Judith Beyer*/Felix Girke

The State of Custom: Gerd Spittler's "Dispute settlement in the shadow of Leviathan" (1980) today

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Abstract: In our article, we engage with the anthropologist Gerd Spittler's path-breaking article "Dispute settlement in the shadow of Leviathan" (1980) in which he strives to integrate the existence of state courts (the eponymous Leviathan's shadow) in (post-)colonial Africa into the analysis on non-state court legal practices. According to Spittler, it is because of undesirable characteristics inherent in state courts that the disputing parties tended to rather involve mediators than pursue a state court judgment. The less people liked state courts, the more likely they were to (re-)turn to dispute settlement procedures. Now how has this situation changed in the last four decades since its publication date? We relate his findings to contemporary debates in legal anthropology that investigate the relationship between disputing, law and the state. We also show through our own work in Africa and Asia, particularly in Southern Ethiopia and Kyrgyzstan, in what ways Spittler's by now classical contribution to the field of legal anthropology in 1980 can be made fruitful for a contemporary anthropology of the state at a time when not only (legal) anthropology has changed, but especially the way states deal with putatively "customary" forms of dispute settlement.

Zusammenfassung: Dieser Artikel befasst sich mit dem wegweisenden Artikel „Streitregelung im Schatten des Leviathans. Eine Darstellung und Kritik rechtsethnologischer Untersuchungen" (1980) des Ethnologen Gerd Spittler, in dem er die Existenz staatlicher Gerichte (der namensgebende Schatten des Leviathans) im (post-)kolonialen Afrika in die Untersuchung von außergerichtlichen Rechtsformen einbezieht. Nach Spittler liegt es an den unerwünschten Charakteristika staatlicher Gerichte, dass Streitparteien es vorzogen, eine informelle Vermittlungsinstanz heranzuziehen als ein Urteil vor Gericht anzustreben: je weniger Menschen die Gerichte mochten, desto eher wandten sie sich Streitschlichtungs-

Korrespondenzautor*innen: Judith Beyer, Professor. Head of Research Group "Social and Political Anthropology", University of Konstanz, 78457, Germany, +49 (0) 7531 88-5072,
E-Mail: judith.beyer@uni-konstanz.de
Felix Girke, Dr. phil. Academic Coordinator International Management Asia-Europe, HTWG University of Applied Sciences, Konstanz, 78462, Germany, +49 7531 88 5597,
E-Mail: felix.girke@htwg-konstanz.de

regelungen zu. Wir beziehen Spittlers Erkenntnisse auf gegenwärtige Debatten in der Rechtsethnologie um die Beziehungen zwischen Streit, Recht und Staat. Anhand unserer eigenen Forschungen in Südäthiopien und Kirgistan demonstrieren wir, wie Spittlers mittlerweile klassischer Beitrag zur Rechtsethnologie immer noch für eine zeitgemäße Ethnologie des Staates fruchtbar gemacht werden kann, wobei sich seither nicht nur die (Rechts-)Ethnologie gewandelt hat, sondern auch der konkrete Umgang von Staaten mit vorgeblich „gewohnheitsrechtlichen" Formen der Streitregelung.

Keywords: state, custom, customary law, disputing, harmony, legal anthropology

Over four decades ago, the German anthropologist Gerd Spittler, a specialist in West African societies with an early research interest in legal anthropological and legal sociological questions, wrote a path-breaking article for *The German Journal of Law and Society* entitled "Dispute settlement in the shadow of the Leviathan" (1980). In this text, Spittler – who later went on to investigate the relationship between peasants and the state as well as the lifeworld of Tuareg nomads – provides both a detailed description and a structured critique of legal anthropological scholarship. Reflecting where most work in this subfield had been done up until then, his text focuses on the colonial era and early post-colonial era in Africa, and highlights the relationship between institutions and procedures of dispute settlement and the role of the state, particularly of state courts. It was the first article that systematically reviewed the vast amount of anthropological monographs written by mostly British social anthropologists on dispute settlement in its relation to the state. Spittler's main argument is that the predominance of the diverse forms of informal dispute resolution which anthropologists "found" in their African fieldsites were already essentially tied up with and even predicated upon the existence of the state and its courts: even during the colonial era, when most anthropologists set out to study "traditional" legal institutions, the state had already been a central force to reckon with, even if the researchers at the time often seemed to either not understand or obfuscate this fact: to assume an opposition between "traditional" dispute institutions (or "primitive courts") and "modern" courts, Spittler stated, was therefore unwarranted (1980: 6).

In our review article, we first provide a concise summary of Spittler's line of thought as he develops it in his seminal article. Second, we relate his findings to contemporary debates in legal anthropology that investigate the relationship between disputing, law and the state. Third, we show through our own work in Africa and Asia, particularly in Southern Ethiopia and Kyrgyzstan, in what ways Spittler's by now classical contribution to the field of legal anthropology in 1980

can be made fruitful for a contemporary anthropology of the state at a time when not only (legal) anthropology has changed, but especially the way states deal with putatively "customary" forms of dispute settlement.

Reviewing Gerd Spittler's "Dispute settlement in the shadow of the Leviathan"

Dispute settlement had become the centre of legal anthropological attention only in the middle of the 20th century. Before, anthropologists had predominantly studied crimes and their sanctions in Melanesia and Africa with the aim to understand how order and social control were upheld in the diverse societies under colonial rule that were accessible for fieldworkers. The interest in these topics is often linked to the putative need of colonial authorities to introduce legislation and sanctions as means to enforce colonial order; contrary to many introductory textbooks, the evidence – especially as so carefully documented by Herbert Lewis (e. g. 2004, 2014, esp. Ch. 1 and 4) – is in that little of what the anthropologists produced was instrumentally useful. Already Talal Asad acknowledged that "the role of anthropologists in maintaining structures of imperial domination has, despite slogans to the contrary, usually been trivial" (Asad 1991: 314). While this disentanglement is worthwhile, we are here mostly interested in the research contexts, and which role the respective presence of state structures played in these older studies.

Bronislaw Malinowski's *Crime and Custom in Savage Society* (1926), Isaac Schapera's *A Handbook of Tswana Law and Custom* (1938), Paul Bohannan's *Justice and Judgment Among the Tiv* (1957), Leonard Pospisil's *The Kapauku Papuans of West New Guinea* (1958) and Philip Gulliver's *Social Control in an African Society* (1963) are some of the key publications of this era – valuable for their ethnographic depth and detail, and embedded in a late colonial setting. From the mid-1950s onwards, anthropological interest gradually moved towards the topic of disputes and their settlement. This shift reflected a more general theoretical reorientation away from functionalism and structural-functionalism towards processual analysis, often of conflicts and their settlement. Non-Western societies were no longer predominantly viewed as existing in a permanent state of equilibrium where custom was "king" and impeded "development"; much rather, interest arose in concrete conflicts and disputes in postcolonial countries, where the reach of state institutions seemed still incomplete.[1] By focussing exclusively

1 This approach was later particularly strongly developed in the 'Berlin School' of social anthropology, as Thomas Hüsken recounts (2004), which assumed that the procedural and institu-

on non-state institutions, however, these early authors posited a spectrum (with the state and its institutions on the opposite end), thereby largely neglecting the state's essential impact on the very phenomenon they were studying. Spittler's English-language abstract already helpfully states this main argument (and his main objection to the legal anthropology of the time) in a few lines:

> "Anthropologists explain the widespread use and success of dispute institutions by cultural factors or by social structure (ongoing relationship, cross-cutting ties, equality). Organized courts are added in this article as another explanation. They contribute to the invocation and effectiveness of the dispute institutions due to their limited capacity and by forbidding violent self-help and monopolizing major cases. Another factor is that parties to the dispute may threaten to take the case to the detested courts." (Spittler 1980: 4)[2]

To wit: drawing conclusions on culture, local ideology or social structure on the basis of an observed prevalence of compromise-oriented dispute settlement is spurious if one does not take into account that state courts exist and are available as an alternative recourse, which would, however, without doubt escalate the dispute itself. He goes on to substantiate this critique. His essay itself is divided into six parts: an un-numbered preamble, and five numbered sections.

After the preamble, which establishes some basic terminology and sketches the tensions inherent in the topic, in the second part of his article, "Verhandlungen und einfache Rechtsinstanzen: Deskription" (p. 7–15), Spittler reviews the early literature on dispute settlement starting with its simplest form: direct negotiations between disputants. In a negotiation, the parties ideally talked things out. In doing so, they might invoke norms to lend legitimacy to their arguments, but these norms were not decisive for the outcome as there was no third party involved that would have ensured their enforcement. Once a "go-between" such as an elder, a lineage head, a chief, or a chairman got involved, legal anthropologists began to refer to this type of dispute settlement as a "court" or "tribal court" (e. g. Gluckman 1968), yet the focus was still not on enforceability but on reconciliation. And while the third person was not part of a state and the position he occupied was not his profession but voluntary or hereditary, in most ethnographic accounts he gets referred to as "judge".[3] Distinctive of such "tribal courts" was that there were usually no fees to pay and no lawyers to hire. The language used in these negotiations was not legalistic, but rather focused on a shared, implicit understanding of what the "customs and traditions" of the particular group

tional "organisation of heterogeneity" presents challenges (legal, political, economic) to all societies without exception.

2 All quotes from Spittler's article have been translated from German into English by the authors.

3 These positions were almost exclusively taken up by men.

were – but these were usually not accessible as an established repertoire, but rather imagined as shared among everyone, including the judges. According to Gluckman (1967), such "customary rules" were often suggested in situ and then declared to be "traditional". In sum, there was little differentiation between social and legal norms. People had, in the words of Paul Bohannan, "'laws' but they do not have 'law'" (Bohannan 1957: 57).

The next section ("Verhandlung und einfache Rechtsinstanz: Erklärung für Verbreitung und Erfolg", p. 16–21) seeks to systematize the previous description. Here, Spittler sets out to investigate what these authors' actual lines of argumentation were for explaining why the set-up of two disputing parties and a "go-between" was so commonly observed, and – as it were – had become legal anthropologists' favourite model when studying dispute settlement at the time. Spittler detects three common explanatory models, and finds them all lacking. First is the "universalist hypothesis", which acknowledged that the processes of negotiation, mediation and reconciliation the anthropologists observed in (mostly) African societies might as well have been observed in contemporary England. But as the predominant interest in non-state dispute settlement procedures was initially fuelled by the researcher's dissatisfaction with their own societies and a subsequent idealization of anything they considered to be "traditional" abroad, the universalist hypothesis only gained limited ground, and the focus of legal anthropology firmly remained on the seemingly special case of non-European societies. Also, Spittler adds, the universalist hypothesis had nothing to say to the side-by-side existence of different legal systems, which in retrospect appears as its more fatal flaw to him.

A second hypothesis employed the concept of "culture" as developed within American cultural anthropology. According to this viewpoint, argues Spittler, some "cultures" were regarded as more prone towards dispute settlement whereas others were viewed as more inclined towards conflict (Benedict 1934[4]). Spittler holds that law can both be a limiting factor in regard to how people are able to dispute and an enabling factor as it lets people justify their transgressions from the status quo in its very name (Spittler 1980, 17); culture does not necessarily constrain the cognitive or normative action space, but might well enable boundlessly creative inventions. As such, he finds the culturalist hypothesis as unconvincing as the universalist one.

4 Ruth Benedict has been criticized for portraying the Zuni of New Mexico as prudent and amicable whereas the 'amity' observed among them was a result of repressive authoritarianism; such a constellation is commonly discussed in terms of harmony ideology today (see Beyer & Girke 2015).

The third hypothesis looks at the topic of dispute settlement from the perspective of social structure. By addressing the issue of social structure, legal anthropologists focussed on the wider context in which dispute settlement procedures were embedded, as well as the accessibility of mediation to the disputing parties (Spittler 1980: 10–11). The judge could act as a mediator because he upheld long-term and multiplex relations with both disputing parties. In order to reach a compromise, he was willing to look at "the total social relation" and not only at the dispute matter at hand. In contrast to state courts, argues Spittler, where much emphasis is placed on the enforceability of a judgment, the key task for the "go-between" is to reconcile the parties because they needed to continue living amongst and with one another after the court session was over. Moreover, the social structure-hypothesis found reciprocity rather than sanctioning to be key. Next to transactions in the economic, political or religious sphere, establishing and maintaining cross-cutting ties by marrying-out one's women or by getting one's elders to talk to one another was found to be another important factor that helped settle disputes or prevent them from turning into open conflict (Colson 1953; Meillassoux 1973, 1976). While Spittler devotes twice as much space to the arguments made in the name of social structure, he remains critical of this body of literature in the end as legal anthropologists seemed to have interpreted their ethnographic data again in a functionalist way, namely by arguing that the main purpose of reciprocity and cross-cutting ties was to settle disputes (Spittler 1980: 20). The reason why dispute settlement existed in these societies was thus envisioned to prevent a Hobbesian situation where latent mistrust prevails between all members of society and where their subjection under a state's control is the only way to prevent a war of all against all from breaking out. Spittler reaches the conclusion that such a reading is too narrow and – again – that the cited studies still gloss over the role of the state.

In the next section ("Streitregelung im Schatten der Selbsthilfe", p. 21–22), he briefly addresses "self-help", i. e., feuding in acephalous societies in Melanesia and South America, and quickly summarizes that this latent state of war in these settings is different from African cases, where non-violent dispute resolution seemed more prevalent: but in Africa, he affirms, by the time of its ethnographic exploration, we do not encounter truly acephalous societies anymore due to the Pax Britannica (1980: 22). Accordingly, he adds, the ethnographers who had claimed that legal negotiations were so important, did observe the phenomenon correctly, but greatly overstated it being grounded in acephalous structures.

With this, his account of the early legal anthropology is complete, and he sets out (in the section "Streitregelung im Schatten des Leviathans", p. 23–27) to further articulate his own argument, and that is to integrate the existence of state courts (the eponymous Leviathan's shadow) into the analysis on non-state

court legal practices. He systematically identifies five main factors. (1) The colonial state's prohibition of vigilante justice, as it had often been practiced among acephalous societies where the courage to fight was viewed as a virtue, led to the gradual predominance of non-violent forms of dispute settlement. The state's monopoly on deciding all cases that were not considered to be 'minor' helped ease the workload for non-state institutions. (2) Spittler emphasizes that especially severe cases, both capital crimes and disputes between strangers where no mediation was easily available, tended to be adjudicated by state courts. This division of legal labour might have given rise to the impression that courts were coercive ("dirty") and dispute resolution was amicable ("clean"); but Spittler drives home the point that both were always complementary (1980: 24). (3) However, the limited capacity of state courts to effectively deal with large numbers of cases and the negative reputation of state courts among the colonized population kept non-state dispute settlement institutions in favour. Often, even state courts lacked the means to enforce a judgment due to organizational reasons which in turn led disputants to not bother approaching them in the first instance as both lawyers and the court need to be paid. (4) But beyond the "organisational deficits" of capacity, there were many procedural reasons for people to avoid state courts – Spittler lists obstacles including high costs, constraints on speaking freely, necessity of a lawyer, and often enough the requirement to use a different (national) language. In terms of material law, there could also be a lack of fit, he adds: there was little chance to get a court to hear a complaint about witchcraft. More generally, many laws were simply not accepted as helpful and appropriate, especially regarding personal and family law (1980: 25). To wit, going to court was expensive, unpredictable, and the results often did not feel just. (5) Finally, Spittler asserts that not only the popularity but also the success of dispute settlement must be understood as a result of the existence of negatively perceived state courts (1980: 25–26). Threats from one of the parties or a "go-between" to escalate a case from the shade tree to the next state court furthered the reconciliation efforts of the disputing parties as many legal anthropologists have emphasized (e. g. Bohannan 1957; Gulliver 1963; Collier 1973). Thus, the mere invocation of a state court could become an effective sanction and as such part and parcel of dispute resolution.

In summary, the reasons why parties to a dispute were reluctant to address state courts include the following: by moving a dispute settlement into a state court, the disputants' very problem was transformed in terms of the language in which it could be addressed and in terms of the way it was being dealt with. A matter of civil concern could become a criminal matter, for example. Instead of paying a compensation a dispute party might have been sent to prison. But not only that the risks involved for the disputing parties were too high regarding misunderstanding, misrecognition and mistreatment, the very judgments that were

spoken in state courts were often not considered "just" (Spittler 1980: 24–25). According to Spittler, it is because of these undesirable characteristics inherent in state courts that the disputing parties tended to involve mediators rather than pursue a judgment in a state court. In other words: the less people liked state courts, the more likely they were to (re-)turn to dispute settlement procedures. This is how he ends his article. Now how has this situation changed in the last four decades since its publication date?

To address this question, it is worthwhile to return to the title he chose to give to his paper, and the questions he is asking about the domains of state and non-state domains: Why does the Leviathan cast a shadow, and on what? Did Gerd Spittler play with the association – common among anthropologists – of dispute settlement, particularly in Africa, mostly taking place under a shade tree where people would gather to escape the scorching heat? The shade tree was also the place where negotiations, mediations and dispute settlements occurred; but it seems more likely that he was not evoking the cool shade, but the obfuscating shadow cast by the (post-) colonial state. There, dispute settlement was happening, but not well visible. Either way, the benefit of the metaphor is unclear – if the argument is that even dispute settlement outside the courts (for reasons we will sum up below) was intrinsically shaped by the presence of state courts, why would this fall *outside* the Leviathan, as a shadow surely must? Or does the Leviathan cast a shadow within itself?[5] We take this ambiguity to reflect the central concern of the article – what even is of the state and what is beyond it, specifically regarding dispute settlement? Already the title of Spittler's original contribution indicates that this is difficult to decide. In the following, we expand Spittler's approach and suggest that this is more than a tricky theoretical reflection for scholars only: it is of relevance for the participants in the legal and political processes studied by anthropologists themselves, and it is methodologically safe to assume that the people involved in the empirical phenomena have their own understandings of the issue at stake.

5 This is Thomas Bierschenk's reading, for whom the shadow represents the awareness of those involved in dispute settlement that the (coercive) state institutions are always looming over their negotiations (2004: 204, fn. 35).

Disputing and customary law in the contemporary anthropology of the state

Since 1980, the anthropology of the state, only nascent at the time of Spittler's writing, has developed into one of the most diverse and dynamic subfields within anthropology. A few examples of recent publications serve to indicate how the questions he was concerned with are considered today.

In a comparative article that seeks to reconnect ethnographic legal studies in terms of the convergence in anthropological and sociological traditions, Jonas Bens and Larissa Vetters argue that both legal anthropology and legal sociology have moved away "from studying processes of dispute resolution as a classical topic of a legal anthropology to the analysis of the internal workings, material and affective arrangements as well as external perceptions of official legal institutions" (Bens and Vetters 2018: 246). It is nowadays the state and its law, formerly a focus of legal sociologists, that is increasingly centred in legal anthropology. The sensitizing concept of legal pluralism, argue Keebet von Benda-Beckmann and Bertram Turner (2018), has played an important role in this regard as it allowed for a pluralization of what scholars understand by the concept of 'law' in the first place. Further, von Benda-Beckmann and Turner argue that "dispute studies were [...] instrumental in the 'discovery' of plural legal configurations within the modern nation state" (2018: 259). Thus, on the one hand, legal anthropologists have moved away from dispute studies as a topic of inquiry, but on the other hand, a focus on disputes and their resolution has been a crucial avenue that allowed a more complex understanding into the very ways in which states operate.

A recent edited volume investigates "The state and the paradox of customary law in Africa" (Zenker & Höhne 2018a). The state of customary law is, according to the two editors, unchanged: "a constantly evolving, usually unwritten and often partly uncertain normative order ... bound to change continuously" (Zenker & Höhne 2018b: 1). They acknowledge the central role of the state in this dynamic, and denounce the "colonial imagination" of custom. Still, they confirm that what was imagined as customary law was allowed to be practiced as long as it "did not challenge colonial overrule" and was not overly "repugnant" (ibid.); they also helpfully follow other authors in separating such tolerated and imagined "official customary law" from "precontact native law" (2018b: 2), a move surely appreciated by Spittler as it serves to further disentangle the relation of state- and non-state dispute resolution. Their book acknowledges that dealing with customary law was a very practical concern for administrators, bureaucrats and politicians in many countries (specifically in Africa), and that doing this work while representing a state cannot but engender sophisticated reflections on the relation of both.

Their eponymous paradox to us seems less like a paradox and more like a list of nested practical and conceptual tensions: the state cannot be certain whether "acknowledging or ignoring customary orders" will facilitate its aims; recognizing customary law has a chance to destroy in the attempt to protect it; and administrators sometimes need to "deal with the reign of custom simply to get their own work done" (2018b: 5) even under conditions of legal pluralism. While the term 'paradox' can be debated, the intervention is helpful in emphasizing that of course people involved in negotiations over different legal institutions must have been aware of the dialectics of the situation. Not only have residents of the state's periphery realized the shortcomings of the court system for their needs and concerns, but administrators, politicians and bureaucrats were equally aware that non-official dispute settlement was still going on and unlikely to ever be overcome. This, then, serves to complicate the assumption of Leviathan, the always forward-moving juggernaut of modernity that seeks to stamp out all tradition in its path: this is clearly not what happened, and happens now.

The debate in this volume is broader than Spittler's argument and case material – the latter is, as we discussed, largely interested in the specific interrelation between official courts and dispute settlement, whereas Zenker, Höhne and their contributors treat with law in a multiplicity of contexts and take numerous other aspects into account, and add substantially to questions of the "invention of tradition" (e. g. 2018b: 7–9) and other matters that could be adduced here, but again go well beyond Spittler's narrower argument.

But to return to the source: There is one section towards the end of Spittler's "Streitregelung" which – while seemingly innocuous – reveals how reality has developed in a way not foreseen by him, and it is this section that to us unlocks a particularly fruitful update on the shadow of the Leviathan, and the interplay of "courts" and "dispute settlement". Spittler, in the context of summarizing how the fraught and dangerous aspects of formal legal procedures facilitate the turn to informal dispute settlement, writes the following:

> These courts, evaluated so negatively be the population, significantly contribute to the spread of negotiation and mediatory institutions. Where self-help [i. e., feuding] is forbidden, and approaching the courts seems ill-advised, negotiations and [local] legal instances offer themselves up as alternatives. Gluckman and his co-authors [Allott et al. 1969: 29–30] predicted that in Africa, under these conditions, 'there would be a proliferation of moots and arbitrations outside the statutory system'. … The administration sets up courts that are often not accepted by the population or which, due to limited capacity, can only deal with few cases. As a result, institutions based on arbitration or legal instances spread ever further. (Spittler 1980: 26)

Spittler seems to agree with this prediction; but what could be witnessed in Africa and Asia over these last decades has been quite the opposite: it is rather as if Leviathan itself has read Spittler, and taken his analysis as policy advice. As if in response to the observation that people were avoiding state courts and (re-) turning to dispute settlement institutions, where custom was still king, many countries have sought to incorporate such institutions into the state itself. Not only do states condone simple legal instances and 'customary/alternative dispute resolution' (CDR/ADR), especially in peripheral regions, but some go much further by incorporating them into formal law, thereby depriving them of whatever 'traditional' qualities they might have had. Subsequently, local actors sometimes struggle to redefine these neotraditional institutions as 'theirs' in an effort to reclaim them from the state.

In Central Asia, for example, local dispute resolution was already pluralistic before the Russian administrators began to change the legal landscape of the sedentary and nomadic territories in the nineteenth century. Disputes were being dealt with by lineage elders (*aksakals*; lit. whitebeards), by heads of encampments (*bii*; lit. head), or by experts applying *shari'a* law (*qadi*), depending on the geographical location. In general, customary and Islamic law were intertwined in many areas and could not be as easily separated as the Russians had imagined. With their arrival, "customary law" was written down and codified by colonial officers and ethnographers. Once codified, it could then be ranked lower than the newly introduced state laws. Next to Russian state law, Soviet revolutionary law and, after the collapse of the Soviet Union, international law, the possibilities regarding which law to invoke in a given disputing context became more pluralistic over time, as legal repertoires did not seize to exist only because the state had formally abolished them. They were, however, significantly altered so that when, from the 1990s onwards, the newly independent states of Central Asia began to draw on 'customary law' and alternative institutions for dispute resolution as part of their nation-building strategy, they again created 'customary law' anew rather than 'revitalizing' a previous one. As a result, the neotraditional institutions that emerged were firmly incorporated into state apparatuses and regulated by state law – just as it had been the case under Russian and Soviet rule. In Kyrgyzstan, for example, there now exist courts of elders (*aksakal* courts; lit. courts of whitebeards) in each village throughout the country. The constitution and a separate law stipulate that these courts should "judge according to the customs and traditions of the Kyrgyz people" yet nowhere it is specified what these customs and traditions are (see Beyer 2006). Moreover, the Kyrygz never had *aksakal* courts in the past, only ad hoc gatherings of elders in their capacity as heads of households or lineages, mediating between the disputing parties as Spittler described in the early legal anthropological literature. Nevertheless, over the last two decades,

Judith Beyer has traced how the neotraditional institution of the *aksakal* courts was gradually reclaimed by the local village population and is nowadays regarded as "having always been ours". Whereas in Kyrgyzstan we can thus observe neotraditionalization on the side of 'the state', there is also what Beyer has called 'customization' (Beyer 2015, 2016) on the side of the population: the subsequent rendering of social and legal innovations under the umbrella concept of custom (Kyrgyz *salt* or *ürp-adat*[6]). In doing so, people not only articulate togetherness vis-à-vis outsiders, but are able to present historic developments not as alien, but as something they themselves make happen. What the state imagines the *aksakal* courts to be doing and how disputes are actually being dealt with are two entirely different things (see Beyer forthcoming).

Not surprisingly, then, we find a gap between what is formally recognized as customary law, or legitimate dispute settlement, and how people actually prefer to practice these matters: the gap between lived practice and recognized form seems irreducible since it reflects not that people at the margins of the state are in any way culturally essentialist, but that they – as the proper Scott'ian "weak" (Scott 1985) – resist full incorporation and will continue to seek ways to mark this difference. To sensitize readers, then, we offer the shorthand that "customary law is not customary" (Chanock 1985: 4), and alternative dispute resolution is not alternative (Nader 1997). The framing that they are customary or alternative even is intrinsically political, as these mechanisms are usually facilitated, condoned and (quietly) supported by states and governments and serve to shape relations between the state and its constituent populations, in a global climate where claims of autochthony, indigeneity, and heritage have become an ever stronger currency. Rather than being stridently modern in suppressing customary practices, today we find instances of states displaying, as it were, a 'postmodern' attitude in trying to show that different "normative orders" can exist side by side. Examples abound.

Consider the case of Ethiopia, recently carefully presented by Getachew Assefa in an open access publication.[7] He documents well how the state throughout most of the twentieth century enacted law codes "with the aim of bringing about the complete displacement of any non-formal sources of law that were hitherto in operation" (Assefa 2020: 43). Unsuccessfully – and in 1991, when the revolutionary government of the Ethiopian People's Revolutionary Democratic Front (EPRDF), in pursuit of ethnic federalism, articulated "a policy of cultural self-de-

6 The Kyrygz compound noun *ürp-adat* combines the Arabic terms for custom *urf* and *adat* – known throughout the Arab world and in Indonesia.

7 An earlier publication (Pankhurst & Getachew 2008) provides many valuable case studies from the various regions of Ethiopia.

termination for the ethno-linguistic communities of the country" (2020: 44). This was even reflected in the 1995 constitution, offering motive (in § 91, "the growth and enrichment of cultures and traditions") and caveats ("compatible with fundamental rights, human dignity, democratic norms and ideals"), especially for family and personal laws. Regarding more serious legal matters, Getachew cites a 2011 'Criminal Justice Policy' that the Attorney General has the option to choose to not pursue even capital crimes if "customary means [would bring about] the restoration of lasting harmony and peace among the victim and the wrongdoer" (2020: 53). The invocation of "harmony" here is a typical manifestation: the legal anthropologist Laura Nader (1990) introduced the term "harmony ideology" precisely to address these configurations where not only people are denied proper recourse to the law, but where there exists a broad and powerful tendency to gainsay real grievances. People proclaim that what really is at stake is a challenge to harmony, vaguely and softly defined as an absence not of trouble, but of the acknowledgement of trouble. Correspondingly, under a regime of harmony ideology, the question is often not who might be at fault in a dispute, but who challenged the reign of harmony by claiming to have been wronged in the first place. We have previously explored this concept and its application in Ethiopia and Kyrgyzstan (see Beyer & Girke 2015).

For our purposes in reviewing Spittler's original contribution, revisiting harmony ideology matters because it often enough serves as a framework to legitimize a state's acceptance of putatively customary dispute resolution. As has become clear from the summary above, there is a tangible linkage here: of course people living side by side are interested in reconciling and restoring social order – but they surely are not willingly blind to genuine sources of disagreement. If you will, the difference could be expressed in that customary dispute resolution was interested in 'harmony as an outcome', but state-sponsored 'customary' dispute resolution mistook this and perpetuates it as 'harmony as procedure'.

In the South Omo Zone of Ethiopia, where Girke has done research primarily between 2003 and 2008, local residents have experienced state courts during that period as a looming shadow indeed. State law was virtually non-existent in the villages of the Kara in the lower Omo valley in regard to both civil and criminal cases, and only became applicable (or: available) when Kara traveled to the market towns of Dimeka and Turmi in the hills to the East, or the zonal capital of Jinka. In Ethiopia, which never became a European colony, the division between 'highlanders' who embody and belong to the state and 'lowlanders' in the peripheries of the country, is still pronounced, and the differences essentialized on both sides, and law is one of the key arenas where this divide becomes palpable; Ivo Strecker's account (2013) of "the life and times" of Berimba, a local leader among the neighboring Hamar in the first half of the twentieth century is revealing in that

while a lot has changed since then, the descriptions of the tension between claims of national integration and practical exploitation and oppression of Hamar, Kara and others by the highlander overlords still rings familiar. Law, in particular, is an imposition, and Kara are aware that once they are called to court, their agency is reduced to a minimum, and neither their skills as orators nor the personal networks they have built up over the years to establish their *ethos* – a central capacity in these still primarily oral societies – will be of any help. At the same time, the Kara and their 'cultural neighbors' could not help but notice that while they are constantly admonished to obey laws and respect the state (and accept its rule as legitimate), the laws are at best unevenly and at worst arbitrarily enforced – which in turns sends a message about how powerful Leviathan really is, and how it invests its legal resources in the periphery (Girke 2018: 240). In the Omo region, state law is indeed mostly a distant shadow – and to Girke's knowledge, no Kara has ever gone to court against another: "To claim, as the Kara and others do, the right to handle what amounts to legal issues internally, to not feel bound by Ethiopian law, has come to be an identity criterion …" (Girke 2018: 158) Early during his fieldwork, Girke learned of a case of some Kara and Hamar youths who had been accused of committing an act of sexual violence in one of the market towns. They were arrested, brought to court, convicted of the deed, and sent to prison in the zonal capital for more than 6 years. Soon after, a young Kara herder assaulted a girl and fled into the savannah afterwards. Her brothers (including cousins on the paternal side) waylaid him and beat him close to death with sticks. After his wounds were healed, though, he was fully reintegrated into the village communities, as everybody was sure he had learned his lesson and had been appropriately punished. The other youths up in Jinka still had six years in prison lying ahead of them. The discrepancy was obvious, and it was clear which way to deal with a crime was seen as strictly preferable. Local administrators were of course well aware where the preferences lay, and especially in cases of escalating conflicts between the local polities resorted to admonishments of harmony and giving lip service, in their speeches at peace-making events, to respecting the "customs" and "traditional ways of reconciliation", while pressuring the disputing parties to simply act as if a conflict had already been settled. In a display of true commitment to the irreducible gap between the state and themselves, even the conflicting parties (like the Nyangatom and Kara as described in Girke 2008) simply go along with the fallacious assumptions and propositions of administrators, ironically colluding with one another to minimize the potential friction with the administrators and the police (Girke 2015).

In effect, states that endorse 'customary law' and 'alternative dispute resolution' intend to co-opt what they cannot control (or cannot stamp out), while saving resources by keeping complicated and yet low-stakes cases from periph-

eral regions out of the formal legal system, which is likely thinly-stretched at the best of times. So this does not necessarily reflect an enlightened acknowledgment of lived traditions and authentic cultural-legal heritage: much rather, in many cases, we can interpret such policies as existing either in direct continuation of or in a *reprise* of colonial legal policies, only today in the barely disguised service of nation-building.

Conclusion

The seemingly protracted tension between states and their courts and a population unconvinced by Hobbes' dictum and their (re-)turn to what they can plausibly claim as 'their' own legal system is resolved: Leviathan cannot abide that alternative dispute resolution is truly alternative, and that customary dispute resolution be left to custom. So, what is in the shadow of the Leviathan and what does it hide?

Thomas Reinhardt (2018) recently posited three ways to understand 'shadows' in anthropology: as quasi-objects, as problematisations of a simple agent/patient dichotomy, or as raising complex questions of epistemology and time. Our reading of how the term 'shadow' applies to the empirical phenomenon – intended to honor Spittler's original choice of words – is more simple, but still not prosaic: what is in the shadow is less well visible, and sometimes intentionally so. Maybe Leviathan inevitably casts a shadow that obscures some things that happen within its domain? Maybe Leviathan intentionally arranges itself so that it blocks light from illuminating dark deeds, or actions that run against its ideological self-image? This seems pertinent, as today Leviathan finds it useful to cast light on dispute settlement, and acknowledges that its formal juridico-legal procedures and institutions need not apply equally to all under its power. We suggest, however, that for all this seemingly affirmative and emancipatory embrace of putatively traditional or customary practices, a new obscuring shadow has fallen, and it has fallen on the reasons *why* states are acting in this way: to let light fall on the realization that imposing the formal rule of law everywhere is more expensive and less efficient and still not seen as legitimate in many parts of many countries would be an admission of Leviathan's limits. Much better, then, to follow a harmony ideology doctrine and potentially even gain credit for expanding the purview of tradition, custom, culture, that is in today's terms, giving recognition to people's identity claims – rather than the rule of law.

Combined with the other readings we have referenced above, this leads to the uncomfortable realization that the colonial state and the postcolonial state of the

late-twentieth and early twenty-first century are not entirely dissimilar from one another in how they deal with non-statutory and allegedly customary dispute resolution: *both* have tried and are trying to accommodate or encapsulate or in some other utilitarian way give space to non-state legal instances. In that sense, newer literature turns Spittler's argument against himself: not only did the scholars of yore that he criticizes miss the dialectic of state/non-state legal institutions, but he himself seems to have underestimated the approach of Leviathan in allowing customary dispute resolution to persist. That people turned away from state-courts and towards more local institutions might well have been an intended effect: "Official customary law", as Zenker/Höhne (2018b: 2) cite Starr and Collier (1989: 8–9), was in effect a bone thrown to "native elites" by their "colonial or postcolonial overlords" (Zenker/Höhne, ibid.), and often enough stabilized local officials or chiefs who in turn supported the larger colonial regime.

In summary, there is little in Spittler's text that has borne out until today: the analyses of colonial configurations have become more thorough and subtle, research methodology has been developed further to take account of actors' agency and their ambivalent or even contradictory positionalities, and especially the anthropology of the state has shed any high-modernist assumption that there is, in fact, a unitary, centralist Leviathan that moves forward and – beyond lip-service – even attempts to equally transform all within its domain. The Leviathan's shadow, as is now clear, is a resource, useable by actors on all sorts of levels to obscure the compromises and accommodations required in getting through the day; and even the countries that today enable and support neotraditionalization, legal pluralism and customization have their own shadows where evidence could be found that claims about motivation and purpose do not always correspond with reality. Yet, Spittler's "Streitregelung" maintains a certain historical gravitas in that it systematically challenged the binary of court and non-court legal arrangements, and possibly contributed to the subsequent refinement of legal anthropology and the embrace of legal pluralism as a research paradigm and sensitizing device especially in German-language anthropology.

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