individual (Art. 5 (1, 3)) and the principle of the separation of powers (Art. 26).

31 Cf. the similar legal constructions of Art. 110 (1) in conjunction with Art. 1, 2 (1) of the Greek and Art. 79 (3), 1, 20 of the German constitution.

Furthermore there is a 'right and duty to resist by all possible means anyone who attempts the violent abolition of the Constitution' (Art. 120 (4)), which is similar to Art. 20 (4) of the German Basic Law. In addition, Greece constitutionally obliges 'respect towards the Constitution and the law concurrent thereto, and devotion to the Fatherland and to Democracy' as 'a fundamental duty' on the part of citizens (Art. 120 (2)). We do not find a corresponding duty in the German constitution, whereas Italy states in Art. 54 (1) of its constitution, 'all citizens have the duty to be loyal to the Republic and to uphold its Constitution and laws.'

In what way are the rights of political parties and associations restricted? The younger democracies of Greece, Spain and Portugal do not impose substantive constraints on the freedom of association regarding political parties, except on political movements directly related to the regime that had been overthrown (Boventer 1985: 196ff.). The Greek constitution offers only minor constraints such as 'Greek citizens possessing the right to vote may freely found and join political parties' subject only to the condition that 'the organization and its activities must serve the free functioning of democratic government' (Art. 29 (1)).

It is important to differentiate between *founding* a political party on the one hand, and the *activities* and *aims* of that party on the other hand. As Art. 29 (1) only regulates the foundation (and joining) of a political party, there is thus no explicit material constraint. The wording must not be interpreted so extensively that it results in an unconstitutional restriction of fundamental rights.[32] And moreover, we should remember that the concept of Militant Democracy itself does not aim to *restrict,* but rather to *protect* democratic liberty. The Greek provision on political parties concerning democracy aims both at the internal organisation and at the external activity of the party. The status of political parties in the constitutional system was obviously not designed to open up possibilities of abusing democratic liberties (Filos 2002: 994f., 1012). Nevertheless, their foundation is free and practice shows that political parties have so far confirmed their supposed acceptance of the democratic order (Papadimitriou 1990b: 289). Greece does not have any norm at a constitutional level to prohibit political parties although this had been discussed when forming the constitution in 1974/75: the suggestion to introduce this instrument was strongly criticised and subsequently abandoned (ibid.: 290).

Comparing Constitutional Outcomes of Militant Democracy

To recapitulate, not every country in the first group with a similar historical experience of autocratic regimes protects democracy in the same way. Germany has built a solid democratic constitutional core protected by a Militant Democracy and should therefore be 'guaranteed in perpetuity'. Italy also established a new constitution after World War Two that *only* protects the republican form of government as a core element, whereas Austria revived its constitution of

32 For a restrictive interpretation of Militant Democracy as a constitutional principle that could possibly restrict fundamental rights, cf. Papier and Durner (2003: 365ff.).

1920/29, which did not contain the concept of Militant Democracy and therefore protects democracy from a revision 'only' by formal obstacles.

The second group of countries consists of countries that experienced (fascist) military dictatorships, which came into power by violent means. Neither of these countries followed the same method of protecting their democratic core. However, as Spain sets high procedural obstacles for a legal revision of the democratic constitution and as Greece and Portugal *a priori* prevent the democratic core from any legal revision, the conclusion is that these younger democracies are relatively militant (or rather quite defensive). With an eye on the constitutional history of these countries with similar experiences of dictatorship, the turn towards democracy has given the legal culture of these countries a new form: democracy and the guarantee of its liberties. This can be examined by analysing constitutional law.

The introduction of the provisions on political parties as mentioned above clearly indicates the formation of democracy as well as the rejection of dictatorship (Schefold, Tsatsos and Morlok 1990: 778). Although the constitutional establishment of a Militant Democracy and its elements is 'not simply a product of a historical learning-process' (Frankenberg 2004: 118), there is actually a close link between historical developments and constitutional outcomes that express a *democratic* legal culture. The reaction to history is to a certain degree obvious. Nevertheless, these constitutional provisions do not only express the important status of political parties in a democratic political system. They also lead to consequences in the real political process, as for example political parties in Germany are privileged in that they can only be banned by the Federal Constitutional Court (BVerfGE 5, 139). And, what is furthermore interesting in this context is that, firstly, all six countries with their similar historical experience of dictatorship have introduced such a provision on political parties. Conversely the other countries of the European Community (in its form until 1995) which do not look back on a history of dictatorship have not institutionalised political parties on a constitutional level at all or at least not that explicitly (except for France – cf. Schefold, Tsatsos and Morlok 1990: 825). This result emphasises the connection between historical events of autocracy and the democratic constitutional outcomes even more so. Countries that did not experience a breakdown of the political system nor a complete change of the form of government were not forced to introduce new democratic constitutional provisions.[33]

In respect of the restriction of fundamental individual rights, and collective rights of associations and political parties, there are several differences.

Striking is the fact that Germany and Greece in contrast to the other countries have not constitutionally prohibited a *certain* (especially national socialist or fascist) ideology. They could be seen as substantial and at the same time

33 This consequence is confirmed if one takes into account the constitutions of Eastern European countries that have come into effect after the post-communist era in the 1990s: most of these countries have included constitutional provisions on political parties, most explicitly Poland and Hungary. In 2006 the Slovak Supreme Court for the first time banned a right-wing extremist party according to the new constitution.

insofar and in a special way 'neutral' democracies.[34] Striking is furthermore that the German constitution avails of a unique phenomenon, namely the forfeiture of certain fundamental rights. Thirdly, only Germany and Portugal have provisions on the prohibition of political parties at the constitutional level. Some of the instruments I have examined are related to criminal law rather than explicitly to a concept of Militant Democracy but in this respect they serve a similar function of course.

Several features distinguish the younger democracies from the constitutional law of the first country group. By the instrument of suspending rights in the case of a state of emergency or by explicitly forbidding the abuse of rights, the democracies with a military dictatorship as a historical background reveal reactions at a constitutional level. These instruments have also been introduced after discussing the corresponding German norms. They can be regarded attributes of a Militant Democracy, especially as they are aiming at protecting the democratic order. On the other hand, and corresponding with the will to establish and uphold a democratic order, the constitutional legislators of the younger democracies refused to restrict the individual and the collective rights too severely. An illustrative example is the Portuguese constitution that tries to guarantee extensive liberties. Democratic freedom, which had been oppressed during the times of dictatorship, was to be guaranteed by constitutional law instead of restricted.

In particular Germany in the first group chose another, more restrictive way and therefore its constitution symbolises a more militant legal culture of democracy. But although Germany might have had one of the worst or at least the most well-known totalitarian dictatorship in the history of the 20th century, it is together with Greece the only country in this comparison which does *not* specifically and explicitly ban a *certain* political ideology by means of the constitution, not even the national socialist one. And, surprisingly, Germany is in this respect accompanied by Greece, the only country that experienced a coup followed by the establishment of a dictatorship only *after* World War Two (cf. Schefold, Tsatsos and Morlok 1990: 752). Anyway, the implementation of the prohibitive instruments of the constitutions compared is dealt with fairly restrictively in practice (Boventer 1985: 198; Jesse 1993: 140; Schefold, Tsatsos and Morlok 1990: 827). Nevertheless, the restrictive regulation or even the very rejection of the possibility of prohibiting parties is the main difference of the other countries with Germany's and Portugal's Militant Democracy (cf. Morlok 2001: 2942). Still, the German constitution and its system of Militant Democracy have exerted a quite considerable influence on other European constitutions, especially on Spain and Greece (Ridola 1990; Cruz Villalón 1990a; de Sousa 1990a; de Sousa 1990b: 625; Papadimitriou 1990a).

