

**Reconciling Africa's Fragmented Institutions of Governance:  
a new Approach to Institution Building**

**Report on the Round Table, 4 August 2011  
Sheraton Hotel, Pretoria**

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Panel members (l.t.r.): Prof Lungisile Ntsebeza, Prof. Chuma Himonga, Dr Gerard Hagg, Ms Likhapha Mbatha, Prof. Kidane Mengisteab, Ms. Nomboniso Gasa, Adv. Jacob Skosana, Prof. Pearl Sithole, Mr. Thami Mbele (assistant)

## Background

Between 2009 and 2011 the Pennsylvania State University (PSU, USA) and the Human Sciences Research Council of South Africa (HSRC, SA) conducted research on the relationship between traditional and modern institutions of governance in four African countries: Kenya, Somaliland, Ethiopia and South Africa. The project under the title *'Reconciling Africa's Fragmented Institutions of Governance: a new Approach to Institution Building'* was funded by Canada's International Development Research Centre (IDRC) while the project workshops were funded by the Konrad Adenauer Stiftung (South Africa, Kenya). A Round Table was organized in Pretoria (South Africa) in August 2011 to present the research findings to stakeholders. Participants included traditional leaders, policy makers, scholars, officials and civil society representatives, both from South Africa and African and other diplomatic missions in Pretoria. The programme and a list of participants appear as Annexures A and B in this report. The report covers the background to the research as well as the proceedings of the Round Table. The report will be integrated into the Final Outcomes Report for the project, which will be available on the IDRC website after the project has been closed in September 2011.

The project's initiation was based on the phenomenon that most African post-colonial countries are characterized by parallel institutions of governance – one is the formal system sanctioned by the state and the other is the traditional system, which is adhered to primarily

by the segments of the population in the subsistence peasant and pastoral economic systems.<sup>1</sup> The dichotomy of the institutional systems is largely related to the continent's fragmented economic systems, which range from relatively advanced capitalist system, symbolized by modern banking and stock market exchanges, to traditional economic systems, represented by subsistent peasant and pastoral systems. The different modes of production and the corresponding parallel institutional systems represent separate socioeconomic spaces with divergent property rights laws and resource allocation mechanisms; disparate decision-making systems; and distinct judicial systems and conflict resolution mechanisms. The research project investigated the problematique of the said dichotomy with a view of increasing the understanding of the institutions and their relationships, and of determining possible approaches towards the reconciliation of the dichotomy.

### **Round Table objectives**

The Round Table had three objectives. First, to present the findings of the research project to stakeholders, such as scholars who have studied the same or related issues of governance, the governance sector — such as state policy makers, officials and traditional leadership —, and civil society representatives. Furthermore, the Round Table aimed to promote the debates around the dichotomous institutional arrangements through two panel discussions. Representatives of stakeholder categories were invited to state their views in a way that would provoke further and deeper debate. Lastly, the project leaders aimed at finding common ground about policy-making and research directions.

### **Welcome and introductions**

Prof. Modimowabarwa Hendrick Kanyane of the HSRC welcomed all present and highlighted the need for this meeting. The issues under investigation were important to stakeholders on the continent, while the two research institutions had the mandate to disseminate the findings as a contribution to the current debates. Kanyane emphasized that the existence of different institutions of governance in post-colonial Africa is a reality which impacts on national and sub-national societies. For too long states have ignored the problematique of such parallel or conflicting institutions.

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<sup>1</sup> A third institutional system, which is not addressed directly in this study, are the informal (societal) institutions that consists of norms and rules that shape social relations and expected behavior.

## Presentation of project findings

Prof. Kidane Mengisteab (PSU) and Dr Gerard Hagg (HSRC) presented the findings of the research highlighting the research problems, methodologies, findings as well as approaches and key issues toward reconciliation.



### Introduction

African countries are characterized by dichotomous institutions of governance, primarily a) state sanctioned (modern) formal institutions of governance (MI); b) traditional institutions, which are mostly adhered to by rural populations (TI); and c) informal (societal) institutions (norms). This institutional fragmentation is related to prevailing socioeconomic systems, which range from relatively advanced modern (capitalist) systems symbolized by modern banking systems and stock market exchanges, to traditional systems represented by subsistent peasantry and pastoral systems. Between these two extremes a number of variations and mixtures exist. The parallel institutional systems correspond to the different modes of production and represent separate socioeconomic spaces. They have different property rights laws and resource allocation mechanisms; different decision-making systems; and separate conflict resolution mechanisms

### Problems resulting from fragmentation

Fragmentation results in a number of problems and challenges. For example, can African governments formulate coherent policies that alleviate poverty and promote socioeconomic development under fragmented institutional systems and socioeconomic spaces? Are diversity management, state-building and inclusive democratization attainable when the institutions of the state are largely incompatible with the economic and institutional systems of the overwhelming majority of the population? If not, how may the fragmented institutions be reconciled? The central question is: is it likely that socioeconomic transformation — including economic development, poverty alleviation; diversity management and peaceful state-building, and democratization — would take place under dichotomous socioeconomic spaces? How would the system of resource allocation be governed?

There are a number of specific problems. Communities that operate under the traditional institutional systems are marginalized in access to resources, justice, and public services. State legitimacy is weak due to institutional de-linking of the state from rural communities. Participation of rural communities in the political and democratization processes becomes limited. Civil society becomes fragmented and weak as it rarely incorporates rural communities.

### **Objectives of the study and methodology**

The study was conducted in Ethiopia, Somaliland, Kenya and South Africa and comprised 11 research sites.

Among the specific research questions of the project are

- 1) what are the essential characteristics and attributes of traditional institutions (TI);
- 2) to what extent do TIs overlap with democratic principles; and
- 3) how might the parallel institutional systems be reconciled

Three methodological approaches were used:

- an extensive literature review;
- Interviews of key informants and discussions with focus groups; and
- Random Household Survey interviews (total 900).

For the analysis the following approaches were applied:

- a combination of qualitative analysis and descriptive statistics;
- Chi Square tests of differences, where appropriate; and
- the reconciliation aspect is largely based on theoretical formulation grounded on the comparative experiences of specific countries.

### **Key findings**

Three categories of findings were highlighted:

- 1) Typology of TIs' leadership structures, reliance on TIs, and relations of TIs with formal institutions;
- 2) Overlap with democratic principles (dispute resolution, decision-making, and resource allocation mechanisms and gender relations); and

- 3) Comparison of institutional reconciliation approaches of selected countries, in order to identify the essential elements of reconciling the institutional systems.

# 1) Typology of TIs' leadership structures, reliance on TIs, and relations of TIs with formal institutions

Table 1 categorizes the TI governance structures identified in the 11 research sites.

*Table 1. Structure of Traditional Leadership in the Selected Sites*

Governance System	Method of Selection of Leaders	Magnitude of power of Leaders	Hierarchy of authorities below the leaders	Name of Research Site
Centralized chieftaincy systems	Hereditary	Notable but not absolute power	Sub-chiefs; Headmen	Giyani and Matatiele South Africa
Centralized chieftaincy systems	Hereditary	Limited power	Junior chiefs and elders	Nuer, Ethiopia
Centralized chieftaincy systems	Semi-hereditary	Limited power	Elders, Sub-clan elders Somali sultans	Somaliland
Centralized non-chieftaincy systems	Non-Hereditary, selection with rotation among sub-groups	Notable but not absolute power	Cabinet and council of elders	Borona, Ethiopia
Decentralized elder-based systems	Non-hereditary selection of principal elder (Chair of the council of Elders) with rotation among sub-groups	Limited	Local (village) elders	Njuri Ncheke, Kaya elders, and Pokot elders in Kenya; and Gurage elders in Ethiopia

Source: Key Informant Interviews.

Table 2 shows the percentages of respondents who indicated to what extent conflicts are usually taken to Traditional Institutions for settlement

*Table 2. Proportion of Conflicts That Are Taken to Traditional Institutions for Settlement*

Country Cases	Intra-Community Conflicts %	Inter-Community Conflicts %
Kenya	56.0	56.2
Ethiopia	78.7	52
South Africa	71.2	.*
Somaliland	59.2	70.5

Source: Survey Results. \* According to South African respondents few inter-community conflicts exists.

Table 3 shows the percentages of respondents with regard to the effectiveness of Traditional Institutions relative to Formal Institutions in Conflict Resolution.

*Table 3. Effectiveness of Traditional Institutions Relative to Formal Institutions in Conflict Resolution*

Country Cases	Intra-Community Conflicts		Inter-Community Conflicts	
	TI More Effective %	MI More Effective %	TI More Effective %	MI more Effective %
Kenya	63.6	37	38.4	55.6
Ethiopia	74.8	24.7	56.3	41.0
South Africa	64.9	31.7	_*	_*
Somaliland	70.4	6.1%	68.4	7.0

*Source: Survey Results*

## 2) **Overlap with democratic principles (dispute resolution, decision-making, and resource allocation mechanisms and gender relations)**

The second category of findings related to the overlap with democratic principles. During the key informant interviews many respondents had argued that Traditional Institutions have democratic characteristics, particularly with regard to the participation of women in decision-making activities. Table 4 shows the percentages of respondents indicating to what extent women have access to participation in identified activities.

