State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law

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I. INTRODUCTION

This Article discusses the concept of a mixed legal system[1] in Southern African plural legal contexts from two different perspectives: the perspective of the State and that of users (actors) of national legal systems. From the State's perspective, the various legal orders that compose the national mixed legal system (the mix) co-exist with each other in separate boxes. Their interactions with each other are managed or controlled by pre-determined choice of law rules or by judicial determinations. However, the mix is different when it is viewed from the perspective of actors who use the different legal orders in the mix. The picture is that of a complex mix in which actors combine the various legal orders to suit their needs or purposes. The mix is further

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1. Traditionally, "mixed legal system" is used to refer to the legal systems that combine English common law and civilian (i.e., Continental) law within a single system. In this Article, we use the term "mixture" in the sense of a pluralist system which recognizes both common law and customary law.

complicated by factors connected with deep legal pluralism that influence the actors in their choice of legal orders. These factors include, but go beyond, law as recognized by the State.

Thus, the perspectives of the State and actors of the mix may be characterized as "boxed" and "complex" respectively. In the "boxed" mix the legal orders are compartmentalized in separate boxes by the state, and the actors supposedly choose between legal orders that are neatly packed away in separate boxes until they need one of them. In the "complex" mix, on the other hand, the boxes are dismantled by actors who choose and combine the various legal orders as it suits them.

In advancing the arguments of this Article, we will focus on three of the major components of modern African legal systems, namely common law,[2] African customary law[3] and human rights with special reference to personal law.

II. Legal Pluralism

The notion of legal pluralism is necessary to our understanding of the nature of African legal systems, as well as the State and actors' perspectives of a mixed legal system in Southern Africa.

Debates about legal pluralism in the last forty years or so have centred on the concept of legal pluralism itself, and on the possibility of a theory of law that accommodates regulatory orders with sources of validity in entities other than the State.[4] This Article does not engage with these debates. It assumes the possibility of such a theory and focuses instead on the contribution the concept of legal pluralism makes to our understanding of the perspective of the African State and that of its citizens of the concept of a mixed legal system.

As defined by John Griffiths,[5] among others, legal pluralism generally refers to the co-existence of more than one legal order in one polity. At another level legal pluralism encompasses the notions of state and deep legal pluralism.

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2. For the purposes of this Article, this term refers to the general law of European origin (i.e., statutes, case law and Roman Dutch or English common law, as the case may be).
3. This represents the customary laws of different ethnic groups on the Continent. Each ethnic group has its own laws that vary in some degree from those of other groups.
4. For references on this debate, see F. von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. OF LEGAL PLURALISM 1 (2002).
5. J. Griffiths, *What Is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM & UNOFFICIAL L. 1-55 (1986).

A. State Legal Pluralism

The notion of state legal pluralism, also referred to as weak legal pluralism, is the co-existence of legal orders that are recognized by the State's dominant legal order. In most countries, the common law is the legal order that defines the spheres of recognition and validity of other legal orders. However, in recent years in some countries, such as South Africa,[6] national constitutions have taken over this role. In these cases, the constitution both entrenches state legal pluralism and controls the spheres of validity of customary law and other components of the national legal system.

State legal pluralism, therefore, consists of different legal orders that are recognized by the State as being part of its laws. In the Southern African context, these may include African customary law; common law; and Islamic or other religious systems of personal law. By virtue of the colonial heritage of countries in this region, this kind of pluralism is usually confined to private law, especially the fields of land tenure, succession and inheritance, marriage and divorce.[7]

Human rights deserve special mention. These rights constitute an important component of the State's legal order. As part of this legal order, human rights accentuate state legal pluralism in three senses.

Firstly, human rights consist of international human rights in conventions or similar instruments ratified by the governments of the countries concerned, on one hand, and national human rights contained in the countries' constitutional Bills of Rights, on the other hand.

Secondly, by their nature, and depending on the extent of their domestication by the legislation or court decisions of the country concerned, international human rights assume different levels of authority as sources of legal norms. For example, some national constitutions state that the courts must consider international law when interpreting the (constitutional) Bill of Rights.[8] In other instances, entire international conventions have been incorporated into domestic law by legislation. Relevant examples include conventions concerned with the family and its members.[9] In yet other cases courts apply conventions,

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6. *See* Constitution of the Republic of South of 1996.

7. *See, for example*, Malawi, *in* F. BENDA-BECKMAN, LEGAL PLURALISM IN MALAWI: HISTORICAL DEVELOPMENT 1858-170 AND EMERGING ISSUES (Kachere Series 2007).

8. *See* section 39(1)(b) of the Constitution of South Africa of 1996.

9. See, for example, the domestication of the Hague Convention on Inter-country Adoption by section 256(1)(2) of the Children's Act 38 of 2005 (of South Africa), which states:

> '(1) The Hague Convention on Inter-country Adoption is in force in the Republic and its provisions are law in the Republic [and] (2) The ordinary law of the Republic

which their states have not ratified, as aids to the interpretation of national constitutional provisions.[10]

Thirdly, human rights are divided into different types, such as individual and collective or cultural rights. The former are associated with western legal orders while the latter are identified with non-western legal orders, such as African customary law. Our discussion of State and actors' perspectives of the mixed legal system below focuses on this division of human rights.

Before we conclude this section, it is necessary to mention that, in some countries,[11] post-colonial legislative reforms and/or court decisions have reduced state legal pluralism through the reform and integration of their family and succession laws under customary law and/or religious systems of law and common law into single systems of law. The new laws incorporate elements of human rights in varying degrees.

B. Deep Legal Pluralism

The notion of deep or strong legal pluralism refers to the co-existence of several legal orders irrespective of the extent of their mutual recognition, and the 'legal construction of weak legal pluralism, meaning co-existing legal orders, is just one (possibly important) element of such . . . legal pluralisms.'[12] This form of pluralism recognizes and accepts as 'legal orders' regulatory orders that are generated in semi-autonomous social fields other than that of the State.

The idea of the semi-autonomous social field espoused by Sally Falk Moore[13] is particularly relevant to our understanding of deep legal pluralism and the relationship between the co-existing state and non-state legal orders in a given polity. As amplified by Griffiths, this idea holds:

> '[L]aw and legal institutions are not all subsumable within one "system" but have their sources in the self-regulatory activities of all multifarious social fields present, activities which may support, compliment, ignore or

> applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails.'

See also section 282 of the Act, which incorporates the United Nations Protocol to Prevent Trafficking in Persons, subject to the provisions of the Act.

10. For a discussion of the relevant cases see, for example, B. Rwezaura *Domestic Application of International Human Rights Norms*, *in* LAW, CULTURE, TRADITION AND CHILDREN'S RIGHTS IN EASTERN AND SOUTHERN AFRICA 28-46 (W. Ncube ed., Ashgate, Aldershot, Brookfield USA, Singapore, Sydney, 1998).

11. For example, South Africa, Zambia, Tanzania and Malawi.

12. F. von Benda-Beckmmann, *The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice*, 2 LAW, EQUITY, AND DEVELOPMENT 51, 59 (2006).

13. *S. FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (London, Routledge & Kegan Paul 1978).

> frustrate one another, so that the "law" which is actually effective on the "ground floor" of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiations, isolationism and the like.'[14]

This description clearly projects the co-existence of diverse normative systems or legal orders, including those of the State and non-state traditional entities, such as chiefs, headmen and the extended family or kinship groups. These legal orders intersect and interact with each other in all sorts of ways as a result, among other things, of the use put to them by the actors. It also presupposes an element of choice on the part of the actors who would mobilize them for different ends.

This aspect of deep legal pluralism resonates with what Anne Griffiths refers to as 'legal pluralism of another order,' which 'focuses on actors' perspectives and use of forums'[15] (and it may be added) of legal orders. Like the notion of deep legal pluralism, 'legal pluralism of another order' discredits 'the legal centralist model of law as divorced from social life.'[16] In this regard, the two pluralisms are grounded in the everyday lives of people and their experiences of their social and legal worlds.[17] They also recognize that power and power relations outside of the State, such as that exerted by traditional authorities (e.g., the extended family or kinship groups), have as much influence as the state on 'the discourses that individuals employ and that affect their ability to negotiate status and to articulate claims with respect to one another.'[18] In respect of family law and other areas of personal law, the extended family or kinship group is an important source of the power external to State power that influences these discourses.

We conclude this section by the suggestion that the relatively neutral terminology of "normative systems" or "legal orders" is preferable to that of "legal systems" in certain contexts in discussions of legal pluralism and for the purposes of this Article. This is so because the preferred terminology pre-empts debates about the concept of law that excludes non-state regulatory systems from being law. While these debates have their proper sphere in legal theoretical discourses, they would be obstructive to our appreciation of the conceptions the State and actors

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14. Griffiths, *supra* note 5, at 39.

15. A. GRIFFITHS, IN THE SHADOW OF MARRIAGE: GENDER AND JUSTICE IN AN AFRICAN COMMUNITY 35 (Univ. of Chi. Press, Chi. & London, 1997).

16. *Id.* at 134.

17. *Id.* at 11ff.

18. *Id.* at 12.

have of a mixed legal system in legal pluralist contexts, such as those of Southern Africa.

III. Assumptions About Actors' Choice of Legal Orders

The proposition that in legal systems with more than one legal order actors purposefully choose and select the legal orders they use presupposes certain assumptions about the actors' relationship to the legal system. In this section we discuss three main assumptions concerning the choice and selection of legal orders by actors in the area of personal law in Southern Africa.

A. Knowledge of Legal Orders

The first assumption is that actors in legal pluralistic contexts understand or have some idea or perception of the nature of the normative systems operative in their countries. Contributing to the knowledge of legal orders operative in the area of personal law in some countries are deliberate public educational campaigns conducted, especially by non-governmental human rights organisations, to educate people about the new family and succession laws. Thus, actors have some knowledge or perceptions about the benefits, advantages or disadvantages attached to the different legal orders that regulate their personal matters.

What are the differences in the benefits, advantages or disadvantages of the various legal orders operative in the area of personal law in Southern Africa? It is impossible to compile exhaustive catalogues of the differences between the various legal orders applicable to all the countries in the region. However, we may advance broad and general comparisons between the various legal orders for our purposes. In this respect, customary law and religious normative systems (the first category) may be placed on opposite sides to the legal orders of common law and human rights (the second category).

The first category of legal orders is considered to create rights and obligations that are different in character from those created by the second category of legal orders. For example, in contrast to common law, customary law is generally considered or perceived to lack in egalitarian and/or equitable norms applicable to men and women and spouses in the areas of capacity to enter into contracts, including the marriage contract; matrimonial property; custody and guardianship of

children; divorce and status.[19] This contrast is accentuated in those countries that have enacted new and reformed family regimes under common law to incorporate human rights principles.

Another significant broad comparison between the two categories pertains to the individual and group philosophies that underlie the respective legal orders. For example, because it embodies the values of group solidarity and group rights, customary law has, relatively, fewer individual rights than the legal orders in the second category.

Furthermore, because of the group values, a customary marriage creates rights and obligations binding on both the spouses and their wider natal families in varying degrees. And the latter have important roles to play in the spouses' individual lives at different stages of the marriage. In contrast, a marriage entered into in accordance with common law generally creates rights and obligations that are individualistic in nature in that they generally concern only the spouses and their children. Thus, in contrast to a customary marriage, a marriage in terms of common law accords the married couple legal autonomy from their extended families. This autonomy may be a big advantage for couples wishing to avoid onerous obligations to extended family members in ever-changing modern conditions with scarce economic resources.

B. Information Exchange

The second assumption is that actors pass information about the different normative systems—their nature, their benefits, advantages or disadvantages etc.—to each other. In some cases, this information may be limited in various ways, or be totally wrong or based on mere perceptions: nevertheless, the information passes on. A recent study of the new Mozambican family law amplifies this assumption. It has been reported, for example, that maintenance claims increased in one area in 2007, because people who used the new law of maintenance had spread the news about the benefits of this law by word of mouth. The result was that many women came to know about the rights of children to maintenance.[20]

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19. *See* F. BANDA, WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE 85-157 (Hart Publ'g, Oxford-Portland Oregon 2005).

20. I. Casimiro et al., Impact and Baseline Study of the Implementation of Mozambique Family Law Report 2004/05, at 19 (2008) (unpublished summary).

C. Effect on Actors' Lives

The third assumption is that actors make their choices and selections of the various legal orders according to their understanding or perceptions of how these legal orders function and affect their lives. The choices may also be made according to the potential benefits, advantages or disadvantages each legal order is perceived to have.

In conclusion, we submit that actors have information about legal orders in pluralistic mixed legal systems that inform their choices and selection of legal orders, even though the information may be limited, false, or the result of mere perceptions. These assumptions help us to understand the State's and actors' perspectives of a mixed legal system discussed below.

IV. STATE PERSPECTIVE OF THE MIX

Apparently, the State has an unsophisticated view of a mixed legal system. As already intimated, the components of its legal orders are "boxed" and reinforced by choice of law rules or by judicial determinations of conflicts where they occur between the various legal orders. The actors' choices are equally "bounded," in the sense that the actors can only choose from one or the other legal orders at any given time.

Thus, common law and customary law exist in separate boxes, with state-defined choice of law rules[21] to regulate their interaction. Such rules are a common feature of state legal pluralism in Africa, especially in the area of personal law. The sources of these rules differ from one country to another, but the common sources are legislation and judicial decisions. For example, in Zambia, Tanzania and Ghana, the management of conflicts between common law and customary law are contained in legislation.[22] In contrast, in South Africa, the conflicts management rules are developed by court decisions.[23]

With regard to the perspective of the State as it relates to the human rights component of the mix, individual and collective human rights are similarly placed in their respective boxes, as well as being "bounded." In

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21. These are distinguished from private international law rules that regulate choices made between conflicting norms of sovereign states in transnational transactions or juristic acts.

22. See, for example, section 16 of the Subordinate Courts Act of Zambia, section 9 of the Judicature and Application of Laws Act of Tanzania, and section 49 of the Courts Act of Ghana of 1971.

23. *See Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A). For a discussion of these guidelines, see T.W. BENNETT, CUSTOMER LAW IN SOUTH AFRICA 49-69 (Juta 2007).

other words, individual and collective rights belong to separate boxes. When the rights in the separate boxes conflict with each other, the State's agents must generally find a way of resolving the conflict in a manner that prefers one category of rights over the other.

V. ACTORS' PERSPECTIVE OF THE MIX

In contrast to the State perspective, the actors' perspective of the mix is a complex one. In the first instance, the State's boxes collapse as actors mix and combine different legal orders at hand to achieve their purposes. Thus, they combine in single transactions the common law and customary law legal orders for, at least, two apparent reasons. The first is that the combination enables them to gain the benefits, resources and advantages these legal orders offer at the same time, or as it is necessary. The second reason may be explained in terms of the customary practices that traditional authorities, especially the extended family or kinship group, has power to regulate and enforce within the context of deep legal pluralism.

Thus, in addition to seeking to access the advantages of both legal orders, actors are influenced by factors embedded in the complex intersections between state and non-state legal orders in which these orders interact to reinforce or undermine each other. This proposition may be illustrated by the marriage of Africans and the rite of purification following the death of a spouse in Zambia.

A. Choice of Marriage Regimes

The family laws of countries in Southern Africa permit Africans to contract their marriages under common law (civil marriages) or their customary laws (customary marriages). Put differently, people in this group of the population have a choice to contract their marriages under either legal order, but they can only marry under one of the two legal orders. However, in most cases, Africans who contract civil marriages also conclude customary marriages with the same partner, with the result that they combine more than one legal order in a single transaction or juristic act.[24]

As already stated the reason they do this is to enable them to appropriate the benefits of both legal orders. One of the benefits of a customary marriage is that the extended families of the spouses can

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24. *See, e.g.*, Casimiro et al., *supra* note 20, at 12; C. HIMONGA, FAMILY AND SUCCESSION LAWS IN ZAMBIA: DEVELOPMENT SINCE INDEPENDENCE 266ff. (Lit Verlag 1995).

perform the rite of purification for the surviving spouse following the death of his or her spouse.

B. Purification of Surviving Spouse

It is necessary to discuss the rite of purification following the death of a spouse in detail, in order to appreciate its relevance to the combination of civil and customary marriages by actors as apparent from the Zambian example.

The belief in the rite of purification is quite common in Zambia and cuts across all sections of the society, including urban and rural communities, Christians and non-Christians, and the educated and uneducated members of the society.

The rituals of purification are believed to "cleanse" or remove the spirit of the dead spouse from the surviving spouse, without which the latter carries *cibinde*.[25] *Cibinde* is in turn believed to have power to harm its bearer and those who associate with him or her, including his or her marriage suitors in the event of a remarriage. Four points are important to the understanding of the implications of the rite of purification and *cibinde* for actors in relation to the choice of marriage regimes.

The first point is that the rite of purification can only be performed by or in consultation with the relatives of the deceased spouse's family. Alternatively, the rite may be replaced by treatment by a traditional healer, although most people consider this method to be uncertain and unreliable for the purposes of avoiding *cibinde*.

The second point is that the extended families of most Zambians will in practice not recognize a couple to be married if the parties married only in terms of common law (civil marriage) without meeting the requirements for a customary marriage as well. If the couple were to enter into a civil marriage only, in the event of the death of one spouse, the family of the deceased spouse would not be placed under an obligation to perform the necessary purification rituals for the surviving spouse.

The third point concerns the attitude of State officials towards the rite of purification. Although the High Court had held in one case in 1967 that the rite of purification was repugnant to natural justice and, therefore, invalid,[26] in 1987 the same Court in 1987 enforced a customary law practice prohibiting a widow from remarrying before she was

25. Although its linguistic origin is not clear, this term is used to describe this condition in different communities, including some Tonga of Zambia's Southern Province.

26. Kaniki v Jairus 1967 Z.L.R. 71.

purified by the husband's family. It held that the widow was not released from the previous marriage with the deceased man unless and until she was purified by his family.[27] This decision contradicted the spirit of the Court's earlier decision. More importantly, the fact that the Court enforced the rite of purification implicitly reinforced the non-state traditional authorities' legal order concerning this rite. The same can be said of the "traditional" local courts, which form the lowest rank of the State courts that administer customary law. These courts also enforce the rite of purification in many cases by awarding damages to actors who claim to have been aggrieved by people who are alleged to have *cibinde*.[28] Thus, they reinforce the customary practice of the legal order of the extended family or kinship group regarding the rite of purification. The following case illustrates this point.

A woman sued the defendant, her daughter's husband, in the local court in Lusaka, for transferring evil spirits (*cibinde*) to her daughter. She claimed one head of cattle as compensation. She alleged that the defendant had transferred evil spirits to her daughter from an unpurified woman with whom he had an affair before marrying her daughter. As a result of these spirits her daughter fell ill. Previously the dispute had been taken to a headman, where the defendant admitted having gone out with an unpurified woman before he met and married the plaintiff's daughter. He had been charged two head of cattle for damages caused to the plaintiff through the illness of her daughter. Apparently, the defendant did not pay the two head of cattle, as a result of which the plaintiff sued him in this case. The court decided that the plaintiff had proved her case and ordered the defendant to pay her one head of cattle for compensation according to customary law.

The difference in the quantity of damages awarded by the headman and the High Court probably reflects the difference in the conceptualization of customary law by non-state institutions (e.g., headman) and state institutions (e.g., High Court), which is not unusual. The important point, however, is that the decision of the court in this case supported the extended family by enforcing a customary practice in its domain.

The fourth point concerning the implications of the rite of purification for the choice of marriage regimes concerns the importance of marriage itself in many African societies. Even in those countries, such as Botswana, where a decrease in the incidence of marriage has been observed this institution, according to Anne Griffiths, ideologically

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27. *Kadakwa v Siadimbozye* 1987/HP/A/10 (Lusaka).
28. *See* further HIMONGA, *supra* note 24, at 270ff.

still provides 'the frame of reference in terms of which individuals' relationships are characterized—by the parties themselves as well as others—at any moment, particularly where law is concerned'.[29]

Because of the importance of marriage, actors may want to guard against any incidents, such as *cibinde*, which are likely to undermine the possibility of a spouse's remarriage upon the dissolution of his or her marriage. In the example of Zambia, the concern that the extended family may not recognize the civil marriage and perform the purification rites in the event of the death of one spouse are among the factors that influence actors to conclude customary marriages on top of their civil marriages.

Thus, for some actors, the complex relationship between marriage, death and the supernatural world connected with the ritual of purification and maintained by the extended family, on the one hand, and the enforcement by the State courts of supernatural beliefs connected with marriage and death, on the other hand, serve as sole or additional motivations for combining marriage contracts derived from the two legal orders. In other words, for many an African in Zambia, the intricate intersections between marriage, death, supernatural powers, family power and State power constitute important elements of his or her perspective of the mixed legal system in the field of personal law.

The complexity of the actors' perspective of the mixed legal system also extends to the human rights component of the state legal order. Here the State's human rights "boxes" of individual and collective or cultural rights are equally dismantled by actors. The actor-oriented human rights perspective, espoused by Celestine Nyamu-Musembi, may be used to amplify this point at a theoretical level.[30]

Nyamu-Musembi defines the actor-oriented perspective of human rights as an 'understanding of human rights needs and priorities that is informed by the concrete experiences of the particular actors involved in, and who stand to gain directly from, the struggles in question.'[31] An important aspect of this perspective is that it challenges the antagonistic dichotomy that is usually drawn by liberal human rights discourses between individual rights and collective rights. Instead, it accommodates discourses of rights in which 'people are constantly negotiating between

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29. GRIFFITHS, *supra* note 15, at 14.

30. This approach was applied to the analysis of the role of human rights in social and economic development of disadvantaged people. *See* Celestine Nyamu-Musembi, *An Actor-Oriented Approach to Human Rights in Development*, 36 IDS BULL. INST. OF DEV. STUDIES 41–50 (2005).

31. *Id.* at 41.

an internal moral system (shaped by factors such as culture and religion, and represented by institutions such as kinship) and the formal legal regime of the liberal state.'[32]

This approach also distances itself from the view that collective rights subsume individual interests and concerns under community interests. Rather, the analyses of rights 'point to people's own experiences of [individual] concerns and interests as overlapping and intertwined, sometimes in harmony and sometimes in tension.'[33]

With regard to the resolution of conflicts or tensions between individual and collective approach, the actor-oriented perspective postulates that these sets of rights need not always be seen as antagonistic to each other; the 'actors,' situated as they are in a complex web of relationship, may well negotiate the conflicts concerned. And these negotiations may be sufficiently protective of the individual rights of the 'actors' involved in the struggle for rights. For our present purposes, this process of negotiating rights by actors could well result in the dismantling of the State's "boxed" rights paradigm.

VI. CONCLUSION

Considerations of the notion of a mixed legal system in Southern Africa may need to take account of different perspectives connected with the deeply pluralistic nature of legal systems in this region. This Article has attempted to show that in terms of the operation of the legal systems concerned, the State and the users of mixed legal systems in this region have completely different perspectives. While the State views the mix in simplistic terms, in which the national legal orders, including human rights, are compartmentalized in "boxes," supported by the State's mechanisms of resolving conflicts between them, the actors have a complex perspective of the mix. The latter consists of a combination of the legal orders that is informed by both the choices of the actors and the notion of deep legal pluralism. Through illustrations drawn from the contract of marriage and death rituals, we have attempted to demonstrate, firstly, the nature of the legal and social contexts in which people choose and select the legal orders to regulate their lives. And, secondly, that the factors that shape the actors' perspective of the mix include, but go beyond law as conceived by the State.

Similarly, at the level of human rights, actors reduce the boxes ringed around categories of human rights, such as individual and

32. *Id.* at 45.
33. *Id.*

collective or cultural rights. They do this through negotiating between non-state traditional normative (moral) systems represented by institutions such as kinship and the liberal state's legal orders.