34 This does not mean of course that they tolerate a fascist ideology which would become manifest in an active and unconstitutional way.

Conclusion

The approach to Militant Democracy should include at least three aspects. Firstly, there are the still remaining threats emerging from anti-democratic actors (ab)using the democratic system and its fundamental rights. But in addition to that, threats from 'outside' this system now also have to be considered. If democracies do not tolerate enemies within the democratic system, a similar firm position vis-à-vis enemies from without may be expected. A broader definition of Militant Democracy is asked for, namely: 'Militant Democracy is a political and legal structure aimed at preserving democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing democratic institutions as well as support within the population' (Pfersmann 2004: 47). I think that even that definition could be broadened in times of the threats of international terrorism and non-state actors. At that point Militant Democracy would be overlapping the field of state security. But in contrast to that, Militant Democracy does not seek to protect security in general as it always aims at a very specific aspect of security: the protection of democracy and its freedoms. Approaching Militant Democracy by definition, not the *source* or the *means* of the threats should only come to the fore but rather the *aim* of the threat: democracy.

Secondly (and related to the first aspect), the international dimension of threats requires responses at the same level. Proper instruments beyond the domestic level may not yet be available and therefore have to be developed first.

Thirdly, for the purpose of preventing a doom scenario for democracy, it seems to be justifiable to limit and restrict certain fundamental rights, if this is based on and is in accordance with the rule of law. As said before, Militant Democracy should not be abused for the exclusion of personal or political enemies. Restrictions on fundamental rights are bound by the rationale of Militant Democracy and need legitimation in terms of the rule of law. Guantanamo detention centres where prisoners are kept as terrorist suspects by the US government almost without any regular or legal control, would never qualify as a justified case of Militant Democracy. Another example is the threat of the Turkish army to intervene in the presidential elections in favour of laicism and democracy. Of course, the balance between an effective defence of democracy on the one hand and the individual and collective rights and liberties on the other, is much more difficult in practice than in theory. However, practice ought to be assessed in the standards set by theory.

On the basis of the foregoing a current approach to Militant Democracy can be worded as a value-orientated fundamental decision of a democratic (constitutional) order which is expressed in the sum of all norms, institutions and measures to protect this democratic (constitutional) order and seeks to prevent especially the abuse of liberty (cf. also Becker 1992: 334).

Returning to the Roman aphorism, Militant Democracy indeed aims for 'peace', and if necessary, is prepared for 'war'. But Militant Democracy does not justify any particular war neither any particular form of war. Whether fire should be fought with fire – Loewenstein's statement –, the answer is 'yes'.

'Fire' in the manifestation of Militant Democracy is a reaction to liberalistic constitutional democracies, rather than a self-denial of democracy. Militant Democracy in that sense is the deliberate self-assertion of democracy. Contrary to Loewenstein, however, fire cannot be fought with fire, at the cost and risk of fundamental principles that are the very essence of democracy. Some 70 years after Loewenstein's essay on Militant Democracy was published, several European democracies have experienced an autocratic regime. Mainly as a 'reflex' action to that, the newly established democratic constitutions have more or less adopted the idea that democracy has to be defended against its enemies and they have accordingly established different instruments to prevent that from happening (cf. Capoccia 2001: 452, critically at 454 n. 8).

While such instruments affect democratic fundamental rights, their 'constitutionalisation' as well as their implementation are not dealt with in the same way in the countries compared. These differences between the constitutions are closely related to the development of national legal cultures. What kind of democratic identity should be expressed by a constitution: one that is only or at least more related to the idea of democratic freedom or one that at the same time adopts a concept of securing democracy by specific constitutional provisions? On the one hand, the democratic legal cultures of the six countries in this comparison are similar as they clearly reflect a historical experience of autocracy and try to establish a stable constitutional democracy. In this respect, we could say that all six have accepted the principle of Militant Democracy that has to be upheld in one way or another. On the other hand, the legal cultures are rather different regarding the specific methods for restricting democratic liberties, be it explicitly for purposes of Militant Democracy, or under criminal law. The explicit nature of Militant Democracy in the German constitution not to be found in the other countries is also based on the experience of the failure of the Weimar republic. It is arguable even whether it is appropriate to label the other five countries a Militant Democracy. Some scholars regard the concept of Militant Democracy as a 'German tradition' (cf. the references in Jesse 1993: 137), as a 'German affair', and as a 'German problem' (cf. the references in Boventer 1985: 24f.). My position here is that the decision to adopt a Militant Democracy and to implement certain corresponding constitutional norms was not a unique phenomenon of the German constitution (cf. also Boventer 1985: 27; Fox and Nolte 2000). This result concerns rather the *idea* than the very *label* of Militant Democracy.

Several European democracies, including the countries examined, are prepared to fight fire with fire. Not only in Germany the democratic dilemma is controversial. For instance, Turkey's practice of dissolving political parties has become a major example of the implementation of parts of Militant Democracy with implications at the level of European law (see Kogacioglu 2004; McKlem 2005: 4, 26ff.; Meyer-Ladewig 2003: 183ff.; Morlok 2001: 2936; Tardi 2004: 100f.).

Despite the fact that certain key aspects of Militant Democracy have been introduced in the constitutions compared, the forms and norms of these provisions were the subject of controversy, and have been implemented quite differ-

ently. The discussion on the instrument of the forfeiture of fundamental rights and on the position and prohibition of political parties, e.g. in Spain (Cruz Villalón 1990a: 97, 102) and Greece (Papadimitriou 1990a: 120, 124; 1990b: 290) illustrates this. Consequently for a comparative research such as this, the concept of Militant Democracy is closely related to a concept of different democratic legal cultures that are 'both a result of the past and projected towards an uncertain future' (Nelken 2007). At the same time, it might be too simple (and maybe too soon) to ascribe the constitutional introduction of elements of Militant Democracy only to a historical learning process (Frankenberg 2004: 118). The development of a 'constitutionalised' democracy, and specifically of Militant Democracy, is not inspired by one particular reason. The comparison results in similarities *and* differences although historical experiences have been similar. The democratic constitutions that mirror historical experiences and learning processes should be regarded as an important reason for the establishment of Militant Democracy in its different forms today. The 'reflex-action to history', especially in respect of post-dictatorial democracies, is a succinct expression for this process (Jesse 1993: 139; Morlok 2001: 2936).

Admittedly, 'every society opts for the form of democracy it considers correct, fitting or tolerable' (Frankenberg 2004: 117).[35] There are considerable parallels, based mainly on similar historical experiences as well as on influences and role-model functions of certain constitutions. The still existing national differences might relate to different democratic legal cultures, i.e. what kind of democracy is constitutionalised, which provisions protect democracy and in what ways are they implemented in practise? Nowadays, as democracy in Europe seems to be firmly established, the danger to democracy is not as present as it was in the 1930s. Still, in a pluralistic democracy it is not banned for good and political extremism will remain a permanent potential threat to democracy (cf. Capoccia 2001: 452f.; Papier and Durner 2003: 341f.). A concept of Militant Democracy, which is relevant in the real world of today, also pays attention to threats from outside domestic polities. Anti-terrorism legislation in several states (see McKlem 2005: 1) also has to pass the critical test of the concept: not at the risk and cost of violating fundamental principles.

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35 The nation state might still be a convenient starting point for comparing Militant Democracy and the corresponding legal cultures (cf. Nelken 2007). Examining democracy at the level of the European Union, the question has to be raised to what extent common European (constitutional) law fits with a concept of Militant Democracy. This is the subject of my doctoral thesis in fact.

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Table: Elements of Militant Democracy in Six European Constitutions

	Germany	**Austria**	**Italy**	**Greece**	**Spain**	**Portugal**
Year of Constitution	1949	1920/29/45	1948	1975	1978	1976
Protection of democratic core	Democracy and other principles, 'forever'	Total revision in theory possible but formal obstacles	Republican form of government	Parliamentary democracy and certain fundamental rights	Total revision in theory possible but high formal obstacles	Republican form of government and political rights
Restriction of Fundamental Rights of the Individual	Forfeiture of certain fundamental rights	No (only statutory reservations)	No (only statutory reservations)	No abuse of (fundamental) rights	Suspension	Suspension but extensive guarantees
Restriction of Political Parties/ Movements	Ban on political parties and associations	No national socialists	No fascists	No	Yes, at sub-constitutional level	Yes, esp. military and fascist

Legal Cultures, Blurred Boundaries: the Case of Transitional Justice in Uganda

Barbara Oomen and Iris Marchand

Introduction

When the International Criminal Court (ICC) started functioning in 2003, the first case referred to it concerned the war in Northern Uganda. In deciding to open investigations prosecutor Ocampo argued that Uganda's civil war had not only caused immense suffering but also led to war crimes and crimes against humanity that fell squarely within the court's jurisdiction.[1] Within a year after the announcement, however, the prosecutor was visited by a group of Acholi traditional leaders, who argued that the ICC proceedings would interfere with the fragile peace process, and asked the prosecutor to be mindful of amnesty procedures and traditional dispute resolution mechanisms put in place locally.[2] When the prosecutor continued to issue arrest warrants the traditional leaders were joined in their pleas by most influential actors in Ugandan society, including the government that had referred the situation in the North to the ICC in the first place (Apuuli 2006, Lomo).

Traditional healing procedures, amnesty laws, or international proceedings – which of these are best suited to offer redress in the wake of twenty years of violence? The example of Uganda, in the context of this volume, gives rise to the question of to what extent a classic socio-legal concept like legal culture is suited to addressing the questions posed by such a highly globalized, yet also essentially local legal process. In this contribution, we argue that it is precisely this fragmented character that calls for the tools developed and insights yielded in studies of national legal cultures. In developing this argument, we first discuss the main characteristics of the field of transitional justice and of legal culture studies. Subsequently, we focus on the war in Northern Uganda, and the plethora of legal institutional responses thereto. We then view these responses through the lens of legal culture, and discuss some of the insights to be gained from this approach.

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1 See, for instance, the Statement by the Prosecutor Related to Crimes Committed in Barlonya Camp in Uganda, The Hague, 23 February 2004.

2 Statements by the ICC Chief Prosecutor and the visiting Delegation of Acholi leaders from Northern Uganda, 18 March 2005.

Transitional justice, legal cultures, blurred boundaries

Transitional justice, as a term, describes the varied legal institutions put in place to accompany the transition from a period of human rights violations to sustainable peace and respect for human rights.[3] Institutionally, the notion comprises international(ized) tribunals, truth commissions, (neo-)traditional courts but also amnesty procedures and the vetting of former government officials. From an ideological point of view, the notion points to an ongoing debate on the relationship between truth, justice and reconciliation which is desirable in the aftermath of severe human rights violations. At the centre of the notion is thus not a locality (the situations concerned often have national and international dimensions) or a particular field of law (while the notion is rooted in criminal law issues like reparations, and land restitution procedures fall within the realm of private law). Rather, the subject of study here is a 'situation', in ICC terminology, bound by time, of which its legacy has to be addressed with the transitional justice toolbox (Roht-Arriaza).

In the early days of the transitional justice debate, at the end of the 20th century, the positions thereon were reasonably clear, and could neatly be summarized as Truth versus Justice (Rotberg & Thompson). Truth Commissions, for instance in Argentina, had started off as a way to establish a historical record of the atrocities committed and to provide documentation for trials. Over time, however, they had come to symbolize an alternative form of justice, with reconciliation instead of retribution at its heart (Wilson 2001). The South African Truth and Reconciliation Commission paved the way for this approach, which was followed in countries like Sierra Leone and East Timor.

In recent years, however, the juxtaposition of truth and justice and of reconciliation and retribution has come to be questioned, both from an empirical and from a normative point of view. The Rome Statute, for instance, is a core document in international criminal law but emphasizes the role of the ICC in reconciliation, and institutionalizes the position of victims in its proceedings.[4] Historians, in addition, have pointed at the important role that international tribunals play in providing a historical record of past atrocities (Wilson 2005). Truth Commissions, on the other hand, have increasingly incorporated elements of substantive and procedural law in their mandates – like the possibility to subpoena witnesses – and strengthened their relationship with domestic and international trials. On top of this, there has been a strengthening of (neo-)traditional dispute resolution procedures which defy the truth vs. justice dichotomy, like the *gacaca* in Rwanda, the community reconciliation process in East Timor or the Ugandan rituals discussed below (Quinn, Zartman).

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3 E.g. www.ictj.org and Roht-Arriaza (2006: 1-2). These definitions take a 'narrow' approach to the debate, and have trials, truth commissions and (at times) vetting procedures as their core subjects. Wider definitions also look at memorials, the writing of history and the role of the media. Central works in the burgeoning literature on this subject are Kritz (1995), McAdams (1997), Minow (1998, 2003), Rotberg (2000).

4 Arts. 68 and 75 Rome Statute of the International Criminal Court, which entered into force on 1 July 2002.

Just as the distinction between truth, justice and reconciliation has become blurred in the field of transitional justice, so has the divide between the local, the national and the international. One obvious example is the rise of hybrid tribunals, like the Special Courts in Sierra Leone and East Timor, which consist of local and international judges and apply domestic and international criminal law alike (Katzenstein, Romano). More far-fetching, however, is the increase in donor involvement in transitional justice processes worldwide (Carothers, Oomen, Piron). Donor organizations, whether bilateral, multilateral or non-governmental organizations, were the driving force behind the design and the financing of not only the Khmer Rouge Trials in Cambodia and the Truth Commission in East Timor but also behind the highly local *gacaca* in Rwanda. In another manifestation of the blurring boundaries between the national and the international, the tightening web of international criminal law and the notion of universal jurisdiction has led to a 'justice cascade': it severely limits the scope that individual countries have in order to, for instance, provide blanket amnesties (Lutz).

For all the blurring of boundaries – between institutions, their aims, their geographical scope – transitional justice is increasingly presented and studied as a distinct field of law, designed in the global arena but with strongly local manifestations and implications. As such, it offers the type of challenge described by legal sociologists such as D. Nelken, who urges that colleagues should 'face the challenges of transnationalism and the politics of global capitalism or multiple overlapping and conflicting juridiscapes'.[5]

The degree to which the understanding of legal culture can address these challenges hinges, of course, on the definition of the term. Legal culture has been understood, and researched, in a variety of ways since Lawrence Friedman coined the term in 1969. Definitions, for instance, range from 'the network of values and attitudes relating to law, which determines when and why and where people turn to law or government or turn away' (Friedman 1969: 34) to 'a socially derived product encompassing such interrelated concepts as legitimacy and acceptance of authorities, preferences for and beliefs about dispute arrangements, and authorities' use of discretionary power' (Bierbrauer: 243). Nevertheless, the notion always points at law as it exists in a particular situation and privileges people's perception thereof above a merely institutional perspective. Generally, studies of legal culture have concentrated on specific countries, empirically mapping out the number of lawyers, the rates of litigation, but also the attitudes towards the law in a given nation (Friedman 1996, 2003; Nelken).

One important, if not uncontested, insight which has been gained in legal culture studies – paradoxically enough – negates the importance and even the very existence of a specific, bounded legal culture, be it Japanese non-litigiousness or American adversarialism. Rather, the availability of institutional options seems to play a large role in shaping people's attitudes towards the law and legal actions. Here, the interplay between structural, substantive and cultural components, to use Friedman's 1969 trilogy, is infinitely more complicated

5 Nelken, referring to Coombe.

than generalizations on Asian, European or American legal culture convey, with the institutional landscape as both the cause and the consequence of legal culture (Nelken, Blankenburg, Friedman 1996:4). In this sense, legal sociologists have come to some of the same conclusions as anthropologists, who have also, over the past decades, advocated a processual, negotiated and contextual approach to the notion of culture (Appadurai, Coombe, Geertz, Wilmsen).

Recently, legal culture studies and the related field of legal consciousness seem to have undergone a revival (Hertogh, Merry). With the fragmentation of the nation state and the rise of direct democracy there is a general tendency in the social sciences to leave the state as a locus of study, and to turn to individual perceptions and the way in which people use the law, shopping between the myriad institutional forums that characterize the post-modern state. The extent to which such an approach can also help to answer some of the fundamental questions that underlie the transitional justice debate – which legal remedy is best suited to deal with a violent past – will be explored in the following sections.

The situation in Uganda

For over two decades Northern Uganda has been the scene of a largely 'forgotten' but brutal war. A 'forgotten war', because, according to Finnegan and others, the fighting by the Lord's Resistance Army (LRA) and the armed forces of the Republic of Uganda, the Uganda People's Defence Forces (UPDF), hardly received international attention until recently. It is only in the past few years that attention for the situation in Northern Uganda has increased (Apuuli 2005). However, since UN undersecretary Jan Egeland called the situation in Northern Uganda 'the biggest forgotten, neglected humanitarian emergency in the world today', various national and international human rights organizations, researchers and media broadcasting companies have followed him in expressing their deep concern.[6] As a result, the massive internal displacement, the gruesome mutilation and killing of civilians and the recruitment of child soldiers are no longer hidden from the outside world.

Astonishing, if generally vague, figures sum up the scale of the LRA conflict. Since 1996 an estimated one to two million people, or at least three quarters of the population in Northern Uganda, have moved to internally displaced people (IDP) camps, where they live in a state of hunger and often sickness in cramped, dirty and precarious conditions (Gosling & Prendergast, Pham et al., Branch). Although the currently more than 200 camps remain concentrated in the Acholi districts of Gulu, Kitgum and Pader, in recent years the IDP camp phenomenon has extended to neighbouring areas of Northern Uganda, encompassing most notably the Lira, Apac and Katakwi districts (Allen 2006, Lomo & Hovil 2004).

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6 Press release, AFP, 'War in northern Uganda world's most forgotten crisis', 11 November 2003. Reports by the International Crisis Group (ICG), the BBC World Service, IRIN News Service, and various NGOs such as Médécins sans Frontières (MSF) and Unicef.

Estimates of the level of war-related violence indicate that almost every citizen of Northern Uganda has been affected by the war in one way or another (Annan et al.). Although accurate numbers are unavailable because incidents are not systematically reported, it is generally agreed that in the course of the LRA war more than tens of thousands of civilians have been killed, raped or otherwise maimed, often by relatives, or forced to mutilate or kill parents, siblings and extended clan members themselves. In addition, one of the most often quoted characteristics of the LRA war is the abduction and forcible recruitment of children and other civilians to serve in the rebel army. According to Pham et al., at least 20,000 children were abducted by the LRA at a young age and subsequently trained to commit atrocities mostly directed towards their own community (see also Akhavan, Branch).

Why this war and these human rights abuses? What is the LRA fighting for, and what has caused this war to continue for so long? These questions are not easily answered. The causes of the LRA war comprise of a complex web of deeply-rooted grievances dating back to the colonial legacy – and perhaps even pre-colonial memories – combined with the greedy political and military performance of the post-colonial regimes and including contemporary skirmishes over state power in Uganda. Despite President Museveni's seemingly successful political domination since 1986, his power is not without internal opposition. And neither was that of his predecessors.

The British colonial powers in Uganda left a heritage of divide and rule politics, mainly contrasting Northern Nilotic peoples from Southern Bantu peoples (Apuuli 2005, Jackson, Doom & Vlassenroot). The current economic imbalance between the poor North and the relatively rich South of the country can largely be traced back to the British administration. While industrialising the South, and relocating to the South Ugandan groups that were considered elite, the North mainly functioned as a base to develop the army, and its inhabitants were considered cheap labour for cash crop production for the South (Lomo & Hovil 2004, ICG 2004). As Ngabirano pointed out, this North-South divide is still felt today, and opposing many Ugandans into us-versus-them narratives. These narratives of difference have been reinforced during the post-colonial administrations and most notably by the former president Idi Amin. Under Idi Amin many Acholi and Langi people were massacred, triggering deep feelings of hate and distrust among the Acholi that are mainly directed towards the capital Kampala (Gersony).

Rather than seeking to redress such deeply-felt hate in the North by allowing for political negotiation, the current Museveni government has responded primarily by military means. Perhaps such a reaction is deeply engrained in Ugandan understandings of how to gain and hold on to political power. After all, in the early 1980s the current President Museveni himself also fought a rebel war. He effectively owes his current political status to insurgency, by opposing and eventually defeating the former Obote regime with his National Resistance Movement (Baker). Generally, for the best part of Uganda's post-colonial political history, insurgencies have been countered with violence by the ruling army, thereby leading to a further militarization of politics (Van Acker, Doom & Vlassenroot). These cycles of violence have gone unpunished

for all those years and up until today, thereby allowing recourse to violence to become an almost legitimate means of gaining or holding on to power (Lomo & Hovil 2004).

Furthermore, the involvement of the supernatural seems to hamper a climate for peace in Northern Uganda. An often overlooked aspect of the LRA war is the Acholi belief in the power of ancestral spirits (Ellis). In the 1980s the substantive 'Holy Spirit Movement', mainly composed of Acholi fighters caught under the spell of Alice Lakwena Auma, headed southward to Kampala with the intention of overthrowing the capital city (Behrend). Although they failed in their quest – spreading the belief that the Acholi were threatened with extinction by Museveni's 'soldiers of the evil spirits' – the movement has aided both Alice and, later, LRA leader Joseph Kony, to recruit substantial numbers of fighters (Jackson: 49). The effect which the spiritual orders have on LRA soldiers allows Kony to claim popular legitimacy for his controversial fight for a Ugandan government with a constitution based on the biblical Ten Commandments (Nyeko & Lucima, Doom & Vlassenroot).

Finally, even though Museveni initially may have claimed the LRA war to be no more than a domestic dispute (Apuuli 2005), various observers, such as Van Acker, have highlighted the international dimensions which the LRA conflict encompasses. Political strife and insurgent movements in bordering Sudan, notably the Sudan People's Liberation Army (SPLA), have affected the behaviour of the LRA and the UPDF. Furthermore, the USA has left its footprint on the LRA insurgency in Uganda by adding the LRA to its list of international terrorists (Allen 2006). Related to this complex web of international alliances in the political sphere is the – for some – financially profitable war economy, including a largely informal international arms trade. Economic disparities between North and South have long spread dissatisfaction among the people in Northern Uganda, and UPDF recruits are not immune to financial profit either. Corruption among army officers, and financial benefits created by the war economy in general, has helped to sustain the circle of armed violence (Van Acker).

