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CONSTITUTIONS IN A WORLD OF POWERFUL SEMI-AUTONOMOUS SOCIAL FIELDS

Gordon R. Woodman*

I. The Prevalent Condition of Legal Pluralism

The primary social role of humans is nowhere that of subjects of the state, although students of state law tend to forget this. While all people are today subjects of states, they also belong to social groups other than the state, and they generally view their membership of these groups as more important.

Social groups have their own rules for the ordering of members' relations, generated within the group or adopted from external sources. The non-state groups found throughout Africa, such as the "tribe" and the adherents of a religion, order the activities of members by such rules for most of the more important aspects of their lives. These groups are, in Moore's much-used and helpful phrase, "semi-autonomous social fields."¹ Their rules may be appropriately termed "law": there is no empirical distinction between them and state laws other than the practice of certain institutions of the state to differentiate between them; and discussion is assisted if these rules and state laws are viewed as having, at least provisionally, roughly equal status. To deny that the operative rules of conduct of semi-autonomous social fields other than the state are law is to make an ideological, not a scientific assumption.² Although usual in legal literature, it is analogous to the obfuscatory tendency to limit the term "society" to the community of a state.³

This paper seeks to pursue the objective of the present volume, stated in F.L.A. Reyntjens's Call for Papers of 11 February 1988, namely, to

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1. S.F. MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 54-58 (1978).

2. The essence of the argument for this view is contained in Griffiths, *What is Legal Pluralism?*, 24 *J. LEGAL PLURALISM* 1 (1986).

3. As in, e.g., much of the discussion in *PLURALISM IN AFRICA* (L. Kuper & M.G. Smith eds. 1969), except for Smith's chapter, *Pluralism in Pre-colonial African Societies* at 91-151.

“leave the law for what it is for the time being, and to inquire into the specific circumstances related to the global ‘environment’ in which the Sub-Saharan African political systems function, in order to study their impact on the constitutional order and governmental practice.”⁴ It considers the specific circumstances of state subjects’ membership of social groups other than the state. It takes account of a particular aspect of these social groups, their laws.

Questions concerning these laws, such as, in what ways has it been the practice in the past, and how far is it feasible in the present, for states’ constitutions to take account of non-state laws, have been constantly present in constitutional debates in Africa. Usually, however, references have been only implicit. The significance of the laws of semi-autonomous social fields in the social environment of the state’s constitutional order is such that it would seem helpful explicitly to set this as a distinct field for investigation. The lawyer is not ill-equipped to analyze it, for much the same experience and skills are requisite for all instances of law, as “the subjection of human conduct to the governance of rules.”⁵

The purpose of this paper is to emphasize the possibility and implications of such analysis. It is not concerned only with the study of non-state laws as distinct sources of legitimacy, that is, with their claims to allegiance in competition with the state. It argues for a more general consideration of the effects on state constitutions of the existence of non-state laws as social facts. Furthermore, it is suggested that it may be revealing to attend to an aspect of these laws which is sometimes overlooked: as well as claiming obedience to bodies of imperative norms as alternatives to state law, they also offer alternative normative schemes for ordering optional, consensual activity.

Although the skills of a lawyer are useful in the study of non-state laws, an adequate appreciation requires some revision of the traditional approach of students of state law. It is necessary to discard the concepts and axioms induced by the tendency of state law to deny the legitimacy of other laws. Admittedly the object of the present volume, an exploration of aspects of states’ constitutional orders, requires us to adopt the perspective of the designer of state law, or the “state’s-eye view.”⁶ But even

4. F.L.A. Reyntjens, Call for Papers, 11 Feb. 1988.

5. L.L. FULLER, *THE MORALITY OF LAW passim* (1964).

6. J. Griffiths, *supra* note 2. Terms such as “constitutional order” should indeed, according to the argument of this paper, be interpreted to include non-state constitutional orders. There is much room for study and analysis of such constitutional orders in Africa. They include most

that perspective must, if it is to perform a useful function, give attention to other norms of social ordering. An effective state constitutional order takes account of the social realities which affect its objects and functioning. In Africa, where the relative unimportance of state law is at least as marked as anywhere else, other social orderings cannot realistically be overlooked.

The discussion is of present circumstances. There will be references to what are variously called "tribal," "customary," or "traditional" normative systems. These are often depicted as existing in a pre-colonial period, an age viewed as both static, and golden or barbaric (according to the writer's evaluation). But the present discussion concerns the customary laws which constitute parts of contemporary social orders. For the purpose of delimiting this subject-matter it is immaterial whether current customary laws are essentially continuations of those which existed immediately before the enactment of the earliest colonial constitutional orders, or greatly transformed versions, or even recent inventions.⁷ They exist as social facts today, and the present exercise is an attempt to contribute to an understanding of the present, rather than of history.

There will be no prescriptions for African decision-makers. The paper is written by one who is neither a member of nor any longer a resident in an African community. The fact that he feels concern and affection for some African communities would render it scarcely more justifiable, and no less offensive, to sit in another continent and pronounce how Africans should order their societies. In many fora, including, it is feared, that in which this paper was originally presented, objective observation and legal analysis have been confused with value judgments and moral

obviously the governmental systems of the many chieftaincies, but also those of acephalous groups. It is necessary to challenge the tendency in discussion of constitutions to regard "traditional constitutional orders" as obsolete. Cf. C. SAVONNET-GUYOT, *ETAT ET SOCIÉTÉS AU BURKINA* (1986), which discusses fruitfully in juxtaposition the political systems, and so the constitutional orders, of groups within the state as well as that of the state. There needs also to be a study of the recently developed governmental systems such as those of some religious groups and self-help groups. However, the clear object of the present project was to discuss aspects of *state* constitutional orders, while not excluding consideration of the effect of non-state laws upon them. That delimitation of the scope of discussion is accepted in the present paper, although there is a comment on the issue in the last section.

7. This debate about these possibilities is usefully developed in an issue on "The Construction and Transformation of African Customary Law," 28 *J. AFR. L.* (1984), Special Number, the main themes of which are referred to in S. Roberts, *Introduction: Some Notes on 'African Customary Law'* (*Id.* at 1).

prescriptions. The aim here is no more than to further the objective understanding of certain aspects of current processes in Africa.

II. The Variety of Non-State Laws in the African "Global Environment"

It is not necessary to attempt an exhaustive list of semi-autonomous social fields in Sub-Saharan Africa and their laws, nor a complete categorization. The aim is not to provide an encyclopedia of information on legal orders relevant to constitutional ordering. It is rather to show that, for an understanding of the issues of constitutional ordering in any state, a detailed study and analysis is required not only of its social economy (a need widely recognized today, if rarely met), but also of the legal orders of which its subjects are members.⁸ For this it will suffice to mention the commoner types of semi-autonomous social fields, the variety of their laws, and the natures of their boundaries.

One of the most frequently observed and discussed fields is that of the group referred to variously as the "tribe," the "people," and the ethnic group. Its laws have been referred to as "native laws and customs," "African law," or "customary law." There is admittedly difficulty in giving a precise signification to terms such as "tribe" in the context of today's social groupings. It has been powerfully argued that the tribe cannot be satisfactorily identified as an endogamous community, a linguistic group, a group with an internally accepted group name, or a distinct economic political system, nor as a group which is at war only with outsiders, not within itself (a war/peace group), nor as a cultural unit.⁹ Nevertheless, it seems clear that groups conventionally referred to by terms such as tribes and ethnic groups do very frequently have legal

8. Cf. Y. GHAI, R. LUCKHAM & F. SNYDER, *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* (1987). This book exposes admirably the need to interpret law as an aspect of political economy, and provides stimulating reading for the purpose. But its focus of attention is the state and its legal order, and it largely ignores other legal orders. This comment is further developed in a book review for a forthcoming issue of the *JOURNAL LEGAL PLURALISM*.

9. M.H. FRIED, *THE NOTION OF TRIBE* (1975). See also R. COHEN & J. MIDDLETON, *FROM TRIBE TO NATION IN AFRICA: STUDIES IN INCORPORATION PROCESSES* 2 (1970). See also C. Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in *OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA* 105-57, 112-13 (C. Geertz ed. 1963). Geertz lists as "primordial ties" which may become foci for political action: assumed blood ties, race, language, region, religion and custom. He notes that in conflicts between primordial ties and civil sentiments, "several [foci] are usually involved concurrently, sometimes at cross-purposes with each other."

institutions and observe bodies of legal norms which, as sets or systems, are unique to each.

A further difficulty in the claim that ethnic customary laws exist is the argument that some or all of today's "tribes" did not exist before the intensification of European contact and subsequent political colonization.¹⁰ However, that view of history may be accepted without rejecting the conclusion that such groups can be perceived to exist today. Iliffe, for example, finds that "Europeans believed [wrongly] Africans belonged to tribes," but he finds further that in the course of time "Africans built tribes to belong to."¹¹ If tribes were "built," then they are no longer fictions.

The same argument applies to their laws. For the present purpose, of establishing the significance of non-state laws in the environment of state constitutional orders, it is sufficient to contend that laws of ethnic groups exist.¹² If consequently it is decided that some particular state constitutional order is to be designed to take account of the laws of ethnic groups among its population, then it may become necessary to investigate further, to remove doubts and ambiguities in our present understanding of the subject in that state by a detailed study of its ethnic groups and their laws.

The other most frequently noted field is that of the adherents of certain religious creeds. Most outstandingly Islam provides a body of norms for social ordering which Moslems are required to observe and which governments are enjoined to observe and enforce. These are not only aspirations or blueprints, since substantial numbers of people in Africa acknowledge the obligatory force and exclusive effect of these norms, and in practice generally observe them. This is the case also with some groups of organized Christianity, which, for example, provide bodies of norms prescribing the requisites and consequences of marriage. This is the case also, to a less widespread degree, of some other religious creeds.

In addition there is evidence that, in response to features of urbanization and other economic changes, there are beginning to emerge groups

10. T. Ranger, *The Invention of Tradition in Colonial Africa*, in *THE INVENTION OF TRADITION* 247-53 (E. Hobsbawm & T. Ranger eds. 1983). M. CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (1985). See also M.H. FRIED, *supra* note 9, especially Chap. 12, "The Tribe as a Secondary Phenomenon."

11. J. ILIFFE, *MODERN HISTORY OF TANGANYIKA* 324 (1979).

12. Cf. the observation by L.A. Fallers that "primordial qualities," and the "customary law" which goes with them and is asserted to have existed "since time immemorial" may in reality be of recent development. FALLERS, *THE SOCIAL ANTHROPOLOGY OF THE NATION-STATE* note 1 at 1 (1974).

defined by their members' occupations, economic class, or type and degree of education (characteristics which have a good deal of overlap). Studies of educated elites and of professions provide evidence of such incipient semi-autonomous social fields.¹³ Furthermore, there are, again primarily in urban areas, mutual aid associations the members of which acknowledge obligations imposed by their rules. Some observers have found a trend towards multi-ethnic membership.¹⁴ In these cases the rules appear to be binding by virtue of some transethnic customary law. Again, there have emerged groups of unemployed in urban areas who acknowledge obligations of mutual assistance when reliance on kin assistance fails.¹⁵ These also appear to be new groups observing their own, self-generated, self-validated norms.

These are not unprecedented developments. It is likely that in earlier periods there have existed groups defined by the practice of trades and other occupations, by lines of descent other than those predominant in the ethnic group, or by personal adherence to religious movements, each group with its own laws.¹⁶

13. On urban elites, see the suggestive, although not on this point conclusive L. Plotnicov, *The Modern African Elite of Jos, Nigeria* in *SOCIAL STRATIFICATION IN AFRICA* 269-302 (A. Tuden & L. Plotnicov eds. 1970). On the special case of the military profession, see e.g. R. LUCKHAM, *THE NIGERIAN MILITARY* (1971). (This work, however, also provides useful qualifying information on the effect of conflicting norms of primordial identities).

