Courting Custom: Regulating Customary Dispute Settlement in Rural South Africa and Malawi[1]

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Keywords

Informal justice and community-based conflict management; Legal pluralism; Gender and women's rights; Africa: South Africa; Malawi

Abstract

The continued relevance of customary law for the regulation of the daily lives of Africa's citizens poses serious governance challenges to sovereign states, such as how best to regulate customary dispute settlement. While identifying largely similar problems and naming access to justice as key goal for legislative change, South Africa proposed to enhance and regulate the position of its traditional courts, whereas Malawi opted for the creation of hybrid local courts that combine characteristics of regular state courts and customary fora to be the main avenue of customary law cases. This paper analyzes the strengths and weaknesses of both approaches and displays how the two countries' historical and political contexts enable and constrain their regulatory choices in the field of customary dispute settlement, as well as influence the risk and benefits of the various options. In this respect, the political power of the traditional leaders is a significant determinant.

1. Introduction

Recent decades have demonstrated the continued relevance of customary law for the regulation of the lives of Africa's citizens. Most of these citizens navigate family relations, access to natural resources, and settlement of disputes through customary law as administered by family heads, elders and traditional leaders. The state legal system is often a much less direct instrument of governance in their lives. Statutory laws are less well known, state courts harder to access, and attempts to enhance knowledge, access and preeminence of state law institutions have often had limited impact. As a result, recent decades have witnessed a re-evaluation of customary justice systems and a resurgence of traditional leadership (Englebert 2002:51-64; Oomen 2005:1-9; Ubink 2007; Ubink and Van Rooij 2011; Mnisi Weeks 2015).

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The prevalence and relevance of non-state justice systems poses serious governance challenges to sovereign states. How to effectively govern a country where each locality has its own norms, leadership structures and dispute settlement institutions; where many relations and rights are regulated by customary law? This partly is a question of which customary rights, positions and entitlements to recognize, but also of which fora will have the power to decide on such issues. This article focuses on the latter question, and discusses two different approaches taken by African countries to the challenges their governments discern in regulating customary dispute settlement.

In the first approach, the government recognizes or formalizes the highest level or levels of traditional dispute settlement institutions. Thus formalized, these customary courts – operating under various names such as traditional courts, customary courts, or community courts – may for instance, be permitted to make use of the state machinery for the enforcement of their summons, decisions and sanctions. At the same time, formalized customary courts may be required to administer justice in accordance with certain procedural and substantive standards. Parties that are dissatisfied with customary courts' decisions can appeal at least some of these decisions to state courts. This opens up possibilities for state courts to oversee the adjudicative work of customary courts, as well as for the development of checks and balances that can ensure adherence to procedural and substantive standards. Such a system has for instance, been introduced in Namibia (Peters and Ubink 2015), Botswana (Kumar 2009), and Nigeria (Bello et al. 2009; Okafo 2009).

Success of this approach depends on the responsiveness of customary courts to the new standards; whether citizens will find their way to state courts; the extent and manner in which state courts undertake their role as checks on customary courts; and the extent to which state court decisions impact customary administration and dispute settlement. Related concerns are whether formalization gives too much power to traditional leaders, for instance in the field of sanctioning, and whether it inhibits citizens from opting out of the customary justice system, which can be particularly detrimental to the position of minorities and women. These worries are compounded by the fact that customary courts often do not allow legal representation.

A second approach found in African countries is to opt for some kind of hybrid institution that combines characteristics of regular state courts and customary fora to be the main avenue of customary law cases. These hybrid courts are presided over by lay judges, with or without strong ties to local traditional authorities; they apply customary and statutory law; and make use of simplified procedures and local language. They can have recourse to the state machinery for enforcement, and appeals go to regular state courts. This type of court is meant to enhance community members' participation in and access to the state judicial system while diminishing the caseload of regular state courts. They can provide an alternative to, and check on, unrecognized traditional dispute settlement fora and develop jurisprudence regarding customary law, overseen by regular state courts. The creation of new hybrid courts to deal with customary law cases furthermore allows for the formulation of procedural and substantive standards these courts are to follow, and for the setting of certain qualifications for the judges, such as educational standards and language proficiency. Examples of hybrid courts are Eritrea's community courts (Andemariam 2011) and Zambia's local courts (Afronet 1998).

Success of hybrid courts depends on whether these new institutions are able to establish themselves as legitimate institutions with knowledge and authority in the field of customary law that operate impartially and independently from the executive, the local traditional elite and other local interests. That will determine not only whether they are able to attract local disputants but also to what extent their decisions have an impact on the decision-making of traditional dispute settlement institutions in their geographical area. In addition, it remains a question whether courts strongly associated with customary law, where traditionally the male gender takes center stage, will be sufficiently able to include female judges. This problem may be compounded when traditional leaders are given an advisory role in the selection.

Scholarship increasingly highlights political and governance aspects of legal pluralism (Kyed 2009; Von Benda-Beckmann et al. 2009). As the justice system is an important governance instrument, its regulation is closely linked to questions of political power, control, subjugation, integration and exclusion (Roberts 1994). Authority and rights are interconnected and “the ability to establish political power runs through the capacity to determine who can be a rights subject, and what rights can be enjoyed” (Lund 2016). Both policies of recognition of customary norms and institutions and the creation of new hybrid institutions will inevitably entail a reordering of authority and power (Von Trotha 1996; Weilenmann 2005:5). Kyed (2009), in a study of post-war Mozambique, points out that the official discourse of simple, benign recognition of existing customary norms and structures masks aspects of state intervention, regulation and reform.

As scholarship has shown, similar processes were the hallmark of colonialism: the customary law colonial powers ‘recognized’ was in fact a new hybrid, a product of struggles between the colonizer and the colonized. Additionally, indirect rule policies severely distorted local checks and balances and accountability structures when colonial governments overrode traditional rules of investiture and reserved for themselves the right to appoint and dismiss chiefs. Chiefs were furthermore ‘invented’ where none existed and chiefly power centralized through the creation of hierarchies among chiefs and ‘tribes’. Chiefs’ actions were now backed by state power to the detriment of lower-level decision-makers such as clans, families, elders and individuals, and in ignorance of participatory and negotiable aspects of traditional rule (Chanock 1998; Merry 1991:897-906; Moore 1986; Ranger 1983). Chanock (1989) describes how, in the British colonies, customary norms that used to function as starting points of discussion and negotiations were imposed as fixed rules that claimed continuity with an African past. Such processes were particularly detrimental to the legitimacy of traditional institutions in South Africa, due to the harsh oppression of the colonial and apartheid regimes (Mamdani 1996).

Policies of recognition as well as the establishment of new hybrid institutions are thus informed by political power interests to consolidate local power and mobilize votes, to boost popular legitimacy, and to form or strengthen alliances with strategic local actors. Non-state providers can similarly use state recognition and alliances to consolidate and expand their authority. This highlights the need to scrutinize whose interests are served by the various institutions, whether state or non-state (Kyed 2009; Ubink 2008). Likewise, it is important to scrutinize not just the content of the laws and policies that delineate the powers of customary institutions and the rights of the communities they serve but also the processes by which these laws come into being (Mnisi Weeks and Claassens 2011).

This article studies two countries that pose an interesting contrast: South Africa and Malawi. While both identified largely similar problems regarding customary dispute settlement, and named access to justice as a key goal and motivation for legislative change, they each chose a different approach. The South African government proposed to reform its formalization[5] of traditional courts, whereas Malawi rather opted for the creation of hybrid local courts.

The data informing the analysis are derived from extensive empirical research in traditional communities in South Africa (Mpumalanga and KwaZulu-Natal) and Malawi

[5] South Africa’s traditional courts were initially formalized by the Native Administration Act 38 of 1927, which recognized (and distorted) Chiefs’ Courts. The debate over traditional courts is about reforming the formalization, initially done by a segregationist government, to conform with democracy.

(Chewa) using ethnographic and community-based participatory research methods. The authors have interviewed ministers, judges, and government officials, and attended parliamentary committee hearings. These data were augmented with a review of legislation, case law, policy documents, and official speeches. These texts have been analyzed using discourse analysis as a method, and new legal realism provided a “bottom-up” approach to law and its impact.

The next section of this article outlines the significance of legal pluralism as a comparative-analytical concept. Sections three and four describe the approaches in South Africa and Malawi, analyze whose interests they serve, and link the countries’ choices to their political and governance context. In section five, the article concludes with a comparative analysis of the case studies and the insights they bring to the two approaches to regulation of customary dispute settlement.

2. Legal Pluralism as a Comparative-Analytical Concept

Legal pluralism is generally defined as the presence in a social field of more than one legal order (Griffiths 1986:1; Merry 1988:870). It builds on the thinking of Ehrlich, who coined the term ‘living law’ to explain how legal norms may arise outside or independently of the state (Ehrlich 2002:493). The concept of legal pluralism was originally established as “a sensitizing concept” responding to legal centralism, i.e. the ideology that law is and should be the law of the state and that other normative orderings are hierarchically subordinate to state law (Von Benda-Beckmann 2002:37; Griffiths 1986:3). It was also a response to classical legal anthropology, which until the 1950s or 60s tended to concentrate on small, isolated, untouched societies. Researchers approached the customary legal systems of these societies as autonomous legal systems, largely disregarding the colonial government and its actors and thus unconcerned with any interaction between state and local normative systems and the resulting complex normative structures (Von Benda-Beckmann 1996:740).

Originally, studies of legal pluralism focused on the relationship between state law and customary law in former colonies. Now it is widely recognized that “virtually every society is legally plural” (Merry 1988:873). As Engel (1980:427) explains, all societies display a divergence between ‘law in action’ and ‘law in the books’ and “there is evidence that the divergence is not random or haphazard but systematic.” Studies of legal pluralism now include such diverse fields as the New York garment industry (Moore 1973), farmers and cattle ranchers (Engel 1980; Ellickson 1994), prisoners (Gómez forthcoming), sumo wrestlers (West 1997), and stand-up comedians (Oliar and Sprigman 2008).

In the decades following the introduction of the concept of legal pluralism, two interrelated theoretical controversies dominated the debate. These centered on the definition of law and on whether legal pluralism should be understood as a juristic or as a comparative-analytical concept. In the first debate, “étatists” argued that only normative orders emanating from the state could be considered law. On this basis, they rejected legal pluralism as a concept. Legal pluralists asserted that non-state normative systems can also be labeled law. They pointed out that state law is not the dominant normative order always and everywhere, and that it does not differ so fundamentally from other forms of normative ordering that any comparison between state and non-state normative ordering is prima facie faulty (Von Benda-Beckmann 1996:743-4; Tamanaha 1993). Griffiths (1986:4) articulates that “(l)egal pluralism is the fact. Legal centralism is the myth, an ideal, a claim, an illusion.”

This debate is closely connected to the distinction between what has been called weak and strong legal pluralism. The first term refers to a situation wherein the state recognizes more than one normative system as law. The latter describes a situation where, regardless of recognition by the state, multiple normative orders exist and exert authority over people’s lives (Vanderlinden 1989; Griffiths 1986:5-8; Woodman 1996:157-8). Legal pluralists point out that, "[f]rom an empirical point of view, it is inadequate to regard the state as the sole source of normative ordering" (Corradi 2012:90). Weak legal pluralism may be the formal rule in many countries; the empirical reality is one of strong legal pluralism (Himonga et al. 2014:47). Therefore, the "jurisitic" view of legal pluralism cannot serve as an analytic framework for comparative socio-legal research as it establishes a priori the relationship between state law and other law, instead of treating this as an empirical question.

The focus of studies in legal pluralism is on "the dialectic, mutually constitutive relationship between state law and other normative orders" (Merry 1988:880). Moore (1973) advocates approaching a research field as a 'semi-autonomous social field', as this will draw immediate attention to interconnections of the social field with other social fields and the larger society. This approach emphasizes that individual behavior and processes of interaction, struggle and negotiation within and between semi-autonomous social fields determine what the law effectively is at a particular time and location (Griffiths 1986:36).

Legal pluralism provides justice seekers with a choice of normative systems and related fora, within the restrictions of the social, cultural and political contexts in which justice seekers operate. The threat of forum shopping and the cumulative effect of litigant choices affect forums and press them to accommodate justice seekers' preferences and demands (Hoekema 2004:21-2; Merry 1988:883). Von Benda-Beckmann (1981:117) details how situations of legal pluralism not only provide opportunities for justice seekers to shop for fora, but also for fora to be selective of which cases they want to hear in order to pursue their local political ends. These studies all reject dualistic distinctions between state law and non-state forms of ordering in favor of dialectic analysis of their interrelations. De Souza Santos (2002:437) speaks of 'interlegality', to denote that people experience the various normative orders as "different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions."

If it is the interaction between state law and other forms of normative ordering that shapes the legal experiences, perceptions and consciousness of people, and that determines positions of individuals and institutional actors in their dealings with one another, it follows that the impact of state regulation of customary law and customary dispute settlement institutions is an empirical question. Introducing new state legislation often has different outcomes than expected or intended, as it may add a new layer of normativity to the existing (plural) normative structure. Laws and norms emanating from the state can be mobilized by institutional actors and justice seekers as resources in the negotiation of local law and social relations and for challenging or consolidating power relations (Corradi 2012:93-6; Oomen 2005:211-2). As such, "[m]uch that is new co-exists with and modifies the old, rather than replacing it entirely" (Moore 1973:742).

In the following sections, we will analyze the legal pluralism policies of South Africa and Malawi respectively, with a focus on the interrelatedness of state regulation and local social fields, and the political and governance aspects of the different approaches.

3. South Africa

Traditional courts serve as the primary justice forum for an estimated 17 million predominantly poor South Africans (31% of the population) living in rural areas. Although these courts form an indispensable part of daily life, they are often at odds with constitutional guarantees of gender equality, access to justice, and democratic self-determination. Consequently, they are a long-standing source of political debate and gridlock (Kaganas and Murray 1994; Oomen 2005; Mnisi Weeks 2015).

Even while seeking to 'enhance' and 'promote access to justice' by means of traditional forums, the government has struggled to acknowledge the practical problems faced by ordinary rural people when they bring cases before traditional courts. Instead, it has been caught in the politics of protecting traditional leadership as an institution, a position systematically advocated by organizations like the Congress of Traditional Leaders of South Africa as well as traditional leaders within the ruling party and government leadership (Comaroff and Comaroff 2009:6-8). The economic partnership between government and traditional leaders around the exploitation of natural resources in rural areas has been an important contextual factor. This partnership has helped to magnify the significant role traditional leaders play – and limit the influence ordinary people have – in determining the powers traditional leaders can possess under legislation and over rural people's lives.

Until recently, the political momentum has been decidedly in the direction of giving traditional leaders extensive, unchecked powers. When space opened up for the renegotiation of jurisdiction so that the government could choose to establish traditional institutions anew, on an opt-in basis as in pre-colonial times (Delius 2008), the power that traditional leaders hold led the government to perpetuate the arrangements put in place by the apartheid government (Claassens 2005:73,95). The Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) and the Communal Land Rights Act 11 of 2004 (CLRA) are expressions of this move. The latter was passed to give traditional leaders institutionalized land administration powers. Though the Constitutional Court struck this Act down, the Communal Land Tenure Bill drafted in 2015 is not much different as it effectively transfers ownership to the traditional community and allows traditional leaders and councils to administer the land. The Traditional and Khoisan Leadership Bill (B23-2015) amends the TLGFA in ways that allow government departments to delegate wide-ranging powers to traditional leaders, whereas these departments currently have to legislate such dissemination of powers. It also removes sanctions for failure to reform the councils by electing councilors and ensuring that women are represented.

Regulation of the traditional courts at first seemed to be taking the same direction, in the Traditional Courts Bill introduced in 2008 and re-introduced in 2012 (B15-2008/B1-2012). The newest Traditional Courts Bill (B1-2017), a passion project of the new Deputy Minister of Justice and Correctional Services, however, departs from this trend. As its legislative process is just beginning, it remains to be seen if the Bill constitutes a fragile anomaly or a new direction.

3.1 Present Regulatory System

At present, traditional courts continue to be recognized and minimally regulated by the Native Administration Act of 1927 under the revised name of 'Black Administration Act'. Of this 1927 legislation, only the parts that regulate traditional courts continue to be valid.[6] The rest of the legislation has been either repealed or struck down by the Constitutional Court.[7] This initially created a sense of urgency around generating replacement legislation. Aside from the sheer distaste of relying on legislation passed by a segregationist government almost a century ago, it is widely accepted that the Act is grossly out of keeping with the courts as they exist and operate today (Maithufi et al., 2015).

In 2003, a bill to reform the regulation of traditional courts was drafted by the South African Law Reform Commission (SALC 2003). The Department of Justice and Constitutional Development almost wholly rejected it (Mnisi Weeks 2012), and subsequently introduced its own draft, the Traditional Courts Bill (TCB), in 2008 and again in 2012. The department's draft, which diverged extensively from the SALRC's (ibid), was almost wholly

[6] Sections 12, 23, Schedule 3.
[7] *Bhe and others v Magistrate, Khayelitsha, and others; Shibi v Sithole and others; South African Human Rights Commission and another v President of the Republic of South Africa and another* 2005 (1) SA 580 (CC).

rejected by the public, who felt that it forcibly imposed a governance regime that was not traditional under the pretense of it being the people's own.[8]

In February 2014, the Bill lapsed subsequent to lack of sufficient support for the Bill from the provinces. Following consultation with a select but diverse group in December 2015 and a multi-stakeholder reference group thereafter, a new draft, the Traditional Courts Bill (B1-2017), has been conceptualized. A fundamental objection to the TCB-2008/2012 was that, in preparing the Bill, the Department of Justice and Constitutional Development[9] had, by its own admission, mainly consulted traditional leaders and the South African Local Government Association.[10] The Bill's content consequently reflected a status quo bias in favor of the interests of these institutionalized actors and excluded the interests of ordinary people – especially those who live in rural areas and rely on the courts for their primary access to justice.

Besides the procedural concern, the submissions made in opposition to the TCB-2008/2012 were based on three primary critiques that echoed those of the apartheid policy of indirect rule (Mamdani 1996). First, the model of 'courts' on which the Bill was based was not reflective of the multilayered and participatory structure of this system of community dispute management forums. Second, the framework for recognizing traditional leaders and establishing (the boundaries of) their territories is a relic of the apartheid past and is therefore an undemocratic imposition. Third, the ANC's attempts to resuscitate purportedly traditional forms of governance and justice at the expense of democratic rights and freedoms strips ordinary rural people of their hard-won citizenship, cultural choice, and other rights. The TCB-2017 responds to each of these critiques to varying degrees.

Since the first of the roster of customary law legislation enacted by the democratic government passed in 2003, the salient question has been whether the ANC government would finally learn from the past and take the voices and experiences of ordinary people into account. Some might cautiously hope that the TCB-2017 signals a subtle shift in the politics surrounding traditional institutions toward the government allowing rural people to articulate, live under and continuously participate in democratic arrangements that adhere to their own understandings of tradition – rather than those of government and traditional leaders. However, draft legislation on customary land and traditional governance suggests otherwise.

As a political moment, the resistance to the TCB-2008/2012 allowed ordinary people to make clear that they want better traditional courts. Yet traditional leaders' historical ability to endear themselves to government (Claassens 2005:73,95; Oomen 2005:37-86) seems to persist (Mnwana 2014:22; Wicomb 2014:58-9) and, even when they operate traditional courts undemocratically, they have been able to secure the support of the ruling party for their role as the default justice providers in rural areas.[11] The TCB-2017 does not alter this fact. However, it does a better job than the draft before it of allowing observers of customary law to choose to have their disputes settled in traditional or state courts and holding traditional leaders accountable for abuse of power.

3.2 An Invented and Exclusive Traditional 'Courts' Structure

[8] See public submissions, media and academic articles on the Traditional Courts Bill (2008/2012), http://www.larc.uct.ac.za/submissions.

[9] Renamed the Department of Justice and Correctional Services.

[10] Memorandum on the Objects of the TCB, 2012, Clause 4.

[11] See 'Response by President Jacob Zuma to the debate of the President's speech delivered during the opening of the National House of Traditional Leaders; Tshwane Metropolitan Council Chamber', 20 April 2010, http://www.thepresidency.gov.za/speeches/response-president-jacob-zuma-debate-president%27s-speech-delivered-during-opening-national.

One important critique the TCB-2008/2012 faced was that it did not reflect the existing structure of traditional 'courts' in two main ways. First, the Bill only spoke of the senior traditional leader playing the role of presiding officer in the community's traditional court and therefore did not recognize headmen's courts. Second, the Bill also effectively made ordinary people's participation in the court processes subject to the presiding officer's control.[12]

Headmen's courts sit just beneath the community-wide senior traditional leaders' courts and hear disputes between members of the ward (sub-community). Because disputes from highly authoritative family courts and neighborhood forums are first appealed to the headmen's courts (Wilson 1952), the first layer overseen by institutional authorities, these courts hear more disputes than do the appellate senior traditional leaders' courts. Even traditional leaders bemoaned the omission of lower courts (Holomisa 2011).

Furthermore, while the TCB-2008/2012 sought to replace the Black Administration Act, the Bill also perpetuated the Act's mischaracterization of traditional courts as composed of a traditional leader who approximates a civil court judge without a role for ordinary members of the community in traditional courts' decision-making. By adopting the same stance, the TCB-2008/2012 would be compromising the deeply consultative and participatory values embedded in traditional governance that proved mostly resilient (Claassens and Mnisi 2009; Van der Waal 2004). These include practices, described as existing in various South African communities, such as that the senior traditional leader would not speak until the end of a meeting or case to summarize the views of the 'community-in-council' (Hammond-Tooke 1975; Dutton 1923:59-60; Reader 1966:259-60).

Although a complete separation of executive, legislative and judicial power has never been a feature of traditional courts, the 2008/2012 Bill further centralized power in the traditional leader at the cost of a role for the community. This consolidation of power is not permitted under the Constitution, which enshrines separation of powers and checks and balances – features for which some ordinary people expressed a desire. Civil society therefore highlighted the skewed interests served by the Bill.[13]

As was conveyed to the legislative committees, in the absence of the separation of powers, community participation plays a significant role in holding the court and traditional leader accountable to the will of the people (cf. Comaroff and Roberts 1981; Hammond-Tooke 1975:74; Wilson 1952). These patterns of accountability are already under significant strain given the distorting effects that apartheid law and policy had on traditional communities. That regulatory legislation protect such accountability is of particular importance because of the flexibility and fluidity of customary law and its processes (Comaroff and Roberts 1981; Mnisi Weeks 2011), which limits the effectiveness of legal constraints and heightens the need for community participants to check the power of their leaders in the making and enforcement of customary law. This demand is largely motivated by concerns with traditional leaders using their role in traditional courts vindictively against community members with whom they have a history or using the institution to benefit themselves and those in their favor.

In a historical and contemporary context in which traditional leaders cannot be assumed to be benevolent and community members are not empowered to effectively hold them accountable, those who opposed the TCB-2008/2012 argued that certain powers assigned to traditional leaders by the Bill were wide open to abuse (Mnisi Weeks 2012). For instance, the possibility that depriving people of their property rights could be used as a

[12] TCB-2008/2012, Sections 1, 4.

[13] See the Law, Race and Gender Research Unit, Legal Resources Centre and Women's Legal Centre submissions on the Traditional Courts Bill (2008/2012) at http://www.larc.uct.ac.za/submissions.

sanction under the Bill, while these rights are explicitly protected under the Constitution, was troubling to many.

The TCB-2017 breaks from its predecessor sharply as regards this set of concerns. It emphasises the fact that 'a founding value on which customary law is premised, is that its application is accessible to those who *voluntarily subject themselves* to that set of laws and customs.' It also specifies that people may not be intimidated if they register a desire to opt out of the traditional court's jurisdiction.[14] It defines 'traditional courts' in terms of their 'recognising *the consensual nature* of customary law.' The new Bill goes on to provide that '[t]he traditional court system is made up of such different levels as are recognized in terms of customary law and custom.' It defines the latter as 'the accepted body of customs and practices of communities which evolve over time in accordance with prevailing circumstances, subject to the Constitution', and requires that the courts 'be constituted and function under' same. It also builds in numerous qualifiers and provisions that are intended to strengthen the accountability of traditional court members to the parties and community at large. It therefore denies traditional leaders the power to sanction people by removing 'customary law benefits' or use traditional courts to benefit themselves personally.

The new Bill declares that 'the proceedings and decisions of traditional courts are the outcome of *collective deliberations of members of the traditional courts* and are *not presided over by judicial officers*'. Hence, it modifies the traditional leader's power; but it does not completely decentralize it. The TCB-2017 continues the historical trend of South African legislation conceiving of traditional leaders as central and holding top-down authority. The TCB-2017 states that '[m]embers of a traditional court must be *convened by* a traditional leader or any person *designated by* the traditional leader.' Likewise, it declares that 'the traditional leader who ordinarily *convenes* the traditional court' may sometimes '*delegate a person or persons to convene* such a session and *indicate who may participate therein*.' Given that the Bill has already centered the customary community in the customary dispute resolution process, the motivation for this emphasis on the traditional leader as convening the traditional court is unclear other than to suggest that the traditional leader still, in a manner, presides over the proceedings.

3.3 Illegitimate Authorities and Imposed Boundaries

The second primary critique of the TCB-2008/2012 was that it adopted the framework of the TLGFA, which recognizes traditional leaders who are in many instances illegitimate and were imposed during apartheid (Gasa 2011). This concern should be understood against the backdrop of the apartheid government having removed many legitimate traditional leaders and replaced them with people who were willing to cooperate with its policies. The apartheid government also forced communities that had purchased land to be governed by imposed 'traditional' leaders who were given power to administer the land on behalf of 'the tribe'. These artificial tribal formations, and the leaders imposed upon these groups, are perpetuated by the TLGFA. A related concern is that the jurisdictional boundaries that the TCB ascribes to traditional courts were themselves artificially imposed by a repressive regime. During apartheid, large swathes of people were forcibly relocated to fictitious 'homelands' (reserves) subject to the authority of pre-existing or government-established traditional leaders in often newly defined tribes. As a result, people who do not recognize a senior traditional leader as legitimate would be forced to have their matters resolved by him/her.

Aside from a review process undertaken by the Commission on Traditional Leadership Disputes and Claims, traditional leaders installed by the apartheid government

[14] This could be strengthened by allowing people to opt out by completing a simple form or sending a letter, rather than having to appear at the clerk's office in person.

retain their traditional governance positions and maintain the power to resolve local disputes under the TCB. In the 14 years since its inception, this Commission has so far only resolved the disputes and claims pertaining to the status of king or queen. It has not yet addressed the numerous complaints concerning senior traditional leaders

It is not only the slow pace of the process that causes concern. The fact that, under the TLGFA, it is the government that determines the legitimacy of a traditional leader – who then becomes, under the TCB-2008/2012, the presiding officer of, or under the TCB-2017, the convener and delegator of power to convene a traditional court – independently of the community of which (s)he is given charge is inconsistent with both custom and the Constitution. The Constitution recognizes traditional leadership 'according to customary law',[15] which the Constitutional Court has found is developed by the members of a community in terms of their practice.[16] This exclusion of ordinary people from determining who their traditional leader should be is yet another way in which accountability of traditional leaders to their people is undermined.

More troubling than the TCB-2017's emphasis on the traditional leader as convener of the traditional court is that the Bill assumes a top-down orientation of the customary dispute resolution process and system. As shown by the forum shopping literature, this is an inaccurate conception of the system. Correcting this erroneous conception is not just important for ensuring that acephalous communities – i.e. communities that do not have a traditional leader at the apex – can have a recognized traditional court. It is also important for communities that are headed by a traditional leader, as even such communities often have traditional courts created independently of the traditional leader's existence. In fact, scholars have overwhelmingly found that power and authority are delegated upward from the community to the traditional leader, not downward from him/her (Wilson 1952; Hammond-Tooke 1975; Delius 2008). The erroneous assumption that prevails was largely imposed by colonizers who misunderstood customary law and distorted it through legislation (Chanock 2001; Mamdani 1996).

Most problematic of all is that, by assuming that the traditional leader who is recognized in terms of the TLGFA has such powers as to determine who may participate in a traditional court hearing, this provision contradicts the more accurate reflection of customary law's voluntary and collective nature initially stated in the TCB-2017. Therefore, though this Bill gives the initial impression of doing away with the apartheid credentialing of traditional courts, it sustains it by relying upon the recognition of traditional leaders under the Black Authorities' Act of 1951 that is preserved and authenticated by the TLGFA's transitional mechanisms, which have now become effectively permanent. If the TCB-2017 seeks to part ways with its highly contested predecessor (the 2008/2012 Bill) and the legacy of apartheid, it should eliminate this notion of top-down authority that is a vestige of the distorted customary law imposed during colonialism.

3.4 Violation of Fundamental Human Rights

The TCB-2008/2012 has been challenged for resurrecting distorted versions of traditional justice and governance to the exclusion of numerous rights and freedoms that rural people are entitled to as democratic citizens of South Africa. These include the right to a fair public hearing before a court of law or independent and impartial tribunal or forum.[17] This violation was reflected in the failure of the TCB-2008/2012 to provide rural people with full access to having their matters heard by the magistrate's court rather than the traditional courts. While the civil law is the general law of the land, rural people would be excluded from it only

[15] Constitution, Section 211(1).
[16] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC): paras 45, 81.
[17] Constitution, Section 34.

because, unlike urban taxpayers, they reside in rural areas over which traditional leaders have been declared government.

To deny rural people the ability to access state law and institutions except as mediated by their traditional leader was perceived as a relegation of the rural poor to the status of subjects rather than citizens (Claassens 2011; Mamdani 1996). This was thought a return to apartheid's exclusion and a contravention of the Constitution, which sets out to undo the injustices of the past, especially apartheid.[18] Under the Constitution, 'there is a common South African citizenship' and each person 'has the right to equal protection and benefit of the law' and, with it, the right to freely participate in the culture of his or her choosing.[19]

The TCB-2008/2012's prohibition of legal representation constituted another rights infringement, particularly in criminal cases.[20] The argument for not allowing legal representation in traditional courts is compelling in so far as this would change the relatively informal and accessible nature of the forums for poor people. Yet, the problem of these forums being able to hear criminal cases and impose heavy sanctions that could be significantly abused and negatively impact the lives of poor rural people led advocates to argue that the Bill's failure to protect this constitutional right must be addressed. This could be achieved by excluding criminal jurisdiction along with lawyers, or simply declaring that these forums are not 'courts' as the Constitution understands them, but alternative dispute resolution spaces that could conduct mediation and arbitration on an opt-in basis.