Nonetheless, after more than two decades of internal war, Northern Uganda has in recent years arrived at a critical juncture. In 2005 fragile peace negotiations commenced in Juba, Southern Sudan, and in August 2006 a ceasefire was agreed upon by the UPDF and the LRA (ICG 2006). After close to a year of stalling and continued violence a partial agreement was finally signed between the government and the Lord's Resistance Army on the 29th of June 2006. In this agreement on the third point of a five-point agenda the issues of justice and accountability, and the relationship between the ICC arrest warrants, amnesty procedures and the (neo-)traditional system of *matu oput,* to which we shall now turn, have played a central role.

The International Criminal Court

In invoking the jurisdiction of the ICC in the case of Northern Uganda in December 2003 President Museveni made his country the first ICC State Party to voluntarily refer a case to the court since the entry into force of the Rome

Statute in April 2002. The court created by this Statute could easily be considered to be the crown jewel among the transitional justice institutions, a shining example of how the 'age of implementation' of international human rights had finally come about (Ignatieff). Propelled by NGO activism and public indignation the Rome Statute had amassed the 60 ratifications needed for its entry into force within less than four years after the Rome conference, and thus moved from 'an exhilarating idea to a carefully negotiated document and finally an operational institution' at a much greater pace than even the most positive observers could have guessed (Arsanjani: 385).

The ICC's jurisdiction dates back to the Genocide Convention and the Geneva Conventions, translations of the post-war resolve to never allow the holocaust to occur again, that were largely shelved during the Cold War.[7] In addition, the Rome Statute could draw on the case law generated at the early stages of the two *ad hoc* tribunals for Yugoslavia and Rwanda. Generally, the ICC is concerned with the most serious crimes of concern to humanity as a whole: genocide, crimes against humanity and war crimes.[8] Jurisdiction is not only held *ratione materiae* but also *ratione loci, ratione personae* and *ratione temporis*: the ICC can prosecute crimes committed on the territory of State Parties (12[2]) by their nationals, and after the entry into force of the Statute with respect to the State Party concerned (Schabas).[9]

Just like the hybrid courts described in the introduction, the ICC defies easy generalizations and dichotomies in terms of legal traditions. The Rome Statute codifies criminal law principles from different national jurisdictions. While the procedures and rules of evidence seem to draw most of their inspiration from the common law system, the large role for the pre-trial chamber, for one, reveals a civil law inspiration as well. As one observer put it: 'the fight between common law and civil law has been replaced by an agreement on common principles and civil behaviour' (Schabas: 117). In addition, while international tribunals are classically associated with retributive justice geared towards the perpetrators, the ICC will make provisions for reparations to victims, and has institutionalized their position in its proceedings (Articles 75 and 79 Rome Statute).

Museveni referred the general 'situation concerning the Lord's Resistance Army' to ICC prosecutor Moreno Ocampo in December 2003. In the months thereafter, the killings continued, including a massacre in February 2004 when two hundred unarmed people were hacked to death in Barlonya camp. In July 2004 the prosecutor officially indicated that he would investigate the situation in Northern Uganda, and little more than a year later the ICC's pre-trial chamber issued arrest warrants against five LRA commanders, including Joseph Kony (Akhavan, Allen 2006, Apuuli 2006). The arrest warrants held that the

7 Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277 and the four Geneva Conventions, which are partly based on the Hague Conventions of 1907.

8 Art. 5 Rome Statute of the International Criminal Court, which also lists the possibility of exercising jurisdiction over the crime of aggression once a provision on this has been adopted.

9 Arts. 11 and 12(2) Rome Statute.

LRA was deemed to have 'engaged in a cycle of violence and established a pattern of "brutalization of civilians" by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements'.[10]

There is ample discussion on what drove Museveni, who had always resisted international involvement in the war in the North, to suddenly refer the situation to the ICC. One reason was that the military option, operation 'Iron First' in which the Ugandan Army had – with the assistance of the USA – lauched attacks in Sudan, seemed to have only led to more fighting.[11] In addition, the international community, having long considered Uganda a 'donor darling', had started to express concern at the fighting in the North. While the president sponsored peace talks and amnesty procedures on the one hand, he also expressed his resolve to see that 'those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice'[12] (Allen 2005, 2006). Here, the ICC was regarded as a 'depoliticized venue for justice that would be perceived as impartial' and – more cynically – a way in which the government washed its hands 'of an insoluble internal problem' (Akhavan: 403; Arsanjani: 394).

However, it was not long after the wheels of the international criminal justice machinery had creakingly been set in motion for the first time that the first signs of hesitance came out of Uganda. One problem was that the peace process, after having stranded a few times, now actually seemed to be yielding results. Negotiator Betty Bigombe, one of the main persons responsible for the successes, sighed that the ICC arrest warrants meant that 'there is now no hope of getting the LRA commanders to surrender' (Apuuli 2006: 185). The spokesperson for Uganda's Amnesty Commission, which had just started its work, agreed: 'This is going to make it difficult for the LRA to stop doing what they are doing' (Apuuli 2004: 407). As an important Ugandan scholar put it: 'the message is being sent out that, in seeking a peaceful means to ending the suffering of millions of Ugandans in northern Uganda, the government of Uganda, and the people of Uganda for that matter, have committed a serious crime' (Lomo 2006: 1). An international scholar long involved in Uganda summarized local concerns about the ICC as follows: 'it is biased; it will exacerbate the violence; it will endanger vulnerable groups – notably witnesses and children; it is spoiling the peace process by undermining the amnesty and the ceasefire; and it ignores and disempowers local justice procedures' (Allen 2006: 96; Accord).

Many lawyers sided with these critiques, drawing the attention to the complementarity that is one of the founding principles of the Rome Statute (Art. 1). A case, the Statute holds, is only admissible if the State Party 'is unwilling or unable genuinely to carry out the investigation or prosecution' (Art. 17 1(a)). In

10 Arrest warrants in the cases of The Prosecutor vs. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, ICC-02/04-01/05.

11 The USA had included the LRA on the Terrorist Exclusion List of the Patriot Act of 2001.

12 ICC Press Statement, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', The Hague, 29 January 2004.

addition, the prosecutor can decide that, taking into account the gravity of the crime and the interests of the victims, an investigation would not serve the interests of justice. Jurists, from Uganda and elsewhere, put forward these arguments, arguing – amongst other things – that the local amnesty procedures should be considered domestic remedies precluding ICC involvement (Arsanjani, Goldstone, Lomo). Others, however, noted that 'under the ICC Statute and general international law, amnesties are not a bar to the prosecution of egregious crimes' (Apuuli 2004: 408).

Surprisingly enough, Museveni himself also expressed regret at the referral as soon as the arrest warrants were issued. In government rhetoric, two reasons for this are put forward: the fact that the international community had not managed actually to arrest the LRA leaders, and the availability of local alternatives: 'They can't make us violate our culture', as Museveni stated.[13] Given the responsibility of Uganda itself, as well as the neighbouring countries and the international community in executing arrest warrants, Museveni's blaming the international community for not having arrested the LRA leaders lacks credibility. Rather, the possibility of the ICC also opening investigations into crimes committed by the government forces seems to be one of the main reasons for Museveni's change of tack (Akhavan).

