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The conundrum of cross-cultural understanding in the practice of law

André Hoekema

(Emeritus) Professor of legal anthropology in the Law Faculty of the Universiteit van Amsterdam, Amsterdam, The Netherlands

ABSTRACT

In many countries, there are distinct communities that administer justice following their own laws. Often this informal justice is not regulated by official state law. This situation can be called empirical legal pluralism. But regularly aspects of this local law are incorporated into state laws, for instance when traditional, local authorities are granted some official competence as state judges. In a few countries, particularly in Latin America, the local indigenous law as a whole is recognized on a par with state law. These are examples of formal legal pluralism. The question is whether the local jurisdiction changes under these conditions of formal legal pluralism, and if so, in what way? How are the local ways of viewing man, social relations, nature, spirituality, and the good life – their cosmovision – distorted by their law becoming part of the national legal order that manifests a different, more individualistic philosophy? This local cosmovision is sometimes poorly understood and not respected by the dominant elites and legal functionaries of the state. In this article, we look for examples of such cross-cultural misunderstandings. Two cases of the national jurisprudence exercised by a state constitutional court will be discussed, one showing this misunderstanding, and the other one overcoming it.

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1. Introduction

The Mexican Federal State of Quintana Roo recently (1997) declared some parts of Mayan customary law[1] officially valid law and accepted the Mayan way of administering justice as producing legal decisions of the same rank as the state justice decisions. Before 1997, the situation of local Mayan law compared with official state law was one of the empirical legal pluralisms: the two legal orders were not related to each other in official legal terms; each had its own independent, distinct legitimacy and functioning. This has now changed. But the state incorporated parts of Mayan law only on a very restricted scale. The new official Mayan legal competences extend only to a few categories of cases of criminal law, civil law, and family law. Moreover, it is optional; Mayans can choose whether they want to approach their Mayan judges in their new capacity or the state justice. There are also many strict conditions regarding procedures as well as material norms like the ones about

CONTACT André Hoekema A.J.Hoekema@uva.nl

respecting the Constitution of Quintana Roo and human rights. There is a state official nominated to supervise all the Mayan judges' decisions. The author of a PhD examining this system, Herrera, formulated this summary: "An official traditional justice is implemented, settled and initiated by the state, but at the same time limited and restricted by state law" (Herrera 2011, 138).

This is an example of elevating *some parts* of local traditional ways to the level of official state administration of justice. We could call this the *incorporation of some parts of traditional justice in official state justice*. This incorporation produces a situation of formal (or: official) legal pluralism. What interests me in such cases is the possibility that the traditional (Mayan) way of exercising authority gets a Western stamp through formal legal pluralism which might conflict with the philosophy behind the traditional justice. As Woodman ([2011] 2013, 23) wrote:

> If the state recognizes a customary law institution such as traditional authority, that institution comes to be supported by the coercive power of the state. The office holder may find that he or she is no longer dependent on local approval to exercise authority, but rather on the approval of state officials.

It is to be expected that this will lead to changes in the style of administering justice by Mayan judges and even be challenged or perhaps regretted by the Mayan people. Perhaps the more individualistic values underlying a Western-oriented state legal order and the more communal values of Mayan life[2] will clash in the practice of this hybrid legal order. Obviously, we would have to study the empirical functioning of this mixed system in practice to find out what happens on the ground, particularly on the Mayan side, for instance in what way the Mayan authorities use their new competences and how the local public feels about it. This research will not be done here, however[3]. Instead, I will use secondary sources and assemble examples of similar promotions of local law to the state legal order as studied by other researchers to find out whether it is likely or not that such a distortion of customary law will take place. A central idea in this attempt will be the difference in the cultural background of traditional law compared with that of state law. I call this cultural background *cosmovision* and discuss it below (Section 3).

I will now introduce another situation of a possible clash between local law and state law. This is the rather exceptional situation in which local law as a *whole* is elevated to be an equivalent part of the state law, as found in some Latin American countries. Let me call this *recognition of the local law as a whole*. We could assume that this move brings traditional justice *as it is* to the level of official law, so as to preserve all its characteristics. No clash between local law – now also state law – and state law of the dominant style is to be expected. But this is not true; on the contrary, we will see how particularly the rules defining the limits of distinct community justice forces this local justice to adopt state (Western) norms. A case from the jurisprudence in Ecuador illustrates this process of cross-cultural misunderstandings, while another case from Colombia shows how these misunderstandings can be avoided.

2. Problems of cross-cultural understanding in the two cases

In the practice of making new state laws that take over parts of local law and incorporate specific local law elements, the local situation is not always analysed as a product of more

or less distinct customs and ways of life. Take the example of new official land tenure laws. Local groups often use and administer land without having any official title. They organize their own entitlements by stressing family and/or clan relations. But while the distribution of entitlements after someone's death is often codified as an individual right, for instance, in real life such rights "are not absolute and are subjected to the decision making process of a family council" (Grenfell 2013, 173). In this incorporation of local land-holding regimes in official land tenure state laws, there have been many failures to understand local (customary) orders and the underlying basic philosophy (Hoekema 2012). It is quite probable that the new land tenure law will clash with distort local law because the distinct quality of the local law is a *community-based*[4] tenure system that often is not respected or understood in the new state land tenure law. This may cause local people to resent the way their local law and its underlying philosophy have been challenged and misunderstood by the new state law. There is often no serious discussion of how to incorporate a specific local legal institution without changing it into something else, even when socio-economic development designers recommend incorporating elements of customary (local) law in their proposals for state law reforms. This is the conclusion of one of the most extensive recent overviews about "When legal worlds overlap: human rights, state and non-state law" (ICHPR Geneva 2009, 120). This means that official state law reforms may still display "cultural imperialism" (Pimentel 2010).

What about the other case, the recognition of local law as a whole? In some countries, particularly in Latin America (Bolivia, Colombia, Ecuador, Panama, etc.), their state constitution officially grants distinct communities[5], especially indigenous ones, the autonomy to govern themselves and to apply and develop their own laws as a whole. This does not involve incorporating elements of local law into state law; rather, the whole of a local system is recognized by the state constitution as a separate but equally valuable and valid part of the now diversified and interculturally organized state legal order and political entity of the country. I want to call this more radical constellation the *recognition of local law as a whole*. Seen from the state perspective, the local legal order as a whole receives the status of a distinctive but equally valid legal order. The national state is turned into a plurinational state. There are – at least on paper – two (or more) official and valid legal orders. It is not only the legal set-up that has radically changed, but also the political set-up of the country: distinct indigenous institutions are now part of the political state order as well. The ruling elite and the local elite should respect an intercultural society and pay heed to the presence of two (or more) legal and equally valid orders, each of its own distinctive kind.