14. These developments are referred to, with supporting evidence, in G.R. Woodman, *The Decline of Folk-law Social Security in Common-law Africa* in *BETWEEN KINSHIP AND THE STATE: SOCIAL SECURITY AND LAW IN DEVELOPING COUNTRIES* 69-88, at 81 (1988).

15. See the indications in essays by P.C.W. Gutkind: *African Urbanism, Mobility and the Social Network*, 6 *INT'L J. COMP. SOC.* 48-60 (1965); *The Energy of Despair: Social Organization of the Unemployed in Two African Cities: Lagos and Nairobi. A Preliminary Account*, 17 *CIVILISATIONS* 186-214, 380-405 (1967); *The Socio-Political and Economic Foundations of Social Problems in African Urban Areas: An Exploratory Conceptual Overview*, 22 *CIVILISATIONS* 18-34 (1972); *From the Energy of Despair to the Anger of Despair: The Transition from Social Circulation to Political Consciousness Among the Urban Poor in Africa*, 7 *CANADIAN J. AFR. STUD.* 179 (1973). However, Gutkind has also provided a survey of studies of urban life in Africa which shows that this area has not yet been sufficiently fully studied in general, nor studied with sufficient attention to normative orders, for any confident conclusions to be proposed. In particular it is not clear how far normative orders in urban communities are best seen as modifications of ethnic laws, and how far as new, distinct laws in new, essentially non-ethnic fields. GUTKIND, *URBAN ANTHROPOLOGY: PERSPECTIVES ON 'THIRD WORLD' URBANIZATION AND URBANISM* 156-61 (1974).

16. Cf. T. Ranger, *supra* note 10, at 248, referring to the pre-colonial status of persons not merely as subjects of chiefs, but also as members of "cults, clans and guilds." The history of Africa provides many instances of civilizations with modes of production and exchange which involved elaborate divisions of labor, specialized occupations, and so necessarily bodies of rules accepted in limited social fields. An example taken almost at random is the complex inter-oceanic trade carried on from the East coast before the arrival of the Portuguese. See, e.g., H. N. Chittick, *The East*

Semi-autonomous social fields other than the ethnic group need emphasis because much writing implies that the only alternative fields to the state are ethnic groups.¹⁷ In this tendency to reduce a multiplex issue to a dichotomy the claim of the state to a monopoly of legitimacy is challenged, but only to extend it to one further entity. In international law the development of a degree of recognition for groups other than the state and their laws, noted by Ginther, appears to be limited to ethnic groups.¹⁸ This may be inevitable in international law so long as it focuses on non-state groups in the context of possible claims to self-determination and development. But in the wider discussion concerning constitutional orders, if the complex pluralism of the individual's social life is overlooked, then issues concerning the relation between state law and non-state laws will be erroneously formulated.

III. The Content of Non-State Laws

Each of these bodies of non-state law may be viewed as a legal order or system, composed of the elements listed by Paul for state legal systems — norms, institutions, processes and a “socio-economic context which informs and influences” it.¹⁹ The present discussion will focus on the bodies of norms. In many legal systems the institutions and processes are informal and not clearly differentiated. Moreover, although the norms of each system are, at least in part, integral elements of economic processes, both productive and distributive, most research hitherto has given little attention to the functional context of the norms, and has been limited to the study of their content.²⁰

Coast, Madagascar and the Indian Ocean, in 3 *THE CAMBRIDGE HISTORY OF AFRICA* 209-19 (R. Oliver ed. 1977); and V.V. Matveiev, *The Development of Swahili Civilization* in 4 *GENERAL HISTORY OF AFRICA* 455-80 (D.T. Niane ed. 1984).

17. The tendency is sustained by works which contrast state and “tribe.” See, e.g. the principal title of R. COHEN & J. MIDDLETON, *supra* note 9, although this is otherwise an excellent study. See also, e.g., C. Geertz, *supra* note 9; and W.B. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* (1966). (The traditional view of political scientists is exemplified in the debates on self-government and self-determination. See, e.g., B. Barry, *Self-government Revisited*, in *THE NATURE OF POLITICAL THEORY* 121-54 (D. Miller & L. Siedentop eds. 1983); F.G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in *LIBERAL DEMOCRACY, NOMOS XXV* 13-47 (J.R. Pennock & J.W. Chapman eds. 1983).

18. See GINTHER, *Intermediary Groups & Parallel Structures* in this volume.

19. See PAUL, *Rural Development, Human Rights & Constitutional Orders in Sub-Saharan Africa* in this volume.

20. Some analyses attempt to view laws as parts of economic processes. See, e.g., F.G. SNYDER, *CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION* (1981). But these are unusual, the bulk of the literature being in the tradition of the SOAS Restatement of African Law.

Each legal order contains typically two broad types of norms. First, each body of norms includes imperatives such as those requiring the performance of certain duties to political superiors, or forbidding the consumption of certain foods and drinks, or certain sexual relations. Since coercion is usually required to ensure a relatively high rate of compliance, and the application of coercion usually needs to be organized, imperative norms entail concentrations of social power. Necessarily these power-holders — such as chiefs, elders, age-group leaders, secret societies, and religious functionaries — are distinct from the state's power-institutions. They are not necessarily in conflict with the state, since not every imperative norm of non-state law is opposed by a contradictory imperative of state law. State law may permit, without requiring, that which non-state law requires, and vice versa. But if not in contradiction they are almost inevitably in competition, since the state tends to claim a monopoly of the stronger forms of coercion. Acts of enforcement of non-state imperatives are likely to be contrary to state law, even if the imperatives themselves are not. Imperatives may therefore easily become the subject-matter of battles between state and non-state law.

Secondly, each legal order contains norms defining the consequences to be recognized as ensuing from particular events or acts. Thereby the law provides facilities in the form of transactions in which subjects may engage. Examples are the norms defining the conditions and procedures requisite for a marriage or a transfer of property. When these norms exist socially, that is, when they are accepted within the group, members undertake the specified actions in the expectation that others will subsequently act on the basis that the specified conclusions have been drawn.²¹ In less obvious ways than imperatives, but just as surely, facilitative norms also confer power, since the extent to which they can be used to advantage by members of a society is differentially distributed. Thus, just as the contract law of a state may promote the reproduction of capitalist relations of production,²² so the marriage law or land tenure law of a semi-

21. This two-fold classification of legal norms received its most celebrated presentation in H.L.A. HART, *THE CONCEPT OF LAW* (1961). A somewhat more elaborated form, for application to non-state as well as to state law, is to be found in F. VON BENDA-BECKMANN, *PROPERTY IN SOCIAL CONTINUITY: CONTINUITY AND CHANGE IN THE MAINTENANCE OF PROPERTY RELATIONSHIPS THROUGH TIME IN MINANGKABAU, WEST SUMATRA* 28-31 (1979). For the present purpose it is not necessary to consider norms in which the condition is not a human act.

22. The point is extensively discussed in the literature. For an expression of the argument with reference to African society, see R.B. Seidman, *Contract Law, the Free Market and State Intervention*, 7 J. ECON. ISSUES 553 (1973), reprinted in part in *THE POLITICAL ECONOMY OF LAW* *supra* note 8 at 438-49, and reprinted in rewritten form in R.B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* Chap. 5 (1978).

autonomous social field may promote the accumulation of wealth of powers or patronage.²³

From the viewpoint of members of the group these norms are seen not so much as demanding of compliance, as constitutive of civil society. Consequently they tend to have a more important function than imperative norms in many areas, including that of relations between non-state and state laws. Facilitative norms tend to persist as alternatives to provisions of state law partly because they are rarely the subject-matter of battles which the former can, in some cases and to some extent, win by superiority of fire-power in the form of coercive sanctions. Usually it is not feasible for state law to annul facilitative norms simply by imposing a prohibition on their observance. It is notorious that attempts by states to forbid polygamy, marriage payments, or unwritten land transfers have met little success, and indeed direct criminalization of such acts has not often been seriously attempted. On the other hand, if state law merely declares that the consequences of facilitative norms shall no longer ensue, there is little guarantee that this will change socially established thought-patterns which reflect operative economic relations. Yet these norms constitute a great part of the social relations of most people.

This is not to argue that the state cannot take effective action to change or abolish facilitative norms of semi-autonomous social fields. People may be induced to use instead the facilitative norms of state law, for example by laws which limit state-administered benefits to spouses married under state law, or which permit the enforcement in state courts only of state-registered land titles. But such measures are likely to achieve success only by careful calculation which takes into consideration the content and functions of existing non-state laws. A state's constitutional order may take account of this fact of legislative life.

Where a particular legal order has remained in existence since before the establishment of the state, as is arguably the case with most ethnic groups' laws, the content of its legal norms has often changed considerably. This is another aspect of the social change which has occurred in African societies, and is distinct from the emergence of new semi-autonomous social fields such as ethnic groups which previously were not

23. See, e.g., B.A. RWEZAURA, *TRADITIONAL FAMILY LAW AND CHANGE IN TANZANIA: A STUDY OF THE KURIA SOCIAL SYSTEM* (1985); M. Chanock, *Neo-traditionalism and the Customary Law in Malawi*, 16 *AFR. L. STUD.* 80 (1978); and Chanock, *Making Customary Law: Men, Women and Courts in Colonial Northern Rhodesia*, in *AFRICAN WOMEN AND THE LAW: HISTORICAL PERSPECTIVES* (M.J. Hay & M. Wright eds., Boston University Papers on Africa VII, 1982).

identifiable. It is attested in a large volume of literature. Some of the most important causative influences have originated outside the continent.²⁴

IV. The Boundaries of Non-State Laws

It is a commonplace that these boundaries rarely coincide with the boundaries of states' laws. For example, the laws of many ethnic groups are included within the boundaries of particular states, each field comprising part only of the state's field, while some cross the boundaries of two or more states but may not include the entire subjects of any one state.²⁵ The possibility of non-state laws which cross state boundaries is evidenced also particularly by the laws of continent-wide commercial social fields of the present and past centuries.²⁶

It is sometimes said that the precise boundaries of systems of non-state law are difficult to ascertain. There is a serious express or implied criticism of non-state law here, since much Western political theory demands a precisely bounded community for the actualization of desired values such as democracy.²⁷ The assertion of indeterminacy of boundaries may be a reflection on the facts that membership of non-state groups varies over time, and that a person may live simultaneously within different systems of law for different purposes. These features will be mentioned below. Otherwise the assertion suggests that state law is unique in tending to develop detailed, and relatively rigid rules as to the extent of its own applicability. However, there is evidence that non-state systems do include such norms. Thus ethnic customary laws would appear often to include well-developed bodies of conflict of laws norms.²⁸ There are, as is to be

24. See, e.g., the valuable discussion by P. Geschiere, *Imposing Capitalist Dominance Through the State: The Multifarious Role of the Colonial State in Africa*, in *OLD MODES OF PRODUCTION AND CAPITALIST ENCROACHMENT: ANTHROPOLOGICAL EXPLORATIONS IN AFRICA* 94-143 (W. van Binsbergen & P. Geschiere, eds. 1985).

25. GEBERTZ, *supra* note 9, at 114-16. The latter condition poses difficulty for a hierarchical model of types of socially accepted laws with state law as the apical, most inclusive legal order in each territory. Cf. the criticism of this model by Griffiths, *supra* note 2.

26. See, e.g., note 16.

27. Thus Whelan, *supra* note 17, at 13, asserting: "The concept of democracy, although protean, always makes reference to a determinate community of persons (citizens) — a 'people' — who are collectively self-governing with respect to their internal and external affairs."

28. The judgment of J.A. Apaloo in *Youhana v. Abboud*, 2 Ghana Law Reports 201, 203-211 (1974), provides an interesting exploration of one instance of this possibility. There are many instances of particular decisions concerning marriages and other transactions between persons of different ethnic groups.

expected, instances of uncertainty, especially when laws are undergoing change.²⁹ But there is no reason to conclude that there is significantly more uncertainty in this aspect of non-state laws than in any other aspect of non-state or state laws.

Certainly the boundaries of such laws do not always appear to be clear to the observer seeking to map fields of jurisdiction generally. This is because it is frequently difficult to decide where one body of norms gives way to another, essentially different body. It can be unclear whether a set of norms applicable in one field can most satisfactorily be regarded as essentially the same as those in a neighboring field, with variations, or as a different set, with some similarity to the other. Thus, speaking particularly of acephalous, ethnically-defined societies, it has been said that many

do not have clear-cut boundaries, but rather a penumbral or a fading quality to their boundary concept. . . . Because boundedness is not specific to a single or clearly defined set of criteria, there occurs this 'fading' or scalar quality in which in extreme cases groups may have no clear-cut boundaries across wide spaces of terrain involving many localized cultural differences.³⁰

This observation raises serious doubts as to the possibility of state law solving the problem of inter-ethnic non-co-operation through a federal constitution. However, it does not support the conclusion that there is great difficulty in deciding which law is to be applied in particular cases, even though it has been used by state courts reluctant to "recognize" customary law to suggest that such law is excessively "uncertain," and so not susceptible of frequent application. The problem is only that of the Linnaean student seeking to tabulate in strictly drawn categories. There is no necessary difficulty in deciding in any particular case which norm, under the terms of the two or more possibly applicable sets of laws, is appropriate.

It is implied in these observations that the modes whereby non-state laws define their boundaries are generally different from those for states' laws. The latter frequently give predominance to territorial limits. The determinative factor in the delimitation of jurisdiction of state-law insti-

29. Thus the much-discussed *Otieno* case reveals uncertainty about the applicable law in the state law of Kenya and in the non-state laws of the Luo ethnic group and of the urban-dwelling, westernized professional group. See S.M. OTIENO: KENYA'S BURIAL SAGA (S. Egan ed. 1987). See also B. HARDEN, AFRICA: DISPATCHES FROM A FRAGILE CONTINENT 95-125 (1990).

30. Cohen & Middleton, *supra* note 9, at 15. See also FRIED, *supra* note 9, at Chap. 9.

tutions or the applicability of state-law norms is often the location of the central person's residence or of a criminal or tortious act. While non-state laws often make reference to "home areas," the territorial limits of these are not frequently relevant in determining the applicability of those laws. They are more often "personal" laws, applicable on the basis of the status by birth of a principal person in a situation. Thus the inheritance of land, or liability for a wrong tends to depend upon the membership of a particular group by the deceased or the complainant, rather than the locus of the land or the wrongful act. State laws which have purported to "recognize" non-state laws have often disregarded these norms of the non-state laws.³¹

Related to the alleged uncertainty of boundaries of non-state law is the frequency of changes of membership in some groups. There is evidence of this even in groups whose membership is ostensibly defined by descent.³² Overt events which are explicitly recognized as changing a person's subjection to the law of an ethnic group, such as outmarriage and permanent outmigration, are now common in much of the continent.

Finally, the boundaries of non-state laws frequently cross but usually fail to coincide not only with state boundaries but with the boundaries of other non-state laws. The individual who is a subject of a state's law and also a member of an ethnic group with its own law, is also liable to be an adherent of a religion having its own laws, or a member of a profession having its laws, or both, and more. Other members of that ethnic group may be members of different religious and professional groups. Members of other ethnic groups may belong to the same religious or professional group as this individual. This follows from what has already been suggested, and is acknowledged by some observers.³³

V. Implications for State Constitutional Orders

African constitutional orders necessarily effectuate policies on the relations between state and non-state laws. Although few written consti-

31. Thus the statutory "choice of law" rules enacted in many states have been attempts by state legislative drafters to formulate rules which accorded with the requirements and policies of the state, not to express the existing non-state rules. This is discussed also in G.R. Woodman, *Unification or Continuing Pluralism in Family Law in Anglophone Africa: Past Experience, Present Realities, and Future Possibilities*, 4 (2) LESOTHO L.J., 33-79, 47-8 (1988).

32. I. Wallerstein, *Ethnicity and National Integration in West Africa*, in AFRICA: SOCIAL PROBLEMS OF CHANGE AND CONFLICT 472-82 (P.L. van den Berghe ed. 1965); F.A. Salamone, *Becoming Hausa: Ethnic Identity and Its Implications for the Study of Ethnic Pluralism and Stratification*, 45 AFRICA 410-23 (1975), reprinted in ETHNIC RELATIONS IN NIGERIA (A.O. Sanda ed. 1976); W. van Binsbergen, Book Review, 1976 AFR. SOC. RES. 73-75.

33. See e.g., Ranger, *supra* note 16.

tutions expressly address the issues, other provisions, primarily those constituting the state's legal system, commonly do so. Every state legal system expressly or by implication characterizes non-state laws as law, to be accepted by state institutions as such, or as non-law, to be ignored as such by state institutions, or as law for some purposes only, to be accepted in part and ignored in part.

The types of measures by which formal state law may specify its relationship to the particular norms of a non-state law have been analyzed elsewhere. They vary through a range from negative measures which contradict norms of non-state law, to measures of acknowledgement providing that state institutions are not to have exclusive capacity to perform functions which non-state law may perform.³⁴

Where non-state law has been characterized as law, state courts have frequently been enjoined to recognize and give effect to customary, or occasionally religious laws in certain cases. It is sometimes assumed that the norms consequently "incorporated" in state law are or ought to be the same as the non-state norms required to be "recognized." In reality the norms applied by state institutions as "customary laws" are of necessity norms newly created by those institutions. Their content may be determined in part by socially accepted customary or religious laws, but is also determined by the limitations, requirements and policies of state institutions. Thus state measures of "recognition" give rise to "lawyers' customary laws" which differ from popularly practiced customary laws.³⁵

A different analysis is needed to develop an understanding of the various policies of social planning in respect of non-state laws which have been adopted in states' constitutional orderings. There are relatively few studies of specific African examples to assist this analysis.³⁶ There has

34. B.W. MORSE & G.R. WOODMAN, *Introductory Essay: The State's Options*, in *INDIGENOUS LAW AND THE STATE* 5 (B.W. Morse & G.R. Woodman eds., 1988).

35. These issues have been examined in respect of Ghana and Nigeria in my essays *Some Realism About Customary Law: The West African Experience*, 1969 *WIS. L. REV.* 128-52; *Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria* in *THE PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS* 143-63 (A. Allott & G.R. Woodman eds. 1985); and *How State Courts Create Customary Law in Ghana and Nigeria* in *supra* note 34, at 181. The arguments presented there for the view that new norms are necessarily created when state law ostensibly "applies" existing norms of non-state legal systems, should hold good for any state. The processes described there appear, however, to have developed to a somewhat lesser extent in other anglophone African states, and to a much lesser extent elsewhere in Africa.

36. I made an attempt to examine the general arguments most often seen on the related question of the unification of state laws in my essay, *supra* note 31. My essay *The Peculiar Policy of Recognition of Indigenous Laws in British Colonial Africa: A Preliminary Discussion*, 22 *VERFASSUNG UND RECHT IN UBERSEE* (1989), contains a discussion of certain historical policy considerations in the recognition of customary law.

been some discussion and documentation of the policies which states have adopted or may adopt towards ethnic groups. These have given little attention to the laws of such groups, and such discussion as they have contained has tended to consist of commonplace generalizations.³⁷

Past and current practices of states regarding non-state semi-autonomous social fields will not now be further discussed. The primary concern is to indicate possibilities for, and constraints on future constitutional development. However, given the lack of past experience of these issues, no more than a few preliminary reflections can be presented.

A dual basic premise may be proposed. First, the non-state laws of Africa are relatively fully accepted. People observe, and consider themselves under obligation to observe the imperatives of these laws; and they act on the assumption that the results stipulated by the facilitative norms of these laws are recognized by others. The sense of obligation is strong. It has been suggested that members of primordial groups assume that the fact of membership of a community is itself a compelling ground for acceptance of that community's law: the member is assumed to be bound "in great part by virtue of some unaccountable absolute import attributed to the very tie itself," and not only by the demands of affection, practical necessity, interest, or incurred obligation.³⁸

The other part of the basic premise is that the formal state laws of Africa receive relatively low levels of social acceptance. Ghai has remarked that "it is unnecessary to argue that on the whole there is little rule of law in Africa."³⁹ Although Ghai's concern is primarily with the failure of leaders and agents of governments to observe the law, it would seem equally well known that others show little tendency to observe state law.⁴⁰

The continued existence of society requires an ordering of social relationships. In any specific historical circumstances, various systems of law may be available for this purpose. The basic premise claims that in African societies non-state rather than state law tends to perform the function. It argues that there is in fact a strong adherence to the rule of

37. See, e.g., *THE SEARCH FOR NATIONAL INTEGRATION IN AFRICA* (D.R. Smock & K. Bentsi-Enchill eds. 1975), generally, and A. Ojo, *Law and Government in Nigeria*, *id.* at 62-63.

38. C. Geertz, *supra* note 9, at 109.

39. Y. Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT'L J. SOC. L., 179 (1986). See also R.B. Seidman, *supra* note 22, and B.-O. BRYDE, *THE POLITICS AND SOCIOLOGY OF AFRICAN LEGAL DEVELOPMENT* (1976).

40. It seems otiose to list the vast literature which documents particular instances. See, e.g., on family law, the writings referred to in Woodman, *supra* note 31, at note 46; on price controls, T. KILICK, *DEVELOPMENT ECONOMICS IN ACTION: A STUDY OF ECONOMIC POLICIES IN GHANA*, ch. 10 (1977); and more generally, with primary reference to Africa, A. ALLOTT, *THE LIMITS OF LAW* (1980).

law in much of Africa, but that this is adherence to the rule of non-state law. Indeed, there may be a relationship between the weakness of state law and the strength of other laws. A principal contention of the paper in which Moore first introduced the notion of semi-autonomous social fields was that, where the two types of law contradicted each other state law tended to be even less effective than otherwise.⁴¹ The social "fields" of non-state laws may be regarded as social force-fields, attracting allegiance to themselves and repelling the claims of the state to acceptance of its laws.

This may be true also in the Western states from which many of the basic principles of African states' constitutions have been derived. However, it would seem that in Africa non-state normative fields are of even greater social significance, and the state more eminently "soft." The difference is seen most clearly when the laws of ethnic groups are compared with state laws, an instance which seems to arise from history. In Africa the modern form of state is a relatively new institution and has ever since its inception been in competition with long-standing bodies of ethnic laws, entrenched with their established interest-groups and elaborated, socially accepted ideologies. Those aspects of economic ordering associated with the state are newly emerged, and have not replaced other orders, even if they have sometimes transformed them. Most economic activity tends to be within the context of and ordered by the norms of non-state fields, and there is only a limited popular commitment to the state. Even newly emerged modes and forms of production, which may owe their development in part to state activity, are frequently ordered by non-state laws.⁴²

41. MOORE, *supra* note 1, at 54.

42. Cf. G. HYDEN, *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry* 9-37 (1980), on "the peasant mode of production." Hyden argues that in this mode of production the state "plays no necessary role in production. . . . The peasants do not need the state for their own reproduction. They would prefer to be without its interventions" (p. 16). Admittedly Hyden also claims that the small units of production in this case have no functional interdependence resulting in any cooperation which is structurally enforced (*id.*), and that peasants are indifferent or hostile to "a framework of impersonal rules" (p. 17). This would entail that they had no normative economic ordering, or in the terminology used here, no non-state law. Moreover, he writes of a mode of production which is scarcely affected by the activity of the state beyond the extraction of a surplus. However, there would appear to be many instances of peasant production in which there is significant interdependence between productive units, ordered by established normative systems. There are also instances of relatively extensive state involvement. But even for those Hyden's observation on the inessentiality of the state to the mode of production holds good. Thus the normative ordering of those relations of interdependence is by non-state laws. See also the references to "independent peasant production," cited by Hyden, in B. HINDESS AND P.Q. HIRST, *PRE-CAPITALIST MODES OF PRODUCTION 196-8* (1975). Cf. the instance of "rural capitalism" (or rather, peasant petty

Religious laws perhaps owe their effectiveness rather to the psychological force of religious conviction, although they tend to be more fully observed when they accord with the prevalent ethnic and economic orders. The other non-state legal orders are less uniformly and overwhelmingly more effective than state law. It could be that their effectiveness varies with the extent to which they are developments of, and based upon the principles of ethnic laws.

Contemporary trends are not necessarily towards an increased effectiveness of state law. Development is accompanied by increased social tensions which threaten such limited legitimacy as state enjoys. Thus, it has been noted that in Nigeria as a result of the embitterment of inter-ethnic relations prior to the civil war "a two-fold social morality developed: law [sic] held only for relations within the group; outside the group only power relations existed."⁴³ On the other hand, participation in international capitalist production is increasing in Africa, and this is likely to result in a correspondingly increased effective jurisdiction for state laws.

A common response to the realization of the current weakness of state law has been to investigate means of strengthening it, so that it may win the competition for social acceptance. There is discussion of modes of compulsion, of "education" of the people in national responsibility, and of "nation-building."⁴⁴ It is not always clear what is the intrinsic or instrumental value attributed to nation-building, nor whether it has any objectives other than the enhancement of the power of those who control

export commodity production developed in some instances into very small-scale capitalism) described in P. HILL, *THE MIGRANT COCOA FARMERS OF SOUTHERN GHANA: A STUDY IN RURAL CAPITALISM* (1963). The land tenure basis of the activity described there was almost entirely constituted by non-state legal orders. See also E. VERCRUISSE, *THE PENETRATION OF CAPITALISM: A WEST AFRICAN CASE STUDY* (1984), a micro-study of newly emerged forms of production which, although perhaps transitional, seem nevertheless to be of a type which is widespread and likely to recur frequently, and which again seem to be regulated by non-state laws. Such examples suggest that Ghai's arguments, while both convincing and illuminating in respect of the state and state law, omit the large field of economic activity and legal creativity outside the state. This field is continuing, and is the scene of primitive accumulation and of the beginning (at least) of capitalist relations of production. Within it the rule of law (although not of state law) prevails, and the public does "set much store by it."

43. J. O'Connell, *Authority and community in Nigeria*, in *NIGERIA: MODERNIZATION AND THE POLITICS OF COMMUNALISM* 629-72 (R. Melson & H. Wolpe eds. 1971).

44. For example, the Constitution of the Federal Republic of Nigeria, 1979, § 15(4) provided as one of the fundamental objectives of state policy: "The State shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties." By § 15(3) the state was to encourage intermarriage among persons of different groups.

the state, and the advancement of modes of production from which they primarily benefit.⁴⁵ The main thesis of this paper may be reiterated in this context by suggesting that discussion of the weakness of state law has proceeded within a paradigm derived from, at best, recent Western experience, and possibly from nothing more than Western legal ideology. This takes state law as basic law, and frequently as the sole authentic law. Non-state law is placed in the category of social factors which may need to be taken into account in assessing the development of "the" law, or of objects which need to be acted upon in bringing about true legal development. This paradigm is inappropriate in Africa. There the state and its law need to be viewed as superimposed, at relatively recent dates, upon societies which already had their own constitutional orders, including legal systems. An attempt to analyze legal development, or a program to bring it about, should see it as a process of change in fields which are and will remain legally pluralist.

Within that scheme of thought the first reflection is that the constitutional order of a state could accept the independent validity of non-state laws in some or many fields of social activity. This would be a much fuller "recognition" than the existing instances, in which the state purports to confer validity on certain norms of non-state laws by their inclusion among the norms which state institutions are required to apply.

Nevertheless it would not be without analogy in existing practice. It is not unusual for a constitution to recognize existing property rights. This recognition has frequently included property rights conferred by non-state law, such as when early colonial regimes acknowledged existing property rights in land.⁴⁶ Similarly there were cases of early (and temporary) colonial acceptance of the overriding nature of rights conferred by treaties between the colonial power and pre-colonial communities. These rights also arose prior to and independently of the law of the state.⁴⁷

45. These issues cannot be adequately examined here. It may only be suggested that the objective of nation-building has been often promoted either in association with policies of national planning, by those enjoying power and privilege in relation to the plan, or in association with theories of development which rely upon the fostering of capitalist production, by those enjoying benefits from that mode. Cf. *supra* note 42.

46. The rules of general English colonial law are complex and controversial. However, it is quite clear from many instances that existing property rights have frequently been recognized. See K. ROBERTS-WRAY, *COMMONWEALTH AND COLONIAL LAW* (1966). The Ghanaian instance is referred to in G.R. Woodman, *Conflict, Agglomeration, Integration and Unification of the Land Tenure Laws of Ghana*, *YEARBOOK OF AFRICAN LAW* (forthcoming).

47. See, e.g., J. Mugambwa, *The Legal Aspects of the 1900 Buganda Agreement Revisited*, 25 & 26 *J. LEGAL PLURALISM* 243 (1987), which inter alia supplements the discussion of the same instance in H.W. MORRIS & J.S. READ, *INDIRECT RULE AND THE SEARCH FOR JUSTICE: ESSAYS IN EAST AFRICAN LEGAL HISTORY* (1972).

Again, the British policy of indirect rule entailed non-action by state law in certain spheres, where non-state law and institutions were in theory to be left to some extent to function without intervention from the state.⁴⁸ Those policies were based upon complex and ultimately self-interested motivations which might find little approval in independent states today. They nevertheless show that it would not be totally without precedent for a state to opt out of legal involvement in some areas of social activity which would then presumptively be ordered by non-state laws.

Secondly, however, some of the underlying principles of non-state systems of law are contrary to principles which are generally regarded as essential to state constitutions, both because of their moral value and sometimes because of international obligations. In respect of these an opting out by the state would be inconsistent with any constitutional order which seems likely to emerge. This is perhaps most obviously the case as to state-law principles endorsing the autonomy of the individual and equality between individuals. Thus the inferior capacities imposed upon women, certain lineages, members of other ethnic groups, or non-believers, in various customary and religious laws are incompatible with the fundamental human rights acknowledged in constitutional orders. Some constitutional orders have already provided compromises in cases of such apparent conflicts of principle.⁴⁹ But the discovery of such conflicts may also result in provisions of state law expressly directed against certain non-state principles and the behavior which they produce. Examples of this range from various uses of the "repugnancy clause" to enactments prohibiting the observance of specified customary rules.⁵⁰ Here again direct and detailed attention may be given to non-state laws by constitution-makers, but in this case with the aim of most effectively overthrowing them.

48. M. PERHAM, *NATIVE ADMINISTRATION IN NIGERIA* (1937), ch. XXI, is an authoritative exposition of the policy. The qualifications are important. As Perham summarized it, the "tutelary power" was to "assist" African societies "to adapt themselves to the functions of local government." The policy was a calculated strategy of colonial government, not an admission of the validity of African societies' laws. It was not a negative policy of total non-interference, but involved positive "assistance" to produce "adaptation." See also H.W. MORRIS & J.S. READ, *supra* note 47.

49. Thus the Constitution of the Gambia (1970), and the Constitution of Sierra Leone Act (1971) provide in identical terms that no law is to be discriminatory inter alia as between persons of different race, tribe or place of origin; but then exclude from this restriction large categories of laws providing for the application of "personal law" in family matters, or customary law in any matter, to "persons who, under that law, are subject to that law."

50. These range in time from the earliest colonial prohibitions of slavery to quite recent statutes such as Ghana's legislation against certain funeral customs in the Criminal Code (Amendment) law, 1984 (P.N.D.C.L. 90).

Thirdly, it may be possible, and may be thought desirable for certain non-state laws to be strengthened practically by the support of state institutions. The state may engage in this endeavor as a result of a desire to appropriate the legitimacy accorded to traditional institutions, or because of a commitment to the recovery of "traditional values." In practice it may prove difficult to strengthen non-state law by any means other than the avoidance of state intervention, because of the effects, already noted, of measures requiring state institutions to "observe" or "enforce" non-state laws, and to "incorporate" them into state laws. Indeed, even non-involvement by the state law is unlikely to preserve or strengthen non-state law if the areas of activity selected are narrowly limited, because each part of the state's legal apparatus tends to affect all forms of social activity in various, sometimes indirect ways.⁵¹

The difficulty of either preserving or suppressing non-state laws by direct state measures has led various commentators to argue for measures designed to modify them: "[W]hat the new states — or their leaders — must somehow contrive to do as far as primordial attachments are concerned is not, as they have so often tried to do, wish them out of existence by belittling them or even denying their reality, but domesticate them."⁵² It is possible that the means of "domestication" might include "recognition" and "enforcement" adopted with the objective of bringing about some changes in their normative content.

Fourthly, an issue arises as to whether state law may influence the relations between different non-state laws, an interventionist approach which might be attractive as more subtle and less likely to provoke antagonism than direct contradiction of particular non-state laws. There are already some jurisdictional conflicts between different systems of non-state law, and the state might endeavor to increase the possibility of one system winning where that was considered to accord with state policies. It has been argued, for example, that the state had favored the hegemonic trends of Hausa law in Northern Nigeria.⁵³ Some states' laws have indeed long had rules of internal conflicts which purported to regulate relations between certain types of non-state laws. Since there already exist non-

51. Thus measures to "preserve" customary-law chieftaincy under the policy of indirect rule frequently had the effect of changing it into something different. See, e.g., K.A. BUSIA, *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (1951).

52. C. Geertz, *supra* note 9, at 128.

53. F.A. Salamone, *The Clash between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria*, 21 J. LEGAL PLURALISM 15-60 (1983).

state norms regulating the jurisdictional fields of non-state legal systems (non-state private international law), this would in truth amount to confirming or endeavoring to replace non-state by state law. The existing state-law prohibitions on warfare and certain other ways of resolving conflicts between systems of law (prohibitions which would not seem to be essential to the existence and validity of state law, but rather to the assertion of its dominance) aim at such replacement.

The issues discussed here suggest at more profound levels of theory grounds for questioning the ideology of the unity of law, embedded in every modern constitution. It is doubtful whether any group of human beings may be said to order all their social relations according to a single system of law. If the paradigm for the study of constitutional orders of one legal system per nation is replaced with a legally pluralist paradigm, new questions will arise and old questions be reformulated. New questions of legitimacy will, for example, be raised, for it will be seen that state constitutions can neither be constitutive of nor provide the essential legitimacy for other legal orders. There will disappear any tendency to regard the developing of constitutional orders either as writing on a blank legal slate or as nothing more than the development of state law.