Lastly, the TCB-2008/2012 would have allowed the common customary practice that women be represented by their male kin. It also did not require that women form part of the composition of the courts. These facts contravene women's rights to equal status, benefit and protection under the law.[21] Given concerns of corruption, and particularly women's unequal treatment in traditional courts (Claassens and Ngubane 2008:173-5; Curren and Bonthuys 2005:633; Higgins, Fenrich, and Tanzer 2007:1700-1; Mnisi Weeks 2015/16), their rights to a fair public hearing were arguably also violated by the Bill.

The TCB-2017 attempts to address these critiques. Responding to the problem of patriarchy in customary communities and the TCB-2008/2012, the TCB-2017 allows women and men alike to represent themselves before traditional courts and be assisted by whomever they please. It also requires that '[t]raditional courts must be *open to all members of the community*.' Moreover, it mandates that traditional courts 'allow the *full participation of all interested parties without discrimination*'. Regrettably, when it states that '[m]embers of a traditional court must consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution', it does not set a minimum quota.

The new Bill goes to great lengths to permit parties to choose their forum. It states that parties may institute proceedings 'in *any* traditional court'. The respondent, once summoned, may choose 'not to have his or her dispute heard and determined by that traditional court or to appear before that traditional court' but must inform the clerk thereof within 14 days (or longer, if necessary). The TCB-2017 also rightly suggests that traditional courts are not courts under Chapter 8 of the Constitution. Yet it contains some ambiguity. It describes traditional courts as '*courts of law* under customary law' when 'courts of law' is the name given to state courts in South Africa. It also finesses the distinction between civil and criminal jurisdiction, on which the constitutionality of several provisions depends, as was true of the TCB-2008/2012. For instance, if traditional courts have criminal jurisdiction, the Constitution entitles parties to legal representation before them.

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[18] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*, para 21.

[19] Constitution, Sections 3(10), 9(1), 30, 31.

[20] Constitution, Section 35(3)(f). Cf. Rautenbach 2015:284-5.

[21] Constitution, Section 9. *Shilubana* (above).

4. Malawi

In February 2011, during the regime of the increasingly autocratic President Bingu wa Mutharika (2004-2012), Malawi's Parliament promulgated the Local Courts Act (LCA).[22] This Act legislates for new hybrid courts that combine characteristics of state and customary fora to be the main avenue of customary law cases. The Act aims to remedy the profound lack of access to justice for the poor majority of Malawians, caused by the abolition of earlier hybrid courts, the traditional courts. The Act prompted a lot of criticism and popular unrest, and soon after its promulgation President Mutharika's government had to bow to public pressure and send it back to the Malawi Law Commission for reconsideration. Two regime changes later, this is where the Act still is.

To understand the opposition against the LCA, one needs to delve into the history of Malawi. The earlier hybrid courts, called traditional courts, were established during the regime of dictator Kamuzu Banda (1969-1994), who severely abused them to neutralize and persecute political opponents. When President Banda lost power, the unpopular courts were instantly effectively abolished and most of their cases transferred to state courts. It soon became clear that the poor majority of Malawians suffered from various obstacles to find access to justice in these courts. The 1994 Constitution allowed for a return of "traditional or local courts presided over by lay persons or chiefs" with jurisdiction regarding civil cases at customary law and minor criminal offences.[23]

A decade after the fall of President Banda and his traditional courts, the Malawi Law Commission was tasked to study these options. In their 2007 report, the Special Law Commission on the Review of the Traditional Court Act (the Special Law Commission) proposed to introduce local courts presided over by lay chairpersons assisted by assessors.[24] The name traditional courts, as well as the inclusion of chiefs as chairpersons were shunned, to avoid association with the erstwhile traditional courts, as it was expected this would be met with popular opposition and would not pass Parliament. The Special Law Commission furthermore explained its decision from a concern that having traditional leaders as judges would violate the constitutionally guaranteed separation of legislative, administrative and judicial powers (Malawi Law Commission, 2007:16-17). This choice for lay chairpersons over chiefs should also be understood from the underlying politics. Unlike in South Africa, there is no political momentum in favor of chiefs in Malawi at the moment. They are generally not seen as strong and important political allies. They are not well-organized, nor vocal in the media.

While the Special Law Commission's report focuses on the access to justice obstacles poor Malawians face in magistrate courts, an unspoken underlying motive of the Act seems to be to provide citizens with a state-controlled alternative to dispute settlement by the traditional tribunals, the informal customary dispute settlement institutions led by traditional leaders and elders that dominate the rural areas of Malawi.[25] This too needs to be understood within the wider political context of Malawi, characterized by a formal move away from customary law as regulating order and traditional leaders as the all-powerful local authorities in that realm. Simultaneously to this new Act, there have been changes proposed, and some already accepted, with regard to land management (transfer of land management from chiefs to decentralized local land boards) (Centre for Environmental Policy and Advocacy 2013:3), local administration (chiefs as advisers instead of chairs of local development committees),

[22] For a more elaborate discussion of the LCA and its potential to enhance access to justice, see Ubink 2016.
[23] 1994 Constitution of the Republic of Malawi, Section 110(3).
[24] LCA, Art. 5-8, 22.
[25] In 2015, 16.3% of Malawi's population lived in urban areas (World Statistics Pocketbook, http://data.un.org/CountryProfile.aspx?crName=malawi).

and intestate succession (the Deceased Estates Act 2011 departs from customary law as it reduces the role of the extended family as beneficiaries of intestate estates). These changes reveal a 'modernization' attitude among at least part of the government[26] – perhaps most pronounced among officials with a legal background[27] – and underscore that the political momentum is rather one of diminishing the chiefs' powers than enhancing it.

At this moment, the Act does not have a champion, viz. a person or interest group or political party that actively lobbies for its implementation and the installation of local courts. None of the political parties or parliamentarians seem to want to fight for this Act that caused so much unrest when it was introduced. The leading NGOs in the field of access to justice for rural people are approaching the issue of access to justice from different angles, such as through improving the functioning of traditional tribunals, training paralegals, and conducting legal awareness programs in villages. It is contrary to their interest to lobby for local courts at the same time (Catholic Commission on Justice and Peace n.d.).[28] The judiciary is not likely to take the first steps in the creation of the local courts – selection of localities, selection and training of chairpersons, etc. – as long as there is no expression of interest from the government, and the necessary resources for the job have not been allocated.[29]

Although this means that implementation of the LCA in the immediate future is unlikely, it is hard to predict the near and long-term future of the Act. The existence of a profound lack of access to justice for the rural poor is widely recognized, as is the fact that the current court system will not easily be expanded and ameliorated to deal with this issue satisfactorily. As such, a strong case can be made for the creation of hybrid courts that would enhance access to justice for Malawi's poor. This may lead the way back to the LCA once the memory of President Bingu wa Mutharika's increasing authoritarianism has faded, and if and when the government of the day is regarded with less suspicion. Increasing public knowledge and understanding of the LCA and its divergence from the Traditional Courts Act may also contribute to this process.

To assess whether it is likely that the creation of local courts would indeed enhance access to justice for Malawi's poor – the LCA's stated aim – three aspects of these courts warrant special discussion. The first concerns the main controversy in the public debate, viz. the fear that the local courts can be used as instruments of political oppression in a similar manner as the erstwhile traditional courts. The second concerns the question whether the obstacles currently hampering access to justice in magistrate courts and traditional tribunals will not similarly hinder local courts. The third sees to the relationship between local courts and local traditional leaders, which impacts on the popularity and legitimacy of the local courts, as well as the local enforcement and effect of their decisions.

3.1 Executive abuse to suppress political dissent

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[26] An exception is found in the donor-supported Primary Justice Programme of the Ministry of Local Government and Rural Development, which aims to enhance the functioning of traditional tribunals and reportedly has led to a higher appreciation of the role of traditional leaders in impact areas (Meerkotter & Watson 2011).

[27] See for instance interview with Minister of Justice Ralph Kasambara, 4 June 2013, conducted by Emma Hayward.

[28] See also Center for Human Rights Education, Advice and Assistance, http://chreaa.org/, last accessed on 27 December 2013; The Paralegal Advisory Service Institute, *Where there is no lawyer. Bringing justice to the poorest of the poor.*, n.d., http://pasimalawi.org/downloads/PASI_brochure.pdf, last accessed on 27 December 2013; cf. Interview Center for Human Rights Education, Advice and Assistance (CHREAA), 20 November 2012.

[29] Interview high court justice, 15 November 2012. Interview then Attorney General Anthony Kamanga, 16 May 2013, conducted by Emma Hayward.

Popular attitude towards the local courts is heavily influenced by Malawi's history of traditional courts and their rather unique role in suppressing political dissent. traditional courts were established in 1969 as a response to the feeling that the expatriate judiciary did not deal expediently with certain cases, due to a combination of stringent rules of evidence and their inability to understand "a class of case[s] in which a predominant factor is the manifestation of some local belief in witchcraft or superstition, or the existence of some element of African custom."[30] These courts were composed of one trained magistrate, and four chiefs, the latter appointed by the Minister of Justice – a position then occupied by President Banda himself. They could impose any sentence including life imprisonment and the death penalty, legal practitioners were not allowed to represent defendants unless the Minister authorized it, and no appeal lay from a judgment of the national traditional appeal court, which created de jure a dual court hierarchy, with traditional courts under the Ministry of Justice and (state) courts under the judiciary (Nyasulu 1993:1; Pindani, 2000:44).[31] The establishment of these courts was first applauded. Soon, however, people started realizing that the regional traditional courts and the national traditional appeal court were "not courts of justice but instruments of suppression."[32] Political opponents of President Banda were prosecuted in these courts, where penalties were administered despite flimsy evidence and procedural irregularities, with the judges claiming to rely on custom when statutory law would not provide the tools for conviction. Issues of admissibility of evidence, the right to present witnesses, the independence and impartiality of expert witnesses, and jurisdiction of the courts, were all brushed aside through an appeal to tradition (Ubink 2016:775).

One of the most infamous cases was the trial of Vera and Orton Chirwa, political opponents of President Banda.[33] On appeal, there clearly was a difference of opinion among the judges of the national traditional appeal court, with the trained magistrate pointing out the irregularities while the majority traditional leaders turned to custom and tradition in an attempt to legitimize the conviction of the Chirwas (Nyasulu 1993:12; Working Group on Arbitrary Detention 1993; Africa Watch 1990:38-40). For instance, the court held that "be it in law the trial court lacked jurisdiction, the same cannot be said at tradition" (Africa Watch 1990:38). The judgment also criticized the use of the chief investigating officer as an expert witness, but then regarded "questions of independence and impartiality [of expert witnesses as] curable technicalities" (ibid). Equally, the majority felt that unsigned statements could be admitted at custom and that the failure to summon a witness was not problematic, "because 'looking at the evidence that witness was to come and contradict,' they did not see how he could have contradicted the opinion of the chief investigating officer" (ibid:39).

In another high profile case, a regional traditional court accepted an anonymous letter as a piece of evidence under the "trite observation at Malawi custom that 'there is no smoke without fire'."[34] These miscarriages of justice are intricately connected with the limited independence of the traditional courts, in which appointment and employment were discriminatory and oppressive, and connected to party loyalty. There was widespread executive interference, and even without direct interference traditional leaders acting as judges in those courts felt obliged to convict the suspects.

[30] Daily Debates (Hansard), seventh session, first meeting, second day, 17 November 1969, at 56.
[31] Acts 5 and 38 of 1970.
[32] Interview with former chief traditional courts commissioner (Nov. 28, 2012).
[33] The Republic vs. Orton Edgar Ching'oli Chirwa and Vera Mangazuwa Chirwa, Criminal Cause No. 46 of 1982, southern regional traditional court in Blantyre; Orton Edgar Ching'oli Chirwa and Vera Mangazuwa Chirwa vs. The Republic, Criminal Appeal Case No. 5 of 1983, national traditional appeal court in Blantyre (unreported, quoted in Africa Watch 1990:38).
[34] The Republic vs. Albert Andrew Muwalo Nqumayo and Focus Martin Gwede, Criminal Cause No. 1 of 1977 in the southern regional traditional court at Blantyre (unreported, quoted in Africa Watch 1990:33-36; Pindani 2000:47-8).

Heated debates around the promulgation of the LCA display that similar political abuse of the local courts is feared by the public (Ubink 2016). Two issues, however, make it less likely that the procedural flexibility of customary justice used by the traditional courts to sidestep procedural irregularities will be similarly abused by the executive to suppress political opposition through the local courts. First, a reading of the LCA reveals that the legal structure of the local courts differs significantly from the traditional courts. The local courts have much more limited jurisdiction, especially with regard to criminal cases, as well as powers of sanctioning; they do not fragment a unified judicial system, but are integrated into the judiciary and superseded by the high court; local court chairpersons are selected by the Chief Justice, need to be literate and will receive training, particularly on criminal procedure; and legal practitioners may represent any party in a criminal matter before a local court. [35] Second, and even more important than the legal structure per se, is the significantly different context in which the local courts will be operating. The miscarriages of justice in the regional and national traditional courts were intricately connected to the limited independence of these courts, in an era with a dictatorial regime and a strong party presence with leaders not hindered by scruples from interfering in court processes that paved the way for the "judicialization of repression" (Pereira 2008). Malawi is no longer an authoritarian state. While it is far from a fully-fledged democracy, the scale of executive influence on courts in the last decade is incomparable to what it was during the regime of President Banda. As such, abuse of the procedural flexibility of customary law is much less likely to occur.

3.2 Obstacles to Access to Justice

We now move on to the question whether the obstacles currently hampering access to justice in magistrate courts and traditional tribunals will not similarly hinder the operation of new local courts. The literature mentions several barriers to accessing justice in magistrate courts. These include geographical distance, people's limited legal awareness and understanding of the language spoken and procedures followed at magistrate courts – the latter being particularly problematic in combination with the passive attitude of magistrates and the fact that most parties are unrepresented. Furthermore, lack of support services and bad work ethics of largely unsupervised magistrates result in long delays in the hearing of cases and delivery of judgments, and a growing perception of corruption (WLSA 2000:58-63; Schärf, et al. 2002:7-10; Kanyongolo 2006:131-142,144; Malawi Law Society 2013:3). Additionally, magistrate courts are criticized for the way they apply customary law. Magistrates' limited knowledge and appreciation of customary law, compounded by their rotation nationally and a tendency to bring their common law approach to the province of customary law, all lead magistrates to ignore customary practices or dismiss them as backward (Malawi Law Commission 2007:17; Manda 2012:52-3; Cf. Schärf et al., 2002:12, 20, 21).[36]

On paper, several characteristics of the local courts may reduce the likelihood of experiencing similar obstacles to accessing justice to those currently encountered at the magistrate courts. These include the closer geographical distance of local courts, their use of local language,[37] and the fact that they are chaired by persons with 'adequate knowledge' of local customary law, who are not educated in overly formal procedures and are assisted by assessors with like knowledge of local customary law. It remains to be seen how the criteria 'adequate knowledge of customary law' will be applied.

Additionally, although still to be drafted by the Chief Justice, the simpler procedures envisaged may address the issue of disputing parties' lack of understanding of procedures and

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[35] LCA, Art. 40(1), 41(2).
[36] See interviews District Commissioner, 8 March 2013; Justice of the supreme court of appeal, 12 March 2013; Magistrate, 21 June 2013.
[37] LCA, Article 19(1).

allow for a more active role of the chairperson in the proceedings. The proposed Local Court (Civil Procedure) Rules state that the hearing of civil cases shall be in accordance with customary law procedure.[38] This would most likely mean few formal rules regarding admissibility of evidence and would possibly allow broad participation of the audience as witnesses and commentators and the inclusion of personal knowledge of assessors and chairpersons as evidence, procedural aspects people are familiar with from traditional dispute settlement institutions. This is by no means certain, though, as in South Africa governmental regulation of traditional courts has led to their increased formalization (Mnisi Weeks 2015/2016). In a similar way here, governmental regulation could have a formalizing impact on the hybrid courts' (customary) civil procedures.

Traditional tribunals, which process the majority of rural disputes, have their own problems. They are criticized for the unequal protection of vulnerable groups including women and children and prejudice in favor of kin and locals vis-à-vis non-kin and foreigners. Much like those in South Africa, they are also censured for the levying of court fees that obstruct access for the poorest, and for the custom of bringing monetary gifts to traditional leaders, which causes allegations of bias and corruption, an issue linked to the limited accountability of traditional leaders to the people. There are also concerns about certain procedures, in particular with regard to evidence, due process and record-keeping (International Organisation Development Ltd. 1999; De Gabriele & Handmaker 2003; Meerkotter & Watson 2011; Ubink forthcoming). The operation of traditional tribunals is further said to be hampered by the waning authority and influence of traditional leaders within their communities, which negatively impacts on people's compliance with summonses and the rate of acceptance of decisions and sanctions. This is compounded in more ethnically-mixed communities.

Some of these problems associated with traditional tribunals are also possibly avoided in local courts. Several features of the local courts are relevant here. First, local court chairpersons have to be literate and in possession of a high school diploma. In addition, they will receive several months of training, with a particular focus on record-keeping and procedural law – especially with regard to criminal jurisdiction – and one would expect the protection of vulnerable groups. The fact that local courts are not connected to customs of gift-bringing will make it self-evident when a transaction of money is illicit. Supervision through the appeal system in combination with the recording of cases by the chairpersons theoretically goes some way towards curtailing bias, prejudice and corruption. Lastly, the state machine backing of the powers of summoning and execution of court orders is an important difference with the traditional tribunals, regarding an aspect mentioned by local people as hampering the effectiveness of the traditional tribunals.

While the real test will lie in the implementation of the LCA, several features of the proposed local courts are likely to diminish the obstacles that Malawi's rural poor currently face in their search for justice. These gains will, however, be partly offset by the exclusion of a number of important legal fields from their jurisdiction. Under the LCA, the local courts have jurisdiction regarding the administration of customary law in civil matters but several important subjects are excluded from jurisdiction, including disputes regarding land, inheritance, custody, witchcraft and chieftaincy.[39] The rationale behind this exclusion was that these subjects "are handled to the detriment of women and children due to established customs and other matters which result in persecution of subjects" (Malawi Law Commission 2007:11). As a considerable number of disputes in rural Malawi center on these issues, the exclusion significantly diminishes any gains in access to justice the local courts may bring.

[38] LCA, Article 15, 46; Local Court (Civil Procedure) Rules, Article 19(1).
[39] LCA, Article 18.

Furthermore, the presumption underlying the exclusion – viz. that such disputes will then be handled by magistrate courts or high courts, where they can be determined in accordance with all the necessary protection of women and children – is questionable. Considering the limited access to these state courts, it seems likely that the majority of these disputes will be handled in traditional tribunals. This does not tally with the underlying objective of the LCA, which is to provide an alternative forum to traditional tribunals, particularly in cases of unsatisfactory treatment of vulnerable groups such as women and children.

The limited civil jurisdiction of the local courts can perhaps be seen as a missed opportunity to have these courts operate as accessible institutions to create awareness of new statutory norms, especially in those fields where rights of vulnerable groups are violated under custom (Ubink 2016:763). The local courts are to operate with simple procedures and in the local language. Their chairpersons come from the locality, and if properly trained and sensitized, they should know and understand both local customary law and constitutional norms. As such, the local courts could operate as an ideal channel for providing litigants with an understanding of their legal rights and for enhancing awareness in the general population of women's and children's equal rights to protection. On the other hand, one could argue that it would be more effective to stimulate protection of women's and children's rights at the traditional tribunals than to create a new forum and hope that their normative pronouncements will trickle down to the traditional tribunals and the locality. Especially considering that the government is trying to enhance the functioning of traditional tribunals through the 'Primary Justice Program', a program which has shown some success, including regarding responsiveness to women's needs and reduction of negative cultural practices (International Organisation Development Ltd. 1999:25,32,36,52,56-7; De Gabriele & Handmaker 2003:14,17,19,34; Meerkotter & Watson 2011:4,21).[40]

3.3 Traditional Leaders

Policy debates regarding access to justice often consider the subject largely from the angle of service provision, but the justice system is also one of the most important governance instruments and therefore closely linked to questions of political power, control, subjugation, integration and exclusion (cf. Weilenmann 2005:5). When talking of access to justice for rural inhabitants, involving local resources and customary norms, one such question involves traditional leadership. Some claim that the LCA – drafted by the Special Law Commission composed of judges and lawyers – fits in the earlier described pattern of disempowerment of chiefs, as part of the modernization drive that was particularly pronounced among lawyers.[41] Malawi's Minister of Justice iterated that the LCA was "part of a wider governmental policy that aims to erode the power of the chiefs".[42] Others, however, see the LCA as an expansion of chiefly authority "because it gives them a real foothold in the formal court system because they have unparalleled power to set legal content".[43] The LCA does not detail the relationship between local courts and traditional leaders and many questions will only be answered in the implementation phase: will traditional leaders have a say in the selection of chairpersons and assessors; could traditional leaders and elders that serve as councilors on the traditional tribunals also be selected as local court assessors; what role will the advice of assessors play in determining the decisions of the local court chairpersons; will the relationship between traditional leaders and local court personnel be amicable or competitive; and to what extent will local courts personnel be independent from traditional leaders?

[40] For an evaluation of this program, see Ubink forthcoming.
[41] Interview Enoch Chibwana, former chief traditional courts commissioner and ombudsman, 25 May 2013, conducted by Emma Hayward.
[42] Interview Minister of Justice Ralph Kasambara, 4 June 2013, conducted by Emma Hayward.
[43] Interview Justice Ken Manda, 21 May 2013, conducted by Emma Hayward.

What is clear, however, is that most of the disputants who will access the local courts could take their disputes to a traditional tribunal instead or will indeed have been there first. Considering this competitive relationship between the institutions, it is not unlikely that traditional leaders will see the local courts as encroaching upon their powers as well as endangering a source of income. In an earlier phase of Malawi's court development, the introduction of third grade magistrate courts caused friction with traditional leaders in some areas.[44] Similar discord may be expected in certain areas now. And indeed, several people reported that traditional leaders have expressed dissatisfaction with the LCA, which they feel takes away powers that belong to them, and expect that the local courts will bring a wrangle over power.[45] Some traditional leaders are reportedly so offended by the LCA and the new courts that they have chased local magistrates from their court buildings.[46]

Although likely to occur, disagreements and tensions between local court personnel and traditional leaders regarding particular decisions or involving power struggles in general seem not to have been considered by the Special Law Commission. One of its members, then Malawi's Attorney General, reported that he expected the chiefs' willing cooperation in moving the local courts forward.[47] This attitude does not seem to acknowledge that conflicts with traditional leaders have the potential to significantly affect the functioning and legitimacy of the local courts, as well as the local enforcement and impact of their decisions. According to several respondents, traditional authorities have the capacity to prevent community members from going to court.[48] For instance, by framing the local courts as alien and imposed institutions, traditional authorities can create a stigma against using that institution to seek justice (Anderson 2003). One traditional authority stated that if he does not like the setup of the local courts, he will refuse to cooperate: "If someone wants to act in my jurisdiction, they have to do what I say. I will not accept that they function independently within my jurisdiction. I have to uphold the peace in my area. I cannot do that with rival courts."[49]

While the above emphasizes the importance of local courts personnel developing a good relationship with traditional leaders, this also comes with certain risks. A relationship that is too close, or one of dependency of local courts on traditional leaders, may hamper the local courts in their functioning as a check on traditional tribunals and may make it difficult for local courts to assess whether customary law meets constitutional standards.

5. Conclusion: The Politics and Governance of Legal Pluralism

We have presented two countries that, despite different histories, evidence great similarity in concerns regarding traditional courts as primary forums through which justice is to be accessed. For their similar problems in managing legal and institutional pluralism, Malawi and South Africa have adopted very different solutions. In Malawi, the problems of traditional tribunals and the limited access ordinary people have to state courts led the government to rethink where and how rural people can find redress for their grievances, and to create a hybrid institution. In South Africa, the government – despite widespread criticism

[44] Interview former traditional court clerk and administrative officer, 26 November 2012.

[45] Interviews magistrate, 20 May 2013, Human Rights Commission, 24 May 2013, magistrate, 26 July 2013, conducted by Emma Hayward. Field notes of Emma Hayward are on file with the authors. *See also* Hayward forthcoming 2016.

[46] Interview high court justice, 15 November 2012; Interview Center for Human Rights Education, Advice and Assistance (CHREAA), 20 November 2012.

[47] Interview Anthony Kamanga, 16 May 2013, conducted by Emma Hayward.

[48] Interview Human Rights Commission, 24 May 2013, and magistrate, 4 July 2013, conducted by Emma Hayward.

[49] Interview traditional authority, 26 June 2013, conducted by Emma Hayward.

of the traditional courts – was determined to retain the traditional courts as part of a wider politics of preserving the institution of traditional leadership.

Within their relative complexity, the two country cases demonstrate the importance of "unpacking the local". Each country's regulatory choice is embedded in its history and political experience, particularly regarding the role of traditional leaders and their courts during the colonial period and various post-colonial regimes. Solutions chosen are shaped by countries' contextual constraints and the direction taken by local momentum. For instance, bound by deep ties with traditional leaders and embedded in a rhetoric of reclaiming African culture and institutions from apartheid, the South African government rejects any option that does not preserve traditional courts as the domain of traditional leaders. In contrast, the political abuse of traditional courts under Banda is the most vivid memory in the collective mind of Malawi and has led to the choice of hybrid courts led by lay chairpersons. This move is also informed by a negative view of customary law and a modernization approach adopted by parts of the government, alongside the limited power of Malawi's chiefs – both in the political arena and over economic resources. Institutionally speaking, in Malawi, the worry seems to be abuse by either traditional leaders or government rather than by local courts' chairs. The local courts were therefore also partly created to operate as a check on the traditional justice system.

These case studies reiterate that the regulation of the justice system and the relationship between the constituent normative orders is closely linked to questions of political power and control, and inclusion and exclusion. Whether recognizing/formalizing customary justice institutions or introducing alternative hybrid institutions, there is an inevitable change in power relations. In South Africa, we saw the government's resistance to decentralizing chiefly power and urge to consolidate distortions introduced during apartheid in the name of protecting custom. In reality, its agenda is to protect traditional leadership and, thereby, "buy" the rural vote that it believes traditional leaders control, close the gaping hole left by the collapse of local government in rural areas, and get easy access to natural resources in rural areas. Robust critical engagement from the public made the government change course in the TCB-2017, which engages more effectively, but still imperfectly, with the lived realities of ordinary people and customary law in practice. In Malawi, the power dynamics are ambiguous. The hybrid local courts chaired by laypersons could diminish as well as enhance the local power of traditional leaders, depending on the particularities of the relationship between the two institutions. Popular unrest during the legislative process largely focused on the risk of political abuse of the local courts by the government in power, which was compounded by the increasing authoritarianism of the then government. In both countries, these power dimensions determine (and partially explain) who support and who resist the proposed laws, at the local level and at the national political level. In both contexts, political changes could radically alter future outcomes.

The two country cases we have focused on in this article give us insight into the two models described in the introduction. Each model evidently has its own strengths and weaknesses. No single model is inherently better than the other and all models are not equally possible in the context of the local reality of a country.

Neither recognition/formalization of customary dispute settlement institutions nor the introduction of hybrid institutions is as straightforward as governments present it. State recognition of non-state normative orderings never entails a wholesale acceptance of these systems. It is usually partial, conditional, and meant to make the customary order governable by aligning it with certain normative values of the state. The embrace of custom is part of a state's assertion of sovereignty by seeking to make the customary realm dependent on, and regulated by, the state. It can include the imposition of state courts for appeal, an attempt to subordinate customary dispute settlement authority to the state's authority. Recognition and formalization thus imply far-reaching state intervention, regulation and reform. Such reform may weaken structures of traditional authority and customary dispute settlement, at least vis-à-vis the government, state law and state courts, while also strengthening these institutions vis-à-vis their own people by undermining local checks and balances and accountability structures. The public may demand the former but reject the latter, but administrative efficiency, questions of sovereignty, and elite partnerships outweigh real concerns for the local people operating within the customary realm. This has been widely described concerning the colonial period, and South Africa provides a contemporary example.

The replacement of customary dispute settlers with hybrid courts at first glance seems the opposite approach to regulating customary dispute settlement, but has the same goals of increasing state sovereignty and reach over rural areas underlying the more visible aspirations of increasing access to justice for the poor majority. The state in this way aims to diminish the power of traditional rulers and dispute settlers, and is often inspired by a modernization impulse. Despite the formal replacement of customary dispute settlement institutions, in practice, chiefs and elders will often remain heavily involved in dispute settlement. In fact, as discussed for Malawi, the functioning of the newly created institutions may be profoundly affected by a cooperative or antagonistic relationship with local traditional leaders and elders. This relationship is mutually constitutive, with forum shopping shaping both institutions' legitimacy and independence, as well as the local acceptability and enforceability of their decisions.

Local populations are not ignorant of the underlying goals of the regulation of legal pluralism. In South Africa, the TCB-2008/2012 faced strong opposition because the Bill was seen as changing customary dispute management to allow less participation and accountability. In Malawi, notwithstanding all the good intentions regarding increasing access to justice, the people were reminded of earlier hybrid institutions that abused the procedural flexibility of customary law to circumvent the safeguards of statutory criminal law. While the local courts are very different in structure and legal powers, the public was suspicious of the real intentions of the increasingly authoritarian government in introducing these courts. In both cases, popular opposition managed to derail the legislative process and/or the implementation of the Act.

In the end, whatever model is used, the reality of customary justice systems and the case studies of South Africa and Malawi bring to the fore that specific attention needs to be given to the fact that, as an empirical reality, legal and institutional pluralism produces winners and losers. Thus, the processes by which such pluralism is negotiated and local power relations ossified in regulation are crucial. In settling on the appropriate model for the context, and its terms of implementation, primary emphasis should be placed on the protection of vulnerable groups.

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