I must stress here that what I just wrote is a purely normative legal analysis. Empirically, this new plurinational set-up is often not practiced properly by the ruling elites and legal functionaries of a country. In the daily reality, many official state law functionaries sabotage the necessity of taking the cross-cultural situation seriously. While in the incorporation case – the Mayan example – the main question is to what extent official incorporating laws respect the local law, in the recognition case the problem is whether state officials really want to accept the local law as valuable, valid, and an equal part of a new *intercultural* legal order. Officially in the new plurinational situation, respect for the non-state legal order and the underlying philosophy is now required. But not only is this recognition a process full of socio-political troubles, it is also difficult to harmonize two (or more) different legal orders within one sovereign state that is now officially defined as an

intercultural ensemble. To harmonize the various legal orders, there need to be generally accepted *internal conflict rules*: rules of state law that specify the scope, limits, and personal and material competence of the local jurisdiction and provide procedures to resolve conflicts between these two or more jurisdictions.[6] It is true that the indigenous communities now have autonomy to exercise justice in their own way, but that is never an absolute autonomy. Where do we draw the limits of the autonomy of local communities exercising their justice? We have to study the internal conflict rules, but they are not always laid down officially or elaborated to some concrete level. Let us take a simple example. The constitution may contain a rule saying that accused persons always have the right to have a professional defender. In the indigenous jurisdiction there are no professional defenders, instead there are other methods to provide accused people with ways to defend themselves. Should a national constitutional court checking the jurisdictions of indigenous courts label every local criminal process unlawful? Or take the rule that indigenous law shall not violate the constitution of the state nor violate human rights. These internal conflict rules often have strong limiting effects. They seem natural, but most of the time they are taking away with one hand what was granted by the other. It is very rare for instance that local (customary) law is seriously understood "as a potentially human-rights friendly system" (Himonga [2011] 2013, 46).[7] After all, the two (or more)[8] cosmovisions are like "aqua y aceite,"[9] and it is "extremely difficult for outsiders (…) to ever fully comprehend" these local legal orders, embedded as they are in distinct cultural systems (cosmovisions) different from the dominant one" (Chirayath, Sage, and Woolcock 2005, 7). We are still very far from paying heed to the admonition of the Colombian Constitutional Court that once declared (T 496, 26 September 1996) "In a nation where cultural diversity is recognized, no world view can prevail over the other, let alone attempt to dominate it."[10] This Court has gone far in tolerating and accepting local law as different but equivalent to dominant state law. For instance, it does *not* declare that the usual way of locally sanctioning people, like being whipped with stinging nettles, has to be called "corporal punishment" that would be unconstitutional and violate internationally ratified treaties.

Cross-cultural misunderstanding is a serious problem also – even more – in this case of recognition of the other law as a whole. Only in Colombia has progress been made in terms of adequate internal conflict rules and a practice based on them.

3. Cosmovision

The main theoretical element in my article is the notion of a cosmovision behind the local law, to be compared and contrasted with the cosmovision of state law. I am assuming that local communities, although always part of a society as a whole and/or its state, have quite distinct ways of seeing man, social relations, nature, spirituality, and views of the good life compared with the dominant views. Therefore, I call them *distinct communities*, a kind of mini-society with a cohesive philosophy, a cosmovision that may be different from the dominant state philosophy. A cosmovision reflects the socio-cultural background of the lifeways of that community and manifests itself also in the local law. We therefore have to distinguish a cosmovision from the *institution of law*.[11]

We should be aware that culture is not homogenous; it is not shared by every member of the community. A cosmovision therefore also represents relations of power, within the community but also in relation to the dominant power. Culture, and thus also the concept

of cosmovision, is the result of a historic and power-ridden trajectory.[12] Moreover, we need to empirically study the situation of a community to find out if it can be called distinct. But in any way in our examples we use a hybrid mixture of state law and order and local law and order. Not all we meet here can be called distinct. Elements of state law have already penetrated in the distinct communities.

We should examine in the Maya example (a case of incorporation in state law) if and how the state law in this case clashes with the local administration of justice and its underlying cosmovision, for instance because it is not prescribing a consensual style of doing justice any more. The Mayan Traditional Justice Act may be seen as making the traditional judges more legitimate and effective. Or perhaps state and political elites believe that these distinctive ways of life are something of the past. In their ignorance, they have created a state law that frustrates the local legal order and the philosophy underlying the local law practice. How will local people react to the new state law? A lot of empirical fieldwork would be required to get an idea of what is happening in this new mix.

In my second case it is a matter of investigating the internal conflict rules in this instance of recognizing the whole of a distinct justice order. Here, it is almost impossible to harmonize the two or more legal orders in one concept of a plurinational state; internal conflict rules will almost always contain strict limits on the "autonomy" of a recognized indigenous legal order.

Apart from the many complications in studying each of the two cases I do think that the conundrum of cross-cultural understanding will haunt us even more in the future because many communities will maintain some aspects of their distinct character while parts or even the whole of their local law will be incorporated in the state legal order. This is a risky prediction I venture here, but the thesis is supported by a series of monographs (Otto and Hoekema 2012), articles (Sieder 2011), conference bundles (Tamanaha, Sage, and Woolcock 2012), NGO policy reports (Harper 2011), World Bank studies (2003), Deininger (2002), other international organizations, that point to the need to take local (customary) law seriously, to incorporate non-state forms of justice in state law and make a thorough study of *The future of African Customary Law* (Fenrich, Gallizi, and Higgins [2011] 2013). Time will tell if these new futures of customary (local) law will maintain crucial elements of the old cosmovision or tend to replace it by a Western version.

4. Interlegality

In my two cases of formal legal pluralism, we can try to look in a far more concrete way at how local people and also officials react to the situation of their being two (or more) different legal orders that moreover are (completely or partly) coordinated with each other. Are Mayan functionaries indeed changing their ways of dealing with justice in their new role? Or in what ways do local authorities deal with internal conflict rules like the one telling them that no corporal punishments are allowed? But it is even more interesting to study the concrete ways people react to situations of empirical legal pluralism (where there is no formal coordination between the legal orders): perhaps local chiefs cherry-pick some elements from the dominant, Western law *without any official state law ordering them to do so*. They might feel that this serves their interests. This also works the other way round. State officials like police officers sometimes orient themselves to the norms and lifeways of a local (indigenous) community although there is no official rule or

principle requiring them to do so. They may see these local norms as useful, for instance in combatting cattle thieves (a case in Cajamarca, Peru, studied by Piccoli 2009 and 2011). I call these concrete ways of concrete people manoeuvring through two (or more) legal orders *interlegality*, a concept coined by De Sousa Santos (2002, 437). This interlegality is an empirical phenomenon and should not be perceived as a normative goal. Of this interlegality, outside situations of formal legal pluralism are many examples. For instance in Bolivia around 2000, when local law as such was not yet elevated to state level and both legal orders were still formally independent of each another, researcher Orellana Halkyer (2004, 150) noted the following speech from a chief in a traditional meeting: "The way for us to dispense justice is to look both into state law and into local law and then come up with some form of combination. Just sticking to local norms could only lead us into a trap"[13], the trap being the chance that always staying with the old local norms would annoy the Bolivian authorities. Or in Namibia where local communities among themselves try to reach consensus over a change in their traditional inheritance rules more in line with state laws (see Hinz 2012; Ubink 2011a, 2011b). (See further examples of interlegality in Hoekema 2005).

> Interlegality can be defined as follows: local law actors involved in situations with different legal orders adopt elements of a dominant legal order, national and/or international, and elements of the frames of meaning inherent in these orders, into the practice of their local legal order, and/or the other way round.

Interlegality may be seen as the practical activity of adopting elements of the other law but also as an outcome, meaning hybridization of local and state law.

Several motives drive interlegality. Local authorities know very well that the dependent and risky position of their own local community will be improved when they show some openness to cherished Western values. But usually there is more to it than just tactics. Sometimes there is a real feeling that some local practices have to change, e.g. to improve the political position of women or to do away with death penalties. But again this can also work the other way round: for instance, when state legal order functionaries show an open mind to some indigenous way of imposing justice, like "healing" as this is done in Canadian indigenous communities (Proulx 2005). In such cases, the legal orders are not just existing independently one from the other, but are already mixed to some degree, some cross-cultural understanding is to be found. In this way, through interlegality, we are more concretely learning how local authorities (and occasionally state functionaries) deal with cross-cultural (mis)understandings.

5. The case of communally organized communities

I have referred many times above to *distinct* communities. In these communities people have a different view of man, social relations, nature, spirituality, views of the good life, and "laws", while underlying these lifeways, there is a specific philosophy, a cosmovision. It is true that in quite a few distinct communities, their lifeways are not so different from the dominant one any more. But suppose that they have upheld the main part of their proper cosmovision, I want to elaborate more on the concrete ways in which life in these communities contradicts state laws that try to include local ways of life. What conundrum

of cross-cultural understanding do we find there? In this way many still abstract considerations get some more concrete content.

Often such distinct communities are communally organized (or *community-based*). The cosmovision behind this communal character is *indirect (*or *generalized) reciprocity*. Let us analyse this indirect reciprocity further by focussing on communal *land tenure*. This is all the more important as communal land tenure is making a significant comeback on the socio-economic development agenda: it seems to be a challenge for the future to devise official legal regulations in which the main points of communal land tenure are preserved.

Communal land tenure is not collective land tenure without any individual and family rights involved. Therefore, I prefer to call it community-based land tenure.[14] This tenure regards legitimate control and management rights as well as use, transaction, and inheritance rights over a variety of forms of land, like arable land, grazing areas, trees, forest, water, reserve lands, etc. These rights are in the hands of individuals, families, clans and the community itself or its authorities, and they often overlap in time or place. For instance, long-term use rights often overlap with specific rights of other, "secondary" right holders. What are secondary right holders? Take the position of women.

> Land usually belongs to and is managed by a patrilineal group, so that women are always secondary users (…). Their rights of access are highly dependent on the social ties which link them to those with primary rights over land. Hence, for example, on divorce or widowhood, a woman may be forced to leave the land behind and move away. (Quan and Toulmin 1994, 24)

These communal elements are often not understood or at least not respected in projects of incorporation or of recognition. What gets lost, what kind of cosmovision can be reconstructed that holds community-based rural[15] tenure arrangements together? Both the traditional management rights as well as the use rights of the members are not individual private rights. People have a "relational" basis for their entitlements, *reciprocal and relational responsibilities* anchored in their specific status in the community (compare Wastell 2007, 336).[16] While notions of growth of production and individual market orientation are not absent in these regimes, they aim primarily at the social security of the people.[17] The need to survive, help each other out, render each other crucial services in harvesting and preparing fields, and the important element of having the certainty to obtain some piece of land if landless: these are the features of livelihood security.[18] People belonging to the community carry the moral obligation of stewardship for the benefit of present and future members of the community and for the well-being of the community at large. Sometimes these obligations are summarized in the term "a moral economy" (Robbins 2004, 151). The obligations cannot be exhausted in a set of precise rules, and no formulas exist for correct behaviour. They are *unspecified* and require people to know what this duty entails in some concrete setting and to respond to peer pressure to live up to it.[19] This is not to say that there is no notion of a personal self or of individual agency, desire, interest, and emotion. Rather it is another way of perceiving the right balance between individual and general interests. These obligations are internal obligations, a kind of ethic which is assumed on the basis of generalized or indirect reciprocity by and to each member of the community. This is not only a matter of communal land tenure alone but a very general aspect of social relations in these communities. It means that not

only in times of distress, a right holder feels the obligation to restrain from pursuing his individual interests and take care of others, but he also *trusts* that others will step forward to support him in the future.[20] This behaviour is not free like a matter of your private choice, neither is it altruism. On the basis of this caring, each person helps to maintain the social integrity of the community and may reasonably expect to be cared for in turn when stranded in adverse conditions. Over the long term, the accounts of these contributions given and received will balance, although it is impossible to express this balance in precise quantitative terms. These contributions derive their value from the honouring of the specific social relations or the overall good of the community between the community members. Someone's personal good depends on the overall good of the community.[21] Indirect reciprocity stresses the *in*equality in what someone has to contribute to the well-being of others or the community as a whole, and the inequality in your needs. In those kinds of small-scale societies, a person trusts that the others will also care for him under similar circumstances. In Western societies, however, reciprocity seems to reflect a distinct ethic, an individualized and short-term interaction in which personal interest and not the common good is primary: "tit for tat" or "do ut des" exchange, an exchange of money and goods as in a purchase, or the way in which someone receives payment from another who damaged his goods. This relation between individuals is indeed different and manifests as *direct* or *specific* reciprocity. Pirie (2013, 191) described this difference as follows: "Instead of helping someone out because you are his brother or nephew, or a member of the same age-set or club, you give him something by way of measured exchange." The Dutch scholar Dorien Pessers (1999), who wrote extensively about reciprocity, proposed calling the ethics underlying the economic transaction the ethics of "mutuality." But although in Western societies the individual autonomy of each citizen and direct reciprocity are central values, *indirect* reciprocity is not absent. First, care for the well-being of the society as a whole and for its people is often delegated to the state that collects taxes and with that money cares for the sick, the poor, and those in distress, a kind of state-organized solidarity. Second, individuals sometimes voluntarily offer help to the old and sick, care for neighbours, cultivate the environment, and make many more voluntary contributions to the good life. These voluntary contributions nowadays get more the character of not-so voluntary duties. Nevertheless, a country like The Netherlands knows an astonishing quantity of more or less voluntary contributions to the good life. Vice versa, it is wrong to qualify direct reciprocity, direct exchange, as "purely economic", self-serving, "possessive individualism." This direct exchange expresses a very important social and moral value: the equal worth of everyone as an autonomous person without consideration of class, status, wealth, etc. No economic transactions can take place without implicitly paying respect to this high moral value of autonomous subjects and their protection by common ethics and law.

This sketch of communal norms for land tenure arrangements and other parts of community life is rather global. It misses the great varieties in life ways between the many groups that all can be supposed to adhere to the notion of indirect reciprocity. Moreover, it is well known that in several of such communities tendencies are at work towards the individualization of communal relations, while in others traditional authority has degraded into a non-accountable despotic kind (see Ubink 2009, about Ghana) and a moral economy on its way out. Finally, one has to note that certainly not all relations in such a community are so favourably coloured by a moral economy telling the members

"to do good to each other." Once in the Andean region of Peru I had a long conversation with a police officer who by a cunning rhetorical performance in a village assembly had just saved a presumed witch from being condemned to death and executed. Instead she had to leave the village for some years but was allowed to come back. This is not "doing good" but notwithstanding these deficiencies, the notion of indirect reciprocity still influences daily practice both regarding communal land tenure and the life ways outside land tenure.

To terminate this sketch of indirect reciprocity I will now descend to the individual experience of the misunderstandings between the Western administration of justice and the one of distinct communities. It comes from the fascinating book by the Canadian jurist Rupert Ross (2006). He has had a lot of experience with criminal cases of aboriginals in the north of Canada where he functioned as a flying white state attorney. After many years of experience in the North, he arrived at the following conclusion: "At virtually every step in the 'white justice' criminal process we 'see' events differently, and then, understandably, choose to respond to them differently" (Ross [1992] 2006, 207). Take for instance the aboriginal ethics of non-interference. Fathers who see their son heading for trouble because of his clumsy behaviour will never warn him. Anything that might cause another person to lose face, to feel inadequate or foolish, is a blow to his/her self-esteem and an impediment to their development as a human being. Therefore, it is for instance not done to testify in court against someone. Although the social and economic conditions of these aboriginal communities have changed radically in the recent past, many communities still adhere to a cosmovision that reflects their communal character. This cosmovision says that success in life is not measured by advancing your own interests alone but by understanding your role in the sustenance of all components of creation, maintaining harmony and balance within all creation (Ross 2006, 209). One example: it is wrong to go out hunting just for the fun of it, instead of honouring each animal even when you have to kill it for food. An Canadian attorney exercising justice in the far North without trying to understand something of this conundrum of cross-cultural conflicts will fail totally in his job.

6. Jurisprudence (1): the La Cocha case in Ecuador[22]

I would like to illustrate the severe problems of a cross-cultural understanding elaborated in two examples of jurisprudence, one a case in Ecuador and the other a case in Colombia. Again we see the abyss between a Western-style legal order, stressing individual rights, and an indigenous legal order placing communal responsibility above individual interests (specific versus indirect reciprocity). This is a situation in which the local jurisdiction has been officially declared to be a valid and valuable part of a plurinational state and law. If cross-cultural understanding is difficult here, how much more it must be in other less "equitable" situations, such as cases of the incorporation of some local law elements in official state law. But the misunderstandings are not always so frequent. A Colombian court case will be discussed below in which indigenous rights are fully respected.

First, the case from Ecuador will be analysed. Since 2008, the Ecuadorian constitution clearly stresses the need to recognize the full legal order of the many indigenous communities of that country. Article 171 of the 2008 Ecuadorian constitution states that:

> the authorities of the communities, peoples and indigenous nationalities exercise jurisdictional functions, on the basis of their ancestral traditions and their own law, within their territorial domain, with a guarantee of participation and decisions by the women. The authorities will apply their proper norms and procedures when solving internal conflicts. These proper norms and procedures shall not violate the Constitution and the human rights recognized in international instruments. (…) The law will establish the mechanisms of coordination and cooperation between the indigenous jurisdiction and the ordinary one.[23]

In article 343 of the Código Orgánico de la Función Judicial, we find the same wording. These articles cannot be conceived as an internal conflict rule, because they do not in any way concretely indicate how constitutional articles and internationally accepted human rights notions restrict the local jurisprudence. No such internal conflict rules have ever been developed in Ecuador, that is, by the law giver. This task is too difficult; the national elite politicians and lawyers on the one hand and representatives of indigenous communities on the other never come to common conclusions! Nevertheless, many questions haunt the association of these different legal orders in practice. And then a Constitutional Court steps in. In Ecuador, this court took up the first case in 2010 – a case of homicide – and pronounced a judgment in 2014 indicating the limits indigenous jurisprudence had to respect. The case has been called the *La Cocha* case.[24] The Constitutional Court went far in recognizing the indigenous jurisdiction and sketching its major difference compared with Western-style jurisdictions. But finally the Court stepped back and declared only the ordinary justice system competent to deal with homicide cases. Let us examine their reasoning.

On the evening of 9 May 2010, at an event to celebrate a child's baptism in the indigenous community of Zumbahua, a row suddenly started. The participants calmed down, but it flared up again a few hours later, ending in a fight between two groups of people in which one person was badly injured. He died the next day. There were five suspects from a neighbouring village, Guantópolo. But this case of homicide was dealt with in La Cocha, another village nearby. In Guantópolo there was no experience with this sort of very serious event, while in La Cocha, they had dealt with a homicide case before, in 2002, in their own indigenous way. The indigenous authorities of La Cocha – the general assembly (see below) – plus several authorities from other neighbouring communities judged the case. On May 16 and 23, the general assembly of La Cocha sentenced the five perpetrators to a series of measures. Each of them had to pay $5000 to a national indigenous organization to buy material, etc. for the community. They were ordered not to attend feasts and meetings for two years during which they were expelled from the community. They had to undergo a 30-minute bath of water containing stinging nettles, and carry a heavy load of sand and stones back and forth to the centre of the community while naked. Then, they had to be flogged by all the leaders present in the assembly. Finally, they had to demand a pardon in front of everyone. One of the groups, Orlando Quishpe Ante, was seen as the main culprit. He was additionally ordered to do community work for five years and to pay $1750 to the mother of the deceased.

In view of the massive negative publicity surrounding this case and its "barbaric" punishments, functionaries of the official justice system stepped in and arrested not only the five men but also the local indigenous leaders who were accused of taking the affair into their own hands without having – as these officials claimed – any competence to do so.

(This was clearly untrue). The local leaders were set free after a few months, but the five men were locked up in a prison in the capital but were set free afterwards. They were finally acquitted by an ordinary penal court (11 July 2015), after the constitutional court declared its sentence (in 2014) where it was said that in homicide cases the ordinary criminal courts had to deal with it, as we will see now. The prosecutor appealed the acquittal and the case is still pending. So, it might happen that they are punished twice for the same crime, a situation clearly forbidden by the Ecuadorian Constitution. But what did the Constitutional Court say about the question of whether the local indigenous authorities were competent to deal (exclusively?) with the homicide case and whether or not the local measures constituted a violation of the Ecuadorian Constitution and of human rights? First of all, the Court stressed the plurinational and intercultural character of the Ecuadorian state and then determined that the indigenous authority administering local justice is the general assembly, where every member of the community may speak until a decision arises from such collective deliberation. There are no specific individuals like judges with the individual right to take the final decision. Moreover, the Court took notice of two expert-witness reports that clarified that in indigenous justice, there are generally five separate steps to be taken, ranging from a notification of the conflict to the president, the cabildo[25] or the general assembly, passing through research into the facts of the case, deliberation about guilt or innocence of the accused, through to uttering a pardon before all present in the general assembly at the end. The Court stressed that in such indigenous proceedings, the notion of responsibility, which is individual in ordinary justice, is given a collective dimension. The responsibility is not exclusively tied to the person(s) who did the deed, it also falls on those who accompanied and helped him as well as the family who failed to instil him with the necessary communitarian virtues. After this conclusion, the Court wrote:

> In the local justice system it is not the right not to be affected in one's life as such that is judged, but a multiple-level conflict between the family and the community. The judgment serves to re-establish the harmony in the community.

But after this remark, the Court retreated. Everybody's right to inviolability of life is a case that is mentioned clearly in the Constitution: "recognized and guaranteed is every person's right to the inviolability of his life" (article 66-1 Constitution)[26]. It could be possible, the Court reasoned, that the local authorities are not notified of a homicide and that therefore no measures are taken (which is the rule in these indigenous communities, they only function after being notified). This however – the Court said – violates article 66-1 of the Constitution. The right mentioned in article 66-1 is an individual right of every person, and the Court dictated that every instance of homicide has to be punished. In other words, no killer should escape unpunished, and the ordinary (penal) court should punish this malfeasant. Moreover, the Court goes even further: every homicide should be punished by the ordinary courts *even if the case is also taken up and dealt with by an indigenous authority*. In the La Cocha case there was a very active local administration of justice, but nevertheless the Court dictated that this case should be punished by the ordinary (penal) court. This final conclusion was formulated as follows: "Jurisdiction and the competence to take up, resolve and sanction cases that come in conflict with the right to life of any person is the exclusive faculty of the system of ordinary penal jurisdiction."[27] In another sentence, dated 5 August 2015[28], it was declared that this internal conflict rule

only applies to homicide, manslaughter, murder, etc. All other cases belong to the indigenous authorities: "In all other cases it is the competence of the administration of indigenous justice to deal with them, that is, when there is no attack on the life of a person."[29] To defend this position, the Court found that when the adjudicators of the indigenous community solve a murder case, they do not decide on the legally protected value of life as an end in itself, but in terms of the social and cultural effects that the death caused in the community.

Let me criticize both viewpoints: first the individual versus collective argument, and then the reasoning about situations that in a case like this there is no denouncement before indigenous authorities. Regarding the collective versus individual argument, these two viewpoints do not contradict each other. There is the more collective element involved, the obligation to heal the social impact that a murder case provokes in the community. But there is also the individual element: the individual subject is responsible because he is seen as a sick person who has to be healed by physical means and by social control. In these indigenous communities, the taking of someone's life is seen as very serious. But the measures taken differ strongly from the Western type, like putting someone in prison. It is evident that the indigenous authorities do not look only and exclusively at a collective element, the welfare of the community. That is overemphasising the collective dimensions of the right to life.

And what about the notion that sometimes the indigenous authorities are not notified of a homicide case and that therefore no indigenous action follows? This is highly improbable, but in the rare case of the perpetrator being left unpunished, the Court could have said that ordinary justice and indigenous justice would have to cooperate as equals to punish the wrongdoer anyway. As a matter of fact, this is the position of the judge who dissented from the majority position of the Court. Only when local justice does not sanction the suspect at all does ordinary justice have the task to do so – he says in his dissenting view – not on the basis of its own autonomous and exclusive competence but in equal collaboration with indigenous justice. Moreover, this dissenting judge did not accept the Court's ruling that the ordinary justice in homicide cases should *always* step in and overrule the indigenous administration of justice. He did not see a fundamental contradiction between the collective right of the community to be healed from the devastating effects of a homicide case and the right of the individual actor to be held responsible. Therefore, this judge declared all the La Cocha interventions by the ordinary justice system invalid, whether of the Supreme Court or of lower ordinary judges/courts, calling this a violation of the "ne bis in idem" principle. Finally, this judge pointed to an essential condition to promote the overcoming of the cross-cultural abyss:

> in a plurinational and intercultural order of state and law, one has to promote a permanent dialogue between the majority culture and the other cultures (…) to prevent the customs and traditions of the local culture and their cosmovision being subordinated in the majority culture.

We conclude that the majority vote in the Court involved reasoning in the typically Western way by radically distinguishing an individual right to the inviolability of life and then to claim that only the Western way is an adequate reaction to the homicide as stated in article 66 of the Constitution. The Court evidently does not understand the dynamics of the indigenous collective way to deal with homicides. In this indigenous justice, the

actor of a homicide is also dealt with, in particular as a weak and sick person who has to be healed.

The La Cocha case shows clearly how the highest judges hesitate to fully accepting the indigenous approaches. Less hesitation will be seen in the next case of Colombia.

7. Jurisprudence (2). the U'wa case in Colombia

Let me discuss another case that shows how different a Western cosmovision and an indigenous one are, but finds they can be legally reconciled. This case is taken from the experiences (and books) of the legal anthropologist Esther Sanchez from Colombia (Sánchez Botero 2000, 2006). In Colombia, one of the many indigenous peoples is called the U'wa. In their cosmovision, twins do not belong to the normal world but to another world. To receive a twin in their village requires extensive rituals and cleansing ceremonies. It is preferred to pass the twins on to another village. If no resolution of the problem where to bring the twins is found, the twins are left with Mother Nature, meaning in secular Western terms that they are left to die. Fierce discussions are going on inside their communities about this practice, which is tied to the essentials of their cosmovision and therefore, until recently, indicated a fundamental feature of the social integrity of their community. But this practice is changing partly because of confrontations with the surrounding society and the discourses on human rights. Local U'wa members now know that this practice is not indisputable any more.

Now follow the facts of the case. An U'wa couple suspected that the mother was giving birth to twins, so they moved to a white hospital. After the birth of the twins, the father was manipulated into signing a document - in Spanish, the father barely understands Spanish and the mother not at all - in which he consented to leave the babies permanently in the hands of the Child Welfare Board for adoption. It was revealed later that the parents had intended to leave the babies with the Board until they had found out if and how the babies would be welcomed in their home village. The leadership (they are called *caciques*) started deliberations, and as usual this was a long drawn-out process, taking many months. Meanwhile, the babies were placed in an adoption home in the capital, Bogotá, partly because many raucous comments had been published in the official press about barbarism, murder, child killings, and so on.

After a series of court cases, the Colombian Constitutional Court declared that the babies had to be returned home, provided that their health would not be jeopardized (they had some serious illnesses). In a case like this, we come across an encounter fought outside and inside the court, a fundamental clash of meanings, a battle of interpretation. How is the behaviour of this U'wa family and of the caciques to be interpreted: as "abandonment" justifying the action of the state authorities to step in and take coercive measures, or as a way of guaranteeing the children a bright future? Did this latter rival interpretation of what happened make it into the many meetings and confrontations between the local leaders and the officials of the Child Welfare Board? As a matter of Colombian law, the child welfare employees should be open to different meanings, because in Colombia a far-reaching grant of "group rights" to indigenous peoples was enshrined in the 1991 Constitution. Those peoples have the collective right to own their territories, to practice a fair amount of self-government, to have and use their own local institutions of imposing justice and solving conflicts, etc. A law to coordinate the official

state jurisdiction with the indigenous one has never been made, but the Constitutional Court itself has developed an elaborate system of internal conflict rules, urging all official authorities to respect local indigenous decisions.[30] If there is a complaint about a local practice as violating human rights *as they are interpreted in the Western way*, the latter is not the decisive element. The further question has to be asked of what precisely is the meaning of the local norm or behaviour in terms of the cosmovision *of the local people*. The contestation between the Child Welfare Board and the views of the indigenous community of the U'wa finally was decided by the Constitutional Court that ordered that the babies must be returned to their community.[31]

8. Conclusion

In the last 15 years, development experts, legal anthropologists, and politicians in multiethnic countries have favoured policies to incorporate parts of customary laws of local communities in the national legal order. In doing so, the dominant, Western cosmovision plus its law often clashes with the local community norms expressing quite a different view of the good life (cosmovision). In the case of the recognition of an entire legal order as an equally valuable part of the state legal order, an even harsher confrontation between cosmovisions can be seen. The internal conflict rules organizing the co-habitation of these two different legal orders normally restrict the freedom of traditional judges considerably. We have tried to suggest these clashes in various ways. Regarding incorporation of parts of local law, I looked at communally functioning communities plus the personal experiences of Rupert Ross. As to the recognition of an entire local legal order, I quoted a negative jurisprudential example (the La Cocha 2 case) but also a positive one (the U'wa case). The last case shows that sometimes the cross-cultural misunderstanding is partly overcome.

Notes

1. I prefer the term local law to prevent any suggestion about its content, legitimacy, and origin, particularly as regards the linkage to state law.
2. Below the notion of communalism will be discussed. See Section 5.
3. But Herrera did (2011).
4. About community-based tenure, see Section 5.
5. I make a distinction between distinct communities and instrumental ones. Instrumental communities are deliberately created to promote some goal, like the representation of some industry at the national government level or to serve the future of an association of professionals. Distinct communities are *mini-societies* covering many spheres of life like a Mayan community in Mexico, where the biggest part of the members feel that their community protects their identity as Mayans. A distinct community is identity-related. There may be in-between cases of instrumental communities that cover aspects of a specific identity-related community.
6. I call such rules internal conflict rules to distinguish them from so-called conflict rules in international private law. Woodman (2013, 28) calls these rules "choice of law principles".
7. But see Sieder (2011), D'Engelbronner-Kolff (2001), Himonga [2011] 2013, and Nhlapo (1995).
8. Often there are more contrasting cosmovisions involved, like an Islamic or a Buddhist one. But there are important differences as well within what may be called indigenous cosmovision.
9. This expression comes from Ramiro Molina, a Bolivian researcher. "Aqua y aceite" can be expressed in English as "water and fire". Recently, there were wide-ranging discussions in Bolivia about how to set-up a constitutional plurinational tribunal to check if local chiefs as well as

ordinary state judges were respecting constitutional rights and guarantees, like universal human rights but also the rights of the distinct communities to be respected in their different views of how to live a good life. But the indigenous partners in these preparatory discussions concluded that the proposed constitutional test had a Western legal and political style and did not respect the main philosophy of the indigenous population.

10. This case was analysed by Assies (2003).
11. Apart from the institutional aspects of law, one has to distinguish the ways in which judges – whether traditional or state judges – use the norms and values of a legal order, as well as the practice of law, meaning the ways people address the legal order in line with what they expect was promised to them.
12. Sally Merry (1998, 577): "instead of a reified notion of a fixed and stable set of beliefs, values and institutions, culture is being redefined as a flexible repertoire of practices and discourses through historical processes of contestation over signs and meanings."
13. My translation, ajh.
14. Following Lynch and Talbot (1995).
15. I am concentrating on rural land, disregarding urban communal plot holdings.
16. See Henquinet (2013, 226) arguing about a community in Niger that the notion of individual rights is not absent but exists "in relationships where duties are reciprocated and with a social hierarchy". Also, McDonnell writing about the society of the Cree in Quebec, Canada, said, "their relations to each other were defined not on the basis of one individual to another, rather they were defined in terms of obligations and duties of granddaughter to grandfather, husband and wife, mother to son, etc."
17. This is captured well in the title of an IIED brochure: *Land in Africa, market asset or secure livelihood?* (Quan, Tan, and Toulmin 2004).
18. This social value explains the fierce resistance against the introduction of individual and full private property (Platteau 1996, 55–56), and clarifies why and how local smallholders often feel secure under present communal arrangements.
19. Pirie (213, 191) formulates it as follows: "ongoing, albeit unspecific, obligations of protection and support."
20. Schön and Rein (1994, 79) once illustrated this trust excellently: "… .to exhibit trust in such a context is to be prepared to act as though your counterparts will behave cooperatively in spite of the risk that they may not do so and in advance of the evidence that reveals how they will behave". Being a member of a distinct community, or at least of a community that presents an evident interest in your welfare, facilitates this trust.
21. McDonnell analysed the cosmovision inherent in the Cree society in the north of Quebec, Canada. "By recognizing categories of people as different and by bestowing on these differences complementary practices, (the Cree) ensure an integration of individual efforts. It also discourages any sense of individual autonomy becoming overdeveloped."
22. About this case Ruiz-Chiriboga (2016).
23. My translation, ajh.
24. Sentencia No. 113-14-SEP-CC, caso no. 0731-10-EP.
25. Cabildo is the usual name of an indigenous group of people that has certain administrative competences.
26. My translation, ajh.
27. My translation, ajh.
28. Sentencia No. 008-15-SCN-CC.
29. My translation, ajh.
30. The statutory internal conflict rules were very strict (like not violating the laws of the Republic and human rights), but the Court stressed the fact that applying these utterly restrictive requirements would mean annihilating the grant of self-rule. The Court defined four categories of unacceptable customary decisions: imposing a death penalty, forcing people into a situation of slavery, allowing people to be tortured, punishing someone in ways that (s)he could not foresee at all. Colombia is the only country that has such an official system of coordination

between state and indigenous jurisdictions. In countries like Bolivia and Ecuador, attempts are underway to do the same.

31. In other less generous recognition schemes, for instance in the case of incorporating some local law like about communal land tenure, there is no cause for the "no world view can prevail" thesis of the Colombian Constitutional Court, because the incorporation scheme does not provide an overall recognition of the culture (cosmovision) of a people and is generally restrictive, that is, dominated by the Western vision.

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References

Assies, W. 2003. "Indian Justice in the Andes: Re-rooting or Re-routing?" In *Imagining the Andes, Shifting Margins of a Marginal World*, edited by T. Salman and A. Zoomers, 167–186. Amsterdam: Aksant Acad. Publishers, CEDLA Latin American Studies no. 91. Republished in T. Salman, S. Marí i Puig, and G. van der Haar, eds. 2014. Dignity for the Voiceless. New York, Oxford, Berghahn: Cedla Latin American Studies.

Chirayath, A., C. Sage, and M. Woolcock. 2005. *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*. Background paper for the World Development Report 2006: Equity and Development.

D'Engelbronner-Kolff, F.M. 2001. "A Web of Legal Cultures: Dispute Processing Amongst the Sambyu of Northern Namibia". PhD diss., Free University (VU) Amsterdam.

Deininger, K. 2002. *Land Policies for Growth and Poverty Reduction*. A World Bank Policy Research Report. Washington, DC: World Bank and Oxford University Press.

Fenrich, J., P. Gallizi, and T. E. Higgins, eds. 2013 [2011]. *The Future of African Customary Law*. Cambridge: Cambridge University Press.

Grenfell, L. 2013. *Promoting the Rule of Law in Post-Conflict States*. Cambridge: Cambridge University Press.

Harper, E., ed. 2011. *Working with Customary Justice Systems: Post-Conflict and Fragile States*. Rome: IDLO.

Henquinet, K.B. 2013. "Translating Women's Rights in Niger: What Happened to the "Radical Challenge to Patriarchy." In *Worlds of Human Rights, the Ambiguities of Rights Claiming in Africa*, edited by B. Derman, A. Helllum, and K. Bergtora Sandvik, 219–242. Leiden: Brill.

Herrera, J.I. 2011. Unveiling the Face of Diversity, Interlegality and Legal Pluralism in the Mayan Area of the Yucatan Peninsula. PhD diss., Universiteit van Amsterdam.

Himonga, C. 2013 [2011]. "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa." In *The Future of African Customary Law*, edited by J. Fenrich, P. Gallizi, and T. E. Higgins, 31–57. Cambridge: Cambridge University Press.

Hinz, M.O. 2012. "The Ascertainment of Customary Law: What Is *Ascertainment of Customary Law* and What Is it for? The Experience of the Customary Law Ascertainment Project in Namibia." *Oñati Socio-Legal Series (Online)* 2 (7): 85–105. http://ssrn.com/abstract=2100337.

Hoekema, A.J. 2005. "European Legal Encounters Between Minority and Majority Cultures: Cases of Interlegality." In Multicultural Interlegality, The Journal of Legal Pluralism and Unofficial Law, edited by A.J. Hoekema. Vol. 51. 1–29.

Hoekema, A.J. 2012. "If not Private Property, then what? Legalising Extra-Legal Rural Land Tenure via a Third Road." In *Fair Land Governance, How to Legalise Land Rights for Rural Development*, edited by J.M. Otto and A.J. Hoekema, 135–179. Leiden: Leiden University Press.

ICHPR. 2009. *When Legal Worlds Overlap: Human Rights, State and Non-State Law*. Geneva.

Lynch, O.J., and K. Talbott. 1995. *Balancing Acts: Community-based Forest Management and National Law in Asia and the Pacific*. New York: World Resources Institute.
Merry, S.E. 1998. "Law, Culture and Cultural Appropriation." *Yale Journal of Law and Humanities* 10 (2): 575–603.
Nhlapo, T. 1995. "Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously." *Third World Legal Studies* 13: 50–71.
Orellana Halkyer, R. 2004. "Interlegalidad y Campos Jurídicos, Discurso y derecho en la configuration de órdenes semiautónomous en communidades quechuas de Bolivia." PhD diss., Universiteit van Amsterdam.
Otto, J. M., and André H., eds. 2012. *Fair Land Governance. How to legalise Land Rights for Rural Development*. Leiden: Leiden University Press.
Pessers, D.W.J.M. 1999. "Liefde, Solidariteit en Recht, een Interdisciplinair Onderzoek Naar Het Wederkerigheidsbeginsel". PhD diss., Universiteit van Amsterdam.
Piccoli, E. 2009. "Las Rondas Campesinas y su Reconocimiento Estatal, Dificultades y Contradicciones de un Encuentro: Un Enfoque Antropologico Sobre el Caso de Cajamarca, Perú." *Nueva Antropologia* Cuidad de Mexico, XXII 71: 93–113.
Piccoli, E. 2011. *Les Rondes Paysannes. Vigilance, Politique et Justice Dans Les Andes Péruviennes*. Académia-l'Harmattan, Louvain la Neuve: Université Catholique de Louvain.
Pimentel, D. 2010. "Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan." *Hague Journal on the Rule of Law* 2 (1): 1–28.[CrossRef]
Pirie, F. 2013. *The Anthropology of Law*. Oxford: Oxford University Press.
Platteau, J.-P. 1996. "The Evolutionary Theory of Land Rights as Applied to Sub-saharan Africa: A Critical Assessment." *Development and Change* 27 (1): 29–86.[CrossRef]
Proulx, C. 2005. "Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian System." *The Journal of Legal Pluralism and Unofficial Law* 51:79–109.
Quan, J., and C. Toulmin. 1994. "Evolving Land Rights, Tenure and Policy in Sub-Saharan Africa." In *Evolving Land Rights, Policy and Tenure in Africa*, edited by C. Toulmin and J. Quan, 1–29. London: IIED.
Quan, J., S.F. Tan, and C. Toulmin, eds. 2004. *Land in Africa, Market Asset or secure Livelihood*? London: IIED, International Institute for Environment and Development.
Robbins, P. 2004. *Political Ecology*. Oxford: Blackwell.
Ross, R. 2006 [1992]. *Dancing with a Ghost. Exploring Aboriginal Reality*. Toronto: Penguin Canada.
Ruiz-Chiriboga, O. 2016. "Finding the Right Judge: Challenges of Jurisdiction Between Indigenous and Ordinary Adjudicators in Ecuador." *The Journal of Legal Pluralism and Unofficial Law*. doi: 10.1080/07329113.2016.1228381.
Sánchez Botero, E. 2000. "Reflexiones Antropológicas en Torno a la Justica y la Jurisdicción Especial Indígenas en une Nación Multicultural y Multiétnica." In Las sociedades interculturales: un desafío para el siglo XXI, edited by F. Garcia, 57–84. Quito: FLACSO.
Sánchez Botero, E. 2006. "Entre el Juez Salomón y el Dios Sira, Decisiones Interculturales e Interés Superior Del Niño." PhD diss., Universidad de Amsterdam.
Schön, D., and M. Rein. 1994. *Frame Reflection. Toward the Resolution of Intractable Policy Controversies*. New York: Basic Books
Sieder, R. 2011. "Building Mayan Authority and Autonomy: The "Recovery" of Indigenous Law in Post-Peace Guatemala." *Studies in Law, Politics, and Society* 55: 43–75.
Sousa Santos, Boaventura de. 2002. *Toward a New Legal Common Sense*. 2nd ed. London: Butterworths.
Tamanaha, B.Z., Caroline S., and Michael W., eds. 2012. *Legal Pluralism and Development. Scholars and Practicioners in Dialogue*. Cambridge: Cambridge University Press.
Ubink, J. 2009. "Legalising Customary Land Tenure in Ghana: The Case of Peri-Urban Kumasi." In *Legalising Land Rights, Local Practices, State Responses and Tenure Security in Asia, Africa and Latin America*, edited by J. Ubink, A.J. Hoekema, and W.J. Assies, 163–191. Leiden: Leiden University Press.

Ubink, J. 2011a. "Gender Equality on the Horizon: The Case of Uukwambi Traditional Authority, Northern Namibia." In *Working with Customary Justice Systems: Post-Conflict and Fragile States*, edited by E. Harper, 51–72. Rome: IDLO.

Ubink, J. 2011b. "Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary law in Namibia." In *Customary Justice: Perspectives on Legal Empowerment*, edited by J. Ubink, 131–150. Leiden: Van Vollenhoven Institute for Law, Governance and Development and Rome: IDLO.

Wastell, S. 2007. "Being Swazi, Being Human: Custom, Constitutionalism and Human Rights in an African Polity." In *The Practice of Human Rights: Tracking Law Between the Global and the Local*, edited by M. Goodale and S.E. Merry, 320–341. Cambridge: Cambridge University Press.

Woodman, G.R. 2013 [2011]. "A Survey of Customary Laws in Africa in Search of Lessons for the Future." In *The Future of African Customary Law*, edited by J. Fenrich, P. Gallizi, and T. E. Higgins, 9–30. Cambridge: Cambridge University Press.

World Bank. 2003. *Land Policies for Growth and Poverty Reduction*. Washington, DC: World Bank.