In spite of this widespread opposition, the prosecutor has on numerous occasions stated his resolve to have the LRA leaders brought to The Hague to face trials. In 2006, for instance, he reiterated the crimes committed by the LRA and indicated that 'while the current situation is delicate, we believe that peace and justice can work together'.[14] In 2007 Ocampo reiterated that: 'I cannot be a political actor in the talks. I am only a judicial actor at the ICC, I have to do my judicial work'.[15] Nevertheless, the criticism does seem to have played a role in the ICC decision to first open proceedings in the situation of the Congo, and hear the case against Thomas Lubanga Dyilo first. In addition, the ICC's outreach office stepped up activities in Northern Uganda, in order to promote a better understanding of the workings of the court.

The rift between the Ugandan government and the ICC was formalized by the agreement reached by the end of June 2007.[16] This agreement provided guidelines on the relationship between retributive and restorative justice, departing from the 'need for adopting appropriate justice mechanisms, including customary processes of accountability that would resolve the conflict while promoting reconciliation'. While recognizing a host of traditional justice procedures, the importance of truth-telling and alternative sanctions, the parties also agreed to apply formal criminal and civil justice mechanisms to perpetrators of serious crimes or human rights violations during the conflict. In doing so, Museveni explicitly indicated that the agreement sought to shield the top

13 'Museveni gives Kony amnesty', *New Vision*, 4 July 2007, http://www.newvision.co.ug/D/8/12/507631.

14 'Statement by Prosecutor Luis Moreno-Ocampo', *Press Release ICC*, 6 July 2006.

15 Felix Osike, 'ICC Prosecutor Louis Ocampo in His Office at the Hague', *New Vision*, 13 July 2007.

16 'Agreement between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (Lra/M)', AllAfrica, via Lexis Nexis, 2 July 2007.

LRA commanders from the ICC: 'If they go through the peace process then we can use alternative justice, traditional justice which is a bit of a soft landing for them. But if they persist and stay in exile then they will end up in The Hague for their crimes'.[17] While the details of the arrangement were left open, it was clear that the combination of national trials with the amnesty and traditional dispute resolution procedures discussed below could lead the Ugandan government to argue for the withdrawal of the case, given the fact that domestic remedies had not yet been exhausted.

Amnesty Procedures

One of the local alternatives offered to the ICC from the very start were the amnesty procedures. Following years of activism by Acholi religious and traditional leaders and civil society groups the government of Uganda enacted the Ugandan Amnesty Act in 2000, initially with the enthusiastic support of the internally displaced people. The Act defines amnesty as 'pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.[18] It allows for amnesty for all Ugandans who committed crimes against the state since the 26th of January 1986, the day President Museveni took office, provided that they 'renounce and abandon involvement in the war or armed rebellion' and, amongst other things, hand in their weapons (Art. 4 1(b) Amnesty Act). For the situation in Northern Uganda this means that the Amnesty Act allows former LRA combatants to avoid national state prosecution – *and* ICC prosecution – by claiming amnesty from the Ugandan state (Allen 2006, Blumenson; Lomo & Hovil 2005).

Granting amnesty to war criminals is not a new phenomenon, although its practical definition differs according to the context. According to Parker, amnesty generally refers to an agreement between the ruling authority and those rebelling against this authority, exempting the latter from prosecution and punishment by the former. Amnesty has its roots in acts of mercy and forgiveness, virtues resting mainly on religious foundations. Contemporary acts of amnesty, however, are often part of political strategy rather than religious commitment. While the Rome Statute holds that national decisions taken for the purposes of 'shielding the person concerned from criminal responsibility' (Art. 17 2(a)) amount to a national unwillingness to prosecute, and therefore allow for prosecution by the ICC, this negation of local amnesty procedures is far from contested in international criminal law. Former prosecutor Goldstone, for instance, points out how the ICC prosecutor could forego investigation or prosecution if this is not deemed to be 'in the interests of justice' (Art. 53 1(c) Rome Statute; Goldstone).

The idea of the Ugandan Amnesty Act is to ease the decision for combatants to renounce their arms, to stop fighting. A decision to leave the bush for a

17 Reuters, 'Uganda's President Hopes Rebels Choose "Soft Landing"', June 4 2007, but also Golzar Kheiltash, 'ICC Arrest Warrants Hang in the Balance as Ugandans Prepare for Second Round of Peace Talks', *International Enforcement Law Reporter* 23, no. 8 (2007).

18 Government of Uganda, Amnesty Act, 2000.

return to ordinary life is difficult for contemporary LRA combatants because they fear a decline in their personal economic situation, and also because they fear stigma and loneliness, resulting from the thought that they can no longer reintegrate into society (Annan et al.). Although many former child soldiers in Gulu complain about their horrible experiences in the rebel army and the traumas that hunt them, for senior LRA commanders life in the bush is different. As a former LRA combatant expressed it, once rebel commanders return to the community they lack the authority they were accustomed to in the bush, and also the free access to (stolen) food, medicines, technological devices, and 'wives'.[19]

In order to stop the fighting, looting and rape by the LRA, the Amnesty Act attempts to offer senior LRA combatants the option to lead an ordinary life that is no worse than that in the bush. In return for truthful confessions of the misdeeds they have committed and the promise not to resume fighting, the amnesty regulation intends to give former combatants an amnesty package consisting of money and basic utilities, and advice concerning housing and employment opportunities (Pham et al.). As such, the Act is the metaphorical carrot from the Ugandan government, marking a change from the years of unsuccessful battle intending to stop the rebels with a stick. Research conducted in 2006 showed how, indeed, the possibility of being granted amnesty was one of the main factors to convince LRA commanders to leave the bush.[20]

Even if the government's move to seek other than military measures in dealing with the enduring LRA conflict was commendable, the tangible results were less so. In the more than seven years of its existence the Amnesty Act has not managed to end the violence in Northern Uganda, and in some instances has even exacerbated it as the LRA is inclined to bitterly avenge the families of LRA fighters that have surrendered (Allen 2005). As a result, disappointment about the Act, and with it about the government, has spread among Ugandan citizens in the North. The people in the IDP camps seem to feel particularly ambiguous about the amnesty procedures for former LRA rebels. Although Lomo and Hovil (2004) and others have asserted that the moral basis of the Amnesty Act responds to Acholi views on conflict resolution, the largely unchanged reality on the ground also weighs heavily.

In the eyes of many internally displaced people (IDP), a painful aspect of the Amnesty Act is its narrow focus on perpetrators. The Act is an agreement between government and rebels, restricting the space for community involvement in the process. Victims are not given the opportunity to reconcile with offenders, which creates a deeply-felt distance between the former rebel and the community he or she is expected to reintegrate with. Furthermore, while persons who have committed the gravest crimes against humanity are entitled to apply for amnesty the average refugee camp dweller receives nothing from the government, not an apology, no respect, no confirmation of human dignity, let alone financial compensation. This hurts. As such, the one-sided orientation of the Act appears to undermine its effectiveness (Marchand).

19 Personal communication; Kampala, 2 June 2005.

20 http://www.c-r.org/our-work/uganda/documents/CR_Coming_Home_May06.pdf.

The legitimacy of the Ugandan Amnesty Act is also contested for other reasons. Despite earlier interest in local reconciliatory mechanisms for conflict resolution, Amnesty International and Human Rights Watch have stressed in recent reports that the perpetrators committing the severest atrocities in Northern Uganda deserve punishment rather than forgiveness.[21] Quoted by Allen (2006: 189), in a statement supporting the ICC warrants Amnesty International even declares the Amnesty Act 'unlawful' because it does not urge national courts to prosecute.[22] Likewise, many Acholi people increasingly feel that it is no longer possible to reconcile with LRA rebel leaders. The excessive atrocities for which the LRA is mainly responsible are not supported by the general population and the arbitrariness of the LRA attacks is not easily forgotten or forgiven. While the LRA seems to have the government as its main target one day, it turns against Acholi fellows the next. Apart from its inhumane treatment of civilians, it is also this LRA randomness which causes some Acholi to close the door to reconciliation, as is demonstrated by a story told by an old man surrounded by others in camp Orom, Kitgum district:

> The question of forgiving LRA members reminds me of what my grandfather told me about the soil of our garden. He said that long before the LRA started, our family had a large area of land, a very big garden. We treated this land very well, we worked hard, and we were given a lot in return, we did not go hungry. During a violent period of strife with one of the neighbouring clans, however, the land was seriously neglected. We damaged the soil and the crops; we trampled over the garden without respect because we were blinded by the fighting. After some time, the fighting was over and we looked at the land. We saw how much it was suffering. Then we felt guilt, and realised the wrong we had done to the soil. So we promised to never again treat her like that, and we hoped that through our remorse and the respect we regained she would recover. The soil did recover; she had forgiven us. If only we had been a little harsher, however, she would not have been so merciful. And this, I believe, is what is happening with the LRA. The LRA has been too harsh to be forgiven by the Acholi people, and they know it. (Okello, 14 May 2005).

In spite of these concerns, the 2007 agreement could well lead to large-scale amnesties. It calls on the Ugandan Human Rights Commission and its Amnesty Commission as the main actors in implementing the agreement, and allows for amendments of the Amnesty Act to be made. Even if Museveni initially promised Ocampo that the Amnesty Act would be amended to exclude the LRA top, this was never done, and – within the political dispensation – is not likely to happen.

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21 http://web.amnesty.org/library/Index/ENGAFR590042006?open&of=ENG-UGA and http://hrw.org/english/docs/2006/11/16/uganda14611.htm [both accessed 29 March 2007].

22 http://web.amnesty.org/library/Index/ENGAFR590082005?open&of=ENG-385.

Matu Oput

The Acholi system of dealing with criminal offences is, unlike the Rome Statute for the ICC and, to a lesser extent, the Ugandan Amnesty Act 2000, hardly documented.[23] It is claimed that over time, its key principles and associated rituals have been passed on orally to following generations. Although because of the war the majority of the current Acholi generation is restricted in putting reconciliatory rituals into practice, their memory of it has not gone.

As explained by a group of elders in an IDP camp in Kitgum district[24], the main idea of the Acholi justice system in terms of dealing with war crimes is one that rests on forgiveness by the victimized family or community. As such, a case of crime is a communal happening, involving not only the offender and his or her family but the victim(s) in particular. The general procedure of the Acholi criminal justice system focuses on the offending family or clan publicly confessing the crimes committed, showing public remorse by going through various communal rituals and materially compensating the victimized family or clan, after which the latter promises to forgive the former for what they committed.

The various rituals mark the different stages of justice. In the case of violent disputes and murder among families and clans the overarching or final ritual to pass is *Mato Oput*. *Mato Oput* refers to drinking a bitter root extract from the *Oput* tree, an act that is performed together by all parties involved in order to reconcile with each other. An important aspect of *Mato Oput* is the willingness by the offender to compensate the victim for the losses felt. As the staff of the Kitgum office of Caritas note in their report on traditional Acholi rituals, in earlier times young daughters were given to the victimised clan. The birth of her children would replace the clan members lost. Nowadays it is more common to compensate by means of giving cattle or money.

The *Mato Oput* ritual requires a substantial amount of organisation and expensive material resources, including a sheep from each clan, a bull, several goats, new knives, spears, calabashes, bowls and baskets, communally brewed *kwete* and local bread, and large financial court fines for the chiefs. Given the current war-related obstacles to acquiring the necessary material requirements *Mato Oput* has not been practised frequently since the LRA conflict started (Caritas). Nowadays, instead of *Mato Oput* the Acholi returnees often abide by the ritual of *Nyouo Tong Gweno*, a ceremony during which (child) combatants returning from battle are welcomed back into the community. After the returnees have publicly confessed to the misdeeds they committed while being away they symbolically step on an egg, barefooted, to resume their innocence.

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23 Other traditional mechanisms included in the 2007 agreement are: 'Ailuc', which refers to the traditional rituals performed by the Iteso to reconcile parties formerly in conflict, after full accountability; 'Culo Kwor', which refers to the compensation to atone for homicide, as practised in Acholi and Lango cultures, and to any other forms of reparation, after full accountability; 'Kayo Cuk', which refers to the traditional rituals performed by the Langi to reconcile parties formerly in conflict, after full accountability.

24 The group interview was held in camp Palabek, Kitgum, 11 May 2005.

While the Acholi rituals are often presented as strongly local initiatives, rooted in ancient traditions, the reality is one of construction within a context of globalization. As Allen (2006) critically observes, statements of a communal 'tradition' of reconciliatory justice and even the presumably long-established Acholi identity need to be approached with caution. He asserts that 'to the extent that there was ever an integrated Acholi justice system, it was introduced and regulated under the indirect rule of the British protectorate' (ibid. 162), and also that the current borders of Acholiland, the area inhabited by the so-called Acholi people, were formed by the British administration. Nevertheless, local leaders, non-governmental organizations and people in the IDP camps, strengthened in their views by international aid agencies and the increasing local and global media coverage, generally consider the Acholi type of justice to be regarded as an institutionalized 'traditional' system (Allen 2005).

Here it is important to note how the international community, frustrated with the truth vs. justice debate and keen to stimulate alternative, authentic approaches to dispute resolution, plays as strong a role in supporting these 'neo-traditional' forms of dispute resolution as do local actors (Marchal, Nyamu-Musembi, Vandeginste, Zartman). The Acholi Religious Leaders Peace Initiative and the Acholi traditional leaders' associations were largely financed by international donor agencies, and several conferences entitled *Kacoke Madit* (big meetings) were held in London (Allen 2005). One important explanation for the donor emphasis on reconciliation lies in the fact that many of the organizations most closely involved have a religious background.

In writings with titles like 'Beyond Truth Commissions: Indigenous Reconciliation in Uganda' the Acholi way of dealing with war crimes is usually referred to as essentially reconciliatory and contrasted with retributive forms of criminal justice (Quinn 2006). However, although forgiving serious offences and helping to reintegrate former combatants into society requires a substantial reconciling attitude by victims, in a way public remorse can be viewed as a psychological punishment. Furthermore, the supposedly strong Acholi capacity to forgive is accompanied by a detailed memory of their communal history, including that of grave crimes and violent episodes affecting their communities. In that sense, when Acholi victims and offenders reconcile or promise to 'forget' what happened they do so in terms of their behaviour in daily interactions, seeking to avoid actions of revenge; they do not forget the past in their historical accounts.

Taking a legal culture approach

The example of Uganda not only shows the proliferation of institutional responses characteristic of the field of transitional justice these days, but also the blurring of boundaries between types of justice and between the global and the local. As such, it highlights the situational dilemmas that mark the field of transitional justice, both as a concept and concerning its aims. It is precisely in these cases that the notion of legal culture, if used to increase awareness for 'what people think about the law and the values embedded therein', becomes highly relevant (Gibson: 55; Oomen 2007). In situations where the legitimacy

of the state is hardly a given, the international community is one of the most powerful actors and there is a cacophony of voices on what exact mix between truth, justice, reconciliation and reparations is most suited, the best voices to listen to are those that will ultimately be most affected by the institutions put in place.

It is not surprising, then, that this type of empirical research privileging people's voices has become increasingly important in discussions on transitional justice. One of the most noteworthy examples is a large-scale research project on people's perceptions of justice in Rwanda, Bosnia Herzegovina and Croatia, that not only drew attention to the role of ethnic hatred in post-war countries but also gave rise to an ecological model of social reconstruction (Stover, Baxter). A similar type of research, be it very uneven in quality, was carried out in Cambodia, Guatemala and Iraq (ICTJ; Mokhiber). If there are general conclusions to be drawn from these projects, they do not only lie in the importance of wider socio-economic justice but also the value given to local ownership of the process, and the general reluctance among victims to completely forego revenge in order to achieve reconciliation.

In Uganda, the few research projects carried out on people's perceptions of the various institutions, and their desires in terms of justice, reveal some striking differences. While some researchers conclude that the amnesty procedures should remain the focus of attention because these will, eventually, end the violence, others claim that the victims of the LRA conflict mainly seek recognition of local reconciliation practices, presumably embedded in their communal or even 'traditional' understandings of conflict resolution. Other observers assert, if somewhat hesitantly, that most victims actually welcome an externally-driven and essentially retributive institution like the ICC, be it mainly for the LRA top and in combination with reconciliatory and reparation mechanisms for ordinary footsoldiers.

Among those underlining the local legitimacy of the Amnesty Act are Lomo and Hovil (2005). They found that there generally appears to be widespread support for the amnesty procedures among the victims of violent conflict, but that the Act is undermined both by its lack of governmental support and the 'dark shadow' of the ICC intervention (Muhumuza). Despite these hurdles, they conclude that 'the issue of amnesty and its credibility is going to be crucial' and that 'the resilience of the people and their willingness to forgive is tangible' (ibid. 28). This finding is supported by Quinn, who concludes that:

> (I)t is extraordinary that, after 19 years of civil war, many of those who have suffered most are willing to allow Kony to be granted amnesty if he voluntary leaves the bush. This is not an indication of their support for him, or of empathy for what he is doing, but reveals the fact that they are willing to allow him to be granted amnesty if it means an end to the war. In other words, the desire for long-term stability outweighs the demands of modern justice as articulated in international law. This clearly raises huge questions with regard to issues of impunity. (p.26).

Here, also people's preferences are translated into a combination of amnesty and traditional reconciliatory procedures.

Other findings indicate, however, that violence conducted during the LRA conflict has made it increasingly difficult for Acholi victims and criminal offenders to reconcile. Allen, on the basis of his research, questions the 'kind of 'received wisdom' that the Acholi people have a special capacity to forgive, and that local understandings of justice are based upon reintegration of offending people into society' (2005:v, see also Pham et al.). As many Acholi in the IDP camps in Gulu pointed out to Iris Marchand, the LRA conflict has become a vastly extended conflict, involving an unprecedented number of violent crimes that have affected numerous families and clans. In addition, respondents point out how traditional methods of conflict resolution are hardly applicable in the context of this war, where victims and perpetrators can often no longer be distinguished. LRA victims do not have a clearly defined offending family or clan to point at, as most of them are or know perpetrators within their close kin. As a result, both offenders and victims no longer trust their own relatives in terms of forgiveness (Marchand). As one respondent put it:

> Of course we want peace at all costs, but this does not mean that we exclude justice. A large part of the process will be reparation for our people, the people that have been harmed by the conflict. So if you really want to reach peace, you have to bring justice in also because our situation is not turned right only when the violence stops. If peace negotiations would finally succeed and there would be no more fears, then the war has not ended yet. The problem will not be over until we have peace with the situation. We need people to confess their wrongs, we need to see them suffer in return for what they have done to us, and we very much need to be given back what has been taken away from us. We need more than simply applause for peace. (Sarah, 8 April 2005).

In these research projects, therefore, it is hardly clear that an appreciation for traditional and reconciliatory procedures means that victims are willing to forego revenge.

What is evident in all the research is that for most of the Acholi peace is a priority, and that people are willing to consider all roads that could take them there. The scepticism towards the ICC, noted in some of the reports above, could have many different reasons than an aversion to retributive justice: it could also lie in a lack of knowledge on the institution or the fear that ICC involvement will disturb the peace process. Generally speaking, hopes seem to lie with political rather than strictly legal solutions, and priorities with food, schooling and health rather than justice in a narrow sense. Peace is a priority, but so is a national and an international acknowledgement of the mistreatment of the Acholi generally (Marchand 2005). As one Acholi respondent put it, and many others echoed (Allen, Pham):

> Well, maybe your ICC can be a good thing because it will teach them something, but I don't know, maybe it will. But you have to remember the problems of the people… you know, the suffering. So I think it is good to bring your justice and take those bad people out of our life, but we also need more things. I have to get on, you know, it is not like you can say 'well, that's it', because we had everything taken away from us. The problems will still be there.

> For the people the conflict is not over when the LRA is defeated because we are still suffering. (Stella, 22 April 2005).

Conclusion

In the whole cacophony of voices debating the type of justice needed after 20 years of killing, rape and looting, in which international donors advocate traditional justice, government leaders pull international tribunals into local politics, and amnesties get entangled with trials and the war on terror, it is important to give the microphone to the people most concerned.

In doing so, however, a number of issues are important. The first is to be aware of the methodological difficulties in asserting people's opinions of institutions they hardly know, and of which the outcomes are unpredictable for even the most trained jurist. The fact that these difficulties are aggravated by language barriers and the specific context is demonstrated by the very different results yielded by the empirical research projects discussed above.

More importantly, these research projects should be grounded in theoretical understandings of the nature of culture, and of what constitutes the legitimacy of political and legal institutions. The notion of a bound (legal) culture has long been abandoned by anthropologists. In transitional justice discourse, however, it has made a surprising comeback: Western donor organizations and researchers ascribe non-Western societies a capacity to forgive with little attention for the lessons on the creation of the customary and the relation between vengeance and forgiveness that have long been received as wisdom in legal anthropology. While it is clear that Ugandans feel that traditional dispute resolution procedures and amnesties can play an important role in bringing about peace, this should not automatically be interpreted as a choice against retribution.

Finally, it is important to realize that, as Friedman did in 1969 and scholars of legal culture have pointed out since, people's attitudes towards the law are dynamic and shaped not only by culture, but also by structures and substance. Translated into the Ugandan context, this draws attention to the fact that the institutional options that people see also shape their attitudes towards them, as do the outcomes – the substantive elements – of these institutions. Here, the lack of knowledge of what the ICC could attain could be as important in shaping peoples' opinions as a pre-fixed preference for a certain type of justice, and people's attitudes towards international tribunals could well change over time. In this sense, the question is not whether Ugandans prefer to see perpetrators step on eggs, be granted amnesty or be whisked off to The Hague, but how to best gear this combination of institutions towards the one desire that speaks more than clearly from all the research quoted: sustainable peace. As one prominent Ugandan scholar put it: 'I think the greatest justice one can deliver to a people living in conflict is to enable them to enjoy some sort of peace, and then to enable them to have a say in how they think justice should be done – AND TO WHOM!' [25]

25 Moses Chrispus Okello, 'The False Polarisation of Peace and Justice in Uganda', Paper presented at the Conference: Building a Future on Peace and Justice, Nuremberg, 25-27 June 2007.

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