*Table 4. Percentage of Survey Respondents Who Believe That Women Have Access to Participate in the Identified Activities*

	Ethiopia		Kenya		So. Africa		Somaliland	
Participation of Women	Yes %	No %	Yes %	No %	Yes %	No %	Yes %	No %
As Leaders	24.0	76.0	84.8	13.2	22.8	60.1	-	-
As Elders	67.0	33.0	69.6	28.8	28.5	56.5	18.2	-
In Meetings	92.5	7.5	97.2	1.2	89.1	0.5	51.5	7.1
In Obtaining Land	54.7	42.0	55.2	43.2	97.8	9.3	56.1	40.8

*Source: Survey interviews*

A recurrent challenge to Traditional Institutions is the extent to which women and men are treated equally. Table 5 shows percentages of respondents' views with regard to several situations. Table 6 highlights the extent to which bride's price is still paid in the researched communities. During the interviews respondents indicated that bride's price is considered a measure of estimating a bride's status. Table 7 shows the prevalence of polygamy, another issue in gender studies. Follow-up questions showed that many respondents consider



polygamy as valuable, for example in sharing tasks. However, in South Africa the vast majority of respondents felt negatively about this tradition.

*Table 5: Gender Relations*

	Ethiopia		Kenya		South Africa		Somaliland	
	Yes %	No %	Yes %	No %	Yes %	No %	Yes %	No %
Participation of Women								
Inherit Property from parents	34.0	62.0	59.0	40.5	72.9	20.4	87.8	10.2
Inherit Property from Husbands	71.3	21.3	94.0	6.0	91.9	4.5	90.8	7.1
Child Custody	20.3	-	20.0	-	58.8	-	63.3	-
Women Obtain Equitable share of property if divorced	51.3	44.8	28.0	70.8	32.1	57.4	5.1	90.1

Source: Household Survey

*Table 6. Payment of Bride Price*

		Ethiopia	Kenya	Somaliland	South Africa
Yes	%	68.7	99.6	85.7	96.3
No	%	31.3	0.4	13.3	3.3
No answer/not applicable	%	0.0	0.0	1.0	0.5

Source: Household Survey

*Table 7. Practice of Polygamy*

		Ethiopia	Kenya	Somaliland	South Africa
Yes	%	73.3	86.4	80.6	51.1
No	%	26.7	13.6	15.3	46.6
No answer/not applicable	%	0.0	0.0	4.1	2.3

Source: Household Survey

### **3) Comparison of institutional reconciliation approaches of selected countries, in order to identify the essential elements of reconciling the institutional systems.**

Both literature and the interviews indicated that there is a need for reconciliation between the two types of institutions. This confirms the theory that given the socioeconomic problems associated with institutional fragmentation (parallel socioeconomic spaces), reconciliation of institutions seems essential for socioeconomic transformation in general and democratization in particular.

The research has identified several approaches to institutional reconciliation. At a grassroots level communities and individuals negotiate the parallel systems and choose different systems

for different things to maximize benefits. At the state level, Ethiopia and Kenya have not undertaken a formal process of reconciliation, and fragmentation remains. In South Africa the process is still unfolding but it aims to involve traditional authorities in local governance. In Somaliland, with the traditional institution of the *Guurti* at the highest level of government, the approach is far-reaching, although it may have risks that this institution becomes more powerful than the democratically elected parliament.

### **Key aspects of reconciliation**

The research determined a number of key aspects in the process towards reconciliation. First, key concepts of both TIs and MIs should be continuously interrogated as concepts are developed from and within specific cultural and historical contexts. Furthermore, the framework within which discourses take place should be extended in order to break the isolation of TI as a customary law category. In fact the value of both TI and MI should be recognized. The extension should include the contextualization of institutions of democracy so that they accommodate traditional institutions. On the other hand, the unified functions of TIs should be split following the universal democratic governance framework (split of legislative, executive and judicial powers). Furthermore, TIs should be reformed to safeguard women's rights. TIs will take their right place when decentralized governance is promoted, in order to allow active participation of traditional leaders in local governance and in formulating local policy. Similarly the traditional judicial system should be recognized by utilizing the conflict resolution mechanisms of the traditional system. This recognition would also promote diversity management and nation-building and to reduce inter-party conflicts, as well as acknowledging customary property rights laws. Lastly, the capacity of both types of institutions should be built through resourcing and training. Summarised, reconciling the two types of institutions could be a mechanism of empowering rural communities.

### **Contribution to field/theory**

The study may contribute to theory in four areas. First by explaining the socioeconomic problems associated with institutional fragmentation. Second, in determining if sustainable socioeconomic development in general and democratization in particular is feasible under conditions of dichotomous socioeconomic spaces, fostered by institutional fragmentation. Thirdly, the study may also contribute in the search for approaches for institutional reconciliation, and lastly, the study can contribute to clarifying the role of institutional reconciliation in the management of diversity and mitigating ethnic conflicts.



## **Discussion**

In the discussion following the presentation of findings participants pointed to the reality of deeper affinities to traditional institutions, beyond the socioeconomic spaces. The cultural rootedness of TIs should be considered in policy making. The fragmentation was discussed with regard to sub-chief levels, where headmen and families played a significant role in providing social cohesion. The selection of countries and sites was questioned. The research team had based its selection on the need to cover a spectrum of traditional institutions, from hereditary chiefs to elected councils of elders. Furthermore the budget had limited the number of case studies, while there is a need to include more West-African countries. Swaziland, as a traditional kingdom with some formal post-colonial structures, was also proposed as an ideal case. The research team viewed the current study as the first one, to be followed by additional case studies, and acknowledged the need for more in-depth investigation. To the question of the ultimate objective of the study, the need for making policy input and providing training was emphasised.

## **Panel Discussion One: Judicial Institutions, Conflict Resolution and Gender**

The Round Table made provision for two panel discussions in order to induce the discussions of the various issues. The first panel of three members addressed the issues of judicial institutions, conflict resolution and gender.



Prof. Chuma Himonga, National Research Foundation Chair in Customary Law at the University of Cape Town (UCT) presented her views on the impact of colonial history and recent law reform on customary law in South Africa. She disputed attempts to abolish traditional or customary law. The South African Constitution (1996) recognizes traditional institutions, while the South African courts recognized living customary law, i.e. customary law as interpreted and amended to suit current contexts. The latter is usually practiced through informal traditional institutions, such as the headmen's courts and family meetings, which were not linked to statutory systems. Traditional courts are historically and in practice the preferred courts for small civil court cases, and are linked to the statutory courts through mutual referrals. Prof Himonga also warned against viewing women's rights as necessarily contradicting customary law. Within patriarchal traditional cultures women's rights are expressed in language different from the human rights discourse, and these rights are often protected through customs that do justice to women's rights. Such non-Western perspectives should be respected, not abolished. Law reform has the danger of completely undermining the essential characteristics of customary law. The approach to women's rights should not be universal but relative to the cultural context. As a result Prof Himonga proposed a cross-cultural approach to women's rights.



Ms Likhapha Mbatha, of the National Movement of Rural Women, emphasized the need to retain Traditional Institutions for the rural communities. She shortly discussed three problems with the study and with some aspects of Traditional Institutions. First, practical problems in South Africa and the abuse of the institutions are not sufficiently covered. This applies particularly to the levies, which are demanded by some traditional leaders, although this practice is only lawful in Limpopo. Where residents have not paid their levies, the chief can withhold support for application of

identity documents. Although this is illegal, it happens and makes citizens subjects (in Mamdani's terminology). Furthermore the speaker highlighted the problem of terminology, e.g. the meaning of traditional law and traditionality. The speaker also asked for deeper gender analysis. The study did not outline its expected outcomes, although the survey data provides statistical information. The report should draw conclusions from the findings that can contribute to a more functional traditional institutional situation.



Adv. Jacob Skosana, Deputy Chief State Law Adviser: Policy Development, discussed Traditional Institutions from a Constitutional and legal framework. The South African Constitution recognizes cultural values. Traditional Institutions have been enshrined in the Constitution and over 16 million citizens live under a traditional authority. The Repugnancy Clause which was part of apartheid legislation, has been replaced with one which is based on universal human rights. It is clear that not all customs are against the Constitution, but that customary law has to be brought in line with the Constitution.

Skosana shortly discussed the current position of the Traditional Courts Bill. This Bill aims to structure the framework of customary law rather than transforming it. Although the Bill focuses on 'chiefs' courts', the organization of traditional communities is more complex, including family and headman's meetings. However, the Traditional Courts Bill should provide access to justice to millions of people, without limitations of legal costs, language and time. The modern or statutory courts do not provide for the requirements of customary law, such as the objectives of reconciliation and restoration and the involvement of the community. Traditional courts are not governed by procedure but by a sense of justice. Female litigants can represent themselves or can have somebody acting on their behalf in court. In practice magistrate (state) courts refer people living under traditional law to their traditional leaders, except where specific areas of jurisdiction have been assigned to statutory courts (serious crime, divorce).

## **Discussion**

The panel presentations were followed by vibrant discussions. The representative from the Rwandan High Commissioner highlighted the success of *Gacaca* as a traditional court

institution after the 1994 genocide. Furthermore councils of elders exist in all districts. These councils include women and youth and they are highly respected. Both show that reconciliation can take place at a grassroots level. The speaker questioned the possibility to reconcile Western rights on freedom of expression and homosexuality with traditional institutions. Panel speakers agreed on the usefulness of *Gacaca* but also pointed to its challenges in difficult cases, and the levels of discrimination and incidences where the *Gacaca* court exceeded its jurisdiction<sup>2</sup>. Although *Gacaca* has been widely applied, its relationship to statutory courts has apparently not been clarified.

A South African participant supported Prof Himonga's view that human rights should be considered from a cross-cultural point of view. There is no logical conflict between human rights and traditionality. In fact, the speaker identified paternalism in the liberal human rights viewpoint as it excluded indigenous discourses. Human rights are not necessarily universal but should be considered case-by-case. Furthermore patriarchy also exists in modern systems, e.g. property registration in the name of the husband and the name change of a married woman. The subsequent discussion emphasized that human rights and indigeneity are not binary positions, and scholarship has moved beyond such oversimplification. A more sensible approach would be to start with the inner logic and rationale of each system under investigation and assess them on their own terms, leading to a cross-cultural dialogue.

The question was raised who would fall under the jurisdiction of customary law? The answer can be based on legal or technical determinants, as in the various pieces of legislation in South Africa. Law makes provision for conflictual situations between the systems. Is there an option to opt out of traditional institutions? For example, of the 16 million people who are supposed to live under traditional law, many people work for most of the time as migrant workers in urban areas. It was argued that people navigate between the systems. The solution does not lie in strict regulation but to start from the perspective of the users. Indeed some urban Africans tend to apply their customary law in cases. Skosana argued that courts will base their position on the lifestyle of the incumbents and the nature of the transaction. For example, Africans in cities may still apply customary marriage if that fits their general lifestyle.

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<sup>2</sup> The problematics of *Gacaca* is discussed in: IDEA. 2008, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International Institute for Democracy and Electoral Assistance.

Furthermore the question was raised whether customary law could also apply to whites, e.g. in cross-cultural encounters. There is a tension between national and territorial law, and not being binary implies a variety of mixed forms in between.

Further questions exist around the administration of law, and particularly the existence of the Traditional Courts Bill (TCB). Is it possible to apply two types of law within a single country? For example, should the new approach of 'mediation courts' not apply to all communities?

Indeed the TCB is challenged. As customary law is a concurrent function of national and provincial government, the TCB has been sent to the National Council of Provinces for further consultation at community level and with civil society organisations. The National House of Traditional Leaders will also be consulted. However, time is limited as comments should reach the Department by March 2012. The TCB will not be able to address all issues, but should provide a framework from which practice could be ordered and scholars can start contributing to interpretation. The need for further training and capacity building of lawyers and traditional leaders is clear.

Living customary law requires implementation of current customs from a holistic point of view, be it in traditional courts or statutory courts. The jurisdiction and structure of courts determine the process of implementation. Although current legislation (retained parts of the Bantu Administration Act 1927) allows traditional courts to hear criminal cases, in practice murder and rape are taken to statutory courts, often via the police. Enforcement of the TCB is restricted by the area of jurisdiction, and applies to all who subscribe to customary law. There is thus a principle of consent from those who are in dispute. The key is to what community the parties belong, which provides common ground. Prof Mengisteab pointed out that in Somaliland three judicial institutions apply: shariah, traditional and statutory. Processes of application are even more complex in transborder situations, e.g. between Kenya, Ethiopia and Sudan, where communities of the same clan live in all three countries, under different constitutions. Decentralisation rather than integration seemed to be the starting point here.

## **Panel Discussion Two: Resource allocation (including land), Service Delivery, and Gender**

During the second panel discussion three speakers stated their position on resource allocation, and particularly land control, as well as service delivery.

Prof. Lungisile Ntsebeza, National Research Foundation Chair of Land Reform and Democracy in South Africa, at the University of Cape Town provided a framework for understanding his research on land issues. Although the HSRC/PSU report had provided much insight, it showed that even within a single country significant variations



exist. Matatiele and Giyani are quite different from the Eastern Cape on which Prof Ntsebeza has focused. Even within the Eastern Cape there is need for extension of research sites. He pleaded for more in-depth research in the four countries of the study, rather than adding other countries without the benefit of more detailed research. Prof. Ntsebeza highlighted the importance of different historical contexts, e.g. between British and Afrikaner colonialism. He referred to the work of Archie Mafeje<sup>3</sup> which preceded Mamdani's view on 'Subject' and 'Citizen'. Several historical factors played their role, from land dispossession to Christianity, and from urbanization to modern education. Ntsebeza argued that although traditional institutions had persisted, they were often in a distorted form, e.g. around land tenure and governance. The main distortion was the legislation that made chiefs the controllers of the communal land. A second point was the impact of urbanization on traditional communities. Rural communities have changed, particularly in the economic sense, such as the prevalence of hair salons, the usage of mobile phones, television and electricity in the homes. Rural people nowadays shared many values with urbanites. The question then is on what basis we can have laws that apply to one group only, as if there was a homeland lifestyle. Without unified legislation South Africa would become a colony again, and nation building would be undermined.

Nomboniso Gasa, researcher at PNG Services South Africa, emphasized the contradictions that typify reality in South Africa. People live within such contradictions and negotiate multiple social, geographical and economic distances. This situation not only prevails in Africa, but also in many Asian and Latin American countries, even in the Anglo-Saxon world. Gasa pointed to the fused relationship between formal and informal institutions. These are not exclusive, but often overlap. The same applies to inter-identity negotiations through which each individual goes as he/she moves between different institutional contexts. Human beings are continuously

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<sup>3</sup> Mafeje, A. 1971. "The ideology of Tribalism". *Journal of Modern African Studies*, Vol. 9(2):253-261.



mediating different social circumstances. Thus it is difficult to define effective institutional boundaries and systems. Parallelism is often just a mixture with clarity at some points. In Kenya, for example, there are multiple systems, such as capitalism, Kikuyu, colonial and socialism, which apply differently to property rights, marriage or farming.

Gasa also referred to Archie Mafeje's view of tribalism as a social construct, which after colonialism became a political construct with conflicts generally around resources. Similar trends occurred in South Africa where the amaXhosa became a political construct to suit policies for subjugation of peasants into homeland politics. The investigation of clans would have shown the diversity in institutions, such as marriage or 'inheritance of the spear' among the amaPongo. Summarised, resource management is a complex phenomenon determined by cultural, political, social and economic factors. For example, custodianship of land often lies with the family and community, not the chief. Gasa queried the selection of countries in the study. Africa is not homogenous, and West-Africa has its own problematics, e.g. in Nigeria. She elaborated on the co-existence of Hausa Fulani, Yoruba and the Ibo tribes, each with their own governance institutions.



Prof. Pearl Sithole, of the Department of Sociology, at the University of KwaZulu-Natal (UKZN) warned against scholars' overemphasis on the distortion of cultural and indigenous institutions by colonialism, as such an approach would easily preclude indigenous people from participating in the debates. The distinction between traditionality and modernity is not so simple. Such exclusion could become a new colonialism and paternalism. Arguments about the distortion or extinction of traditional institutions implies that such institutions existed, which had to be saved. Using three stories as examples, Sithole argued that language plays a dominant role in explaining indigenous phenomena, and that English was mostly unsuitable.

In the first story a case of '*Ukungcweka*' (stick fighting) resulting in the death of one of the stick fighters, a modern court would have to decide on whether this was 'murder'. From a logical mapping approach there would be negotiations, mutual understanding and compensation of the family of the victim. From a statutory approach the case would need an objective declaration of the deed leading to a sentence. The second story related to '*Ingcugce*', a

historical occurrence, where the chief instructed a regiment of young women to get married to the members of the iNdlondlo regiment after returning from a successful battle in war. The women refused, using the phrase “Ucu aluhlangani entanyeni” (‘over our dead bodies’) as they presumed marriage needed love. The women were indeed killed. In a debate in 2007 the question was raised: Were they delinquents or feminists? The conclusion depends on the cultural viewpoint. The third story related to the formality of the Land Use Management System in KwaZulu-Natal. This process is officially driven by the municipality. However, municipal boundaries are crosscutting traditional communities, with a result that indigenous authorities do the allocation while the municipality managed land use. Such rural patterns of land allocation and management transcend neat cadastral patterns preferred by the municipality.

Sithole drew two morals from the stories. First, tradition and modernism are not mutually exclusive of each other but it is when they are valorised that they become problematic. Modernisation is imported and supposedly better, orderly and scientific. Traditionalism also sometimes defends itself too much as to create principles even over matters of personal feeling and decisions. Modern institutions are not doing traditional institutions a favour by ‘recognising’ them. Traditional institutions are resilient in terms of existence because they link with social meaning. An inherent disability in modernisation is its failure to speak to preferences, adopt a case-by-case approach to issues and design with listening (negotiation). Second, this problem links with other fake binaries – which indicate *ukudlebeleka kwesayensi* (scientific valorisation) — such as subjectivity vs objectivity; qualitative vs quantitative; esoteric vs scientific, and custom vs law. Sithole drew some implications for land and service delivery. Modernity emphasises land tenure, bearing on social status, while traditionality’s emphasis is on social tenure, bearing on access and land use. Liberal approaches focus on individual title and the individualism of acquisition and branding of acquisition mediated by conveyancing and registration.

With regard to service delivery and land use planning modern orientations stress participation, while traditionality orientation focuses on negotiation. Service diversification will never be possible if methods of delivery and land use management are fixed – as per the formal professional land planning principles.

Lastly, Sithole addressed the gender issues. There is an ideological evolution with elements of imbalances that must remain open to negotiation rather than permanent branding. The link between gender imbalances and property is a matter beyond traditional leadership, and rather a matter of patriarchy and property inheritance broadly. Problem is that what is being tabled by academics, is liberalism, a discourse of rights which is idealistic.

Sithole concluded that modernity and traditionality maintain a relationship of paternalism and defiance – in line with the global colonial hegemonic system. Until we are transparent about what we mean we will encourage this paternalism: tradition departs from conceptual rigidity and this must be allowed; modernity abuses scientific valorisation to legitimise itself.

## **Discussion**

A vigorous discussion followed the presentations. Speakers emphasized again the need to view customary law as flexible and dynamic, not fixed. For this reason the concept ‘living customary law’ is preferred, and the only answer to the contradictions of history. Contradictions are historically rooted. Such contradictions and distortions are not necessarily sterile but should at least be acknowledged and not removed. It is discomforting that African traditional culture is still defined in the singular, while there is a rich variety. The danger is that the recognition of traditional institutions may entrench the contradictions. The current focus on functionalism in research should be augmented with historical studies, rediscovering the roots of African societies. One of the participants argued that colonial distortions should not be absolutised. Allegations that Africanness was invented contributes to the binary views. Niger and Nigeria had different colonial histories, but their traditional institutions are still very similar. Ethiopia had not been colonized, but institutions of the Nuer in Ethiopia are similar to some in Kenya. The British had created chiefs outside the traditional system, but this did little to change the traditional institutions. External colonial impositions should be carefully compared with the internal dynamics of traditional institutions. It is indeed not possible to generalize, but cases should be studied from their inner logic.

In their response the panel members referred to several cases of differentiation between communities and institutions. Although the HSRC/PSU study had excluded the informal institutions these should be taken into account as they formed people’s identity and are thus interwoven with traditional institutions, e.g. the secret men and women societies in Sierra Leone. Several speakers urged for further research, and deeper rather than wider, as shallow

research led to oversimplification. Universities are not necessarily geared for such research, and scholars often have fixed minds. In South Africa scholars have to adopt the stance that this country can learn much from other African countries.

Several speakers had referred to peasantry in African countries, which still adhered to traditional customs. The question was raised whether in South Africa such peasantry still existed, after the marginalization of Africans from their land. Prof. Mengisteab doubted whether such a peasantry existed in South Africa, and asked whether other African countries would follow the modernisation route of South Africa. Other speakers argued that in South Africa the peasantry has been destroyed by apartheid, as land was disowned, and Africans were used as cheap labour in mines and on land.

One speaker from Burundi emphasized the fact that it is possible for both traditional and modern institutions to co-exist through national law. Such a law has to be negotiated, but only national governments have the resources for such a process.

One of the panel members again warned against generalization as if communities are homogenous. Scholars tend to fixate things when they theorize and generalize. Life is flexible and fluid, qualitative rather than quantitative. Human beings are not fixed objects without choices. Each person is part of the contradictions of his or her existence. Spiritual aspects of life were often ignored by Western scholars, but formed the basis of African life, as it is in other countries in the world. Again this asked for decentralisation of decision making. Historically even within single countries such pre-colonial differentiation had persisted under colonial rule. For example in Nigeria three mainstream systems, embedded in separate ethnic groups, had persisted during colonialism, and continued under post-colonial rule.

### **Implications for policy making and further research**

The discussions following the panel presentations naturally led to questions about implications of the research for policy making and follow-up research. One participant argued that academics tend to talk within a constricted environment, not taking into account the need for knowledge that can be used by policy makers. The latter are responsible for providing the legal frameworks for both modern and traditional communities. Narrowing the gap between academia and policy makers will improve chances of finding workable reconciliation of the various institutions. Scholars can, for example, contribute to the TCB by embedding flexibility

in the law in order to accommodate living customary law. Both policy makers and scholars should focus more on communities and the real functioning of traditional and modern institutions.

Furthermore there is a need for monitoring of progress, e.g. in the application of law, so that the impacts of law can be measured and used for improvements. Such monitoring should happen first in the communities that implement customary law.

One of the panel members argued that contributions to policy making should increase clarity about matters, e.g. how land use and rights are applied. Ironically, the maps of traditional community areas in South Africa seem to largely coincide with those of the apartheid homelands. Would that not continue the spatial arrangements of apartheid? Ultimately we intend to build a better society, and should be willing to dig deeper to find the truth. Policy makers should be willing to learn from scholars, as the former need the depth of insight of academia. On the other hand academics must realize that legislation is determined by political realities, and that positions by all stakeholders are always politically coloured. Scholars focus on robust and rigorous methods, but are generally not good in advocacy of their ideas, and should engage interpreters of their robust research towards policy makers. The process of law making should therefore be optimally inclusive.

In addition it was argued that policy makers should learn from other countries. For this reasons comparative studies are important to reveal other options than the ones prevalent under a specific ideology. For example, how did other African countries deal with personal law, constitutional law and customary law? Both modernity and traditionality are flexible and dynamic, as the Asian experiences show.

It was proposed that the research should be presented to Ministers and senior policy makers, in order to let them take part in the debates. For both policy makers and scholars such experiences are humbling, and both may enrich themselves, and close the gap between them. Researchers should also keep in mind that policy is not made in a vacuum, but that civil society plays an important role, e.g. by advocacy and mobilization of communities. Boundaries between the various role players in policy making are blurred, and should allow for cross-fertilization.

**Closure**

During closure of the Round Table, Dr Hagg on behalf of the research team, the HSRC and PSU, thanked all panel members and participants for provoking presentations and critical and fruitful discussions. The participants were also thanked for their frank contributions. Support personnel Zama Koba and Busi Mamba from the HSRC were thanked for their important role in making the Round Table a success. The Round Table Report will be widely disseminated, and will hopefully contribute to further debates.

**Reconciling Africa's Fragmented Institutions of Governance:  
a new Approach to Institution Building**

**Report on the Round Table, 4 August 2011, Sheraton Hotel, Pretoria**

**Programme**

08h00 - 09h00	Registration:
09h00 – 09h15	Welcome and introductions
09h15 – 10h00	Presentation of research findings (Prof Kidane Mengisteab, Dr Gerard Hagg)
10h00 – 10h30	Discussion
10h30 – 11h00	Refreshments
11h00 – 11h30	Panel Discussion One: Judicial Institutions, Conflict Resolution and Gender <ul style="list-style-type: none"> <li>• Prof. Chuma Himonga, DST NRF Chair in Customary Law, UCT</li> <li>• Ms Likhapha Mbatha, National Movement of Rural Women</li> <li>• Adv. Jacob Skosana, Deputy Chief State Law Adviser: Policy Development</li> </ul>
11h30 – 12h30	Discussions
12h30 – 13h30	Lunch
13h30 – 14h00	Panel Discussion Two: Resource allocation (including land), Service Delivery, and Gender <ul style="list-style-type: none"> <li>• Prof. Lungisile Ntsebeza, DST NRF Chair Land Reform and Democracy in South Africa, UCT</li> <li>• Ms Nomboniso Gasa, PNG Services</li> <li>• Prof. Pearl Sithole, Dept of Sociology, UKZN</li> </ul>
14h00 – 15h00	Discussion
15h00 – 15h30	Policy and research implications
15h30	Closure

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## ANNEXURE B

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