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Traditional law in times of the nation state: Why is it so prevalent?

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Abstract:

In many modern nation states, both rich and poor, traditional law to this day plays an important role. Given the almost universal prevalence of traditional law, it is surprising how little we know about it. This is the first study that tries to take stock of traditional law from a cross-country perspective. We are also interested in the compatibility of traditional law with state-enforced law and, in particular, with the basic traits of the rule of law. Based on a sample of up to 134 countries, we find that no “typical” traditional law exists, but that traditional law varies in many dimensions such as its timely enforcement, its impartiality, and its protection of basic human rights. Societies that rely extensively on traditional law score low regarding both the rule of law and per capita income. Historical and geographical factors are important predictors of the contemporaneous reliance on traditional law. State antiquity, for example, reduces the prevalence of traditional law, as does a high share of descendants from European populations.

Keywords: Traditional law, Customary Law, Informal Law, Personal Law, Indigenous Law, Religious Law, Legal Pluralism, Rule of Law, Hybrid Law, Internal Institutions.

JEL-classification: H11, K10, K36, O17, O57.

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Traditional law in times of the nation state: Why is it so prevalent?

1 Introduction

Many observers associate the existence of traditional law with pre-modern, pre-nation state institutions. In a sense, then, traditional law represents the remnants of some long-gone era and it is only a question of time until it vanishes completely. Max Weber (1919) famously defined the state as an organization that “successfully upholds the claim to the monopoly on the legitimate use of physical force”. Traditional law is at odds with this idea of the state, if it is not enforced by state agents but by others drawing on physical force. Traditional law can further be at odds with the nation state, if members of society simply do not recognize the state’s claim of having the monopoly on the legitimate use of force.

Contrary to this view, Wojkowska (2006) reports statistics from a number of African countries, where roughly 80 percent of legal disputes are resolved informally. Harper (2011) cites a UNDP survey in Indonesia according to which the formal and customary justice systems were equally likely to be used, but users were more satisfied with the performance of the customary system. 50 percent of all respondents felt that the formal justice system favored the rich and powerful, whereas only 15 percent had that view of the customary justice system. Given that traditional law, to this day, plays an important role in many societies (see also Baker 2010), it is striking how little we know about its content, its relationship with state-enforced law, and its compatibility with the rule of law. Although there is a vast anthropological literature dealing with some of these aspects, those studies tend to focus on specific ethnic groups rather than studying a large set of nation states. This makes it almost impossible to draw general conclusions regarding the role of traditional law in modern-day societies.

A number of questions seem straightforward to ask: (1) How can traditional law be quantified and, hence, compared across countries? This is an extremely challenging issue, as traditional law is often not codified, which implies that we can only observe its use, inquire into its perceived quality, the status it enjoys in society, etc. (2) Which societies formally recognize traditional law? How many countries have constitutionalized it? Where can the state be relied upon to enforce traditional law? In sum, what is the formal legal status traditional law enjoys? (3) What are the factors determining the recognition and use of traditional law? Is it used because it is better than state-enforced law or because opting out of it is virtually impossible? (4) What are the factors determining the perceived quality of traditional law?

Given the dearth of knowledge regarding these and many other questions, the very first steps taken in this study towards providing answers seem overdue. Of particular relevance appear to be the quality of traditional law as well as the determinants of its continued use. Previously, we proposed a way to measure the rule of law that takes not only the enforcement of legislation, but also its substantive quality into account (Gutmann and Voigt 2018). One way to think about the quality of legislation is to ask whether it is universalizable, i.e. whether laws apply equally to all members of society. It has frequently been claimed that traditional law systematically discriminates against a number of social groups (women, the young or the poor), which would imply that its substance is incompatible with the rule of law (e.g., Morrisson and Jütting 2005). Others have claimed that the exact opposite is true and the formal justice system in many countries is more likely to discriminate against specific social groups. To date, no single study has analyzed a large number of countries to determine whether such claims find systematic empirical support. We conduct the first such analysis and use the compatibility of traditional law with the basic traits of the rule of law as our main indicator of the quality of traditional law.

This study ties together several strands of literature. The first strand is concerned with the consequences of colonization (Maseland 2018). This important literature enquires into the consequences of the identity of the colonizer (Lange 2004, 2009; Seidler 2018), the kind of legal system established when colonization took place and how long the country was under the control of a colonial power (Olsson 2009), the quality of colonial administration (Jones 2013), and so on. Most of these contributions are concerned with the effect of colonization on the quality of the legal system or on the likelihood of the respective country being democratic.

We also add to the primarily theoretical literature that deals with lawlessness and economics (Dixit 2004). It is concerned with modes of governance that do not rely on the modern nation state as the ultimate enforcement agent.

Finally, the issue of traditional law has also been approached from a normative point of view. A typical question in that literature is to ask how state-enforced law can be used to change traditional law. Aldashev et al. (2012a, 2012b), for instance, identify the conditions under which state-enforced law can be used as a “magnet”, pulling

traditional law in an intended direction. Cecchi and Melesse (2016) provide experimental evidence for such an effect.¹

This study adds to the literature by taking stock of traditional law from a cross-country perspective. It describes the relationship between three important dimensions of traditional law, namely: its legal status, the extent of its use, and its perceived quality. Based on up to 134 countries, we find that traditional law varies across countries in different dimensions, such as its timeliness, its impartiality, and its protection of basic human rights. Societies relying extensively on traditional law score low regarding both the rule of law and per capita income. Historical and geographical factors are important determinants of the contemporaneous recognition and use of traditional law. State antiquity, for example, reduces the prevalence of traditional law, as does a high share of descendants from European populations.

In Section 2, we define some key concepts. Section 3 develops a number of hypotheses regarding the factors that might determine both the extent to which traditional law is used as well as its perceived quality. Section 4 describes our data sources and presents descriptive statistics. In Section 5, we present our estimation approach as well as the regression results. Section 6 spells out open questions that should be tackled in future work.

2 Defining traditional law

Many alternative terms have been used when referring to traditional law. They include informal law, customary law, personal law, and indigenous law. No universally accepted taxonomy has emerged yet. Here, we refer to traditional law as consisting of institutions (1) based on a rule that is not subject to deliberate human design and (2) enforced by actors that are independent from the state. From

¹ Shavell (2002) is interested in a related normative question, asking about the optimal mix between law and morality. He lists a number of possible evaluation criteria, such as cost of establishment of a rule, flexibility of application, cost of change, etc. Shavell finds that there are areas where law should optimally prevail and others where morality should prevail (and still others where a mix between the two is optimal). But he also observes that the empirical use of law and morality is in line with their theoretically predicted use. Shavell describes morality as “rules of conduct that are associated with certain distinctive psychological and social attributes.” This question is related to ours, because traditional law shares some attributes with morality, but the two are still clearly distinct.

the point of view of the New Institutional Economics (NIE), the different terms used for traditional law all describe types of institutions. Here, we propose a more systematic terminology that clearly delineates these types of institutions from each other. Institutions can be defined as commonly known rules that structure recurrent interactions and are endowed with a sanctioning mechanism that may be employed in case of non-compliance with said rules (Voigt 2013). Institutions, hence, are composed of a rule and a sanctioning component. The term “law” refers only to a subset of institutions, as it does not entail self-enforcing rules or rules complied with due to someone’s own ethical convictions. If a state exists, sanctions for rule violations can be implemented either by representatives of that state (“external” institutions) or by regular members of society (“internal” institutions). Within the category of internal institutions, we can distinguish between sanctions carried out in an unorganized, spontaneous way and those imposed by a private organization, such as a customary court.

Institutions do not only vary in terms of the way sanctions are implemented, but also with respect to the type of rule that is enforced. North (1990) proposes a well-known distinction between formal and informal rules and, by extension, between formal and informal institutions (see also Hodgson 2015). Here, we propose to use an alternative distinction between rules according to the mode by which they are formulated in the first place and then modified over time. We distinguish four modes of creation and modification: (1) rules considered to be designed by some deity, (2) rules emerging from an evolutionary process that is largely exempt from deliberate modification, (3) rules formed in an evolutionary process with ample opportunity for non-state actors to deliberately modify them, and finally (4) rules passed as government legislation.²

Douglass North’s (1990) distinction between formal and informal institutions is based on whether a rule is codified (see also Voigt 2018). In contrast, we focus here on the two categorizations discussed above that are based on: (1) the main actors involved in the design of rules, and (2) the way non-compliance with the rules is sanctioned.³ Combining these two categorizations of rules and sanctions results in a 3×4-matrix depicted in Figure 1. When the state sanctions rule violations even though it concerns rules not promulgated by state organs, we refer to these institutions as “hybrid law”. We further propose to distinguish between the different

² The difference between rule creation by custom and by state actors and the different character of the resulting institutions is stressed in Hodgson (2009).

³ Consequently, we cannot offer a definition for the term informal law in our terminology.

kinds of laws that are enforced by members of society, based on who designs the rule component of these laws. Although such a fine-grained taxonomy might be helpful, in the current study we focus on the distinction between external, hybrid, and traditional law. We, hence, use “traditional law” as a generic term that comprises religious (or personal) and customary (or indigenous) law.

Figure 1: Categories of law: Creation versus enforcement

creation enforcement	(1) deity	(2) custom	(3) private actors	(4) state actors
spontaneous	religious law	customary law	privately created law	X
organized, private				
organized, state	hybrid law			state law

Evidently, religious law does not presuppose that a rule was actually designed by a deity – it suffices, if its design is attributed to one. The resulting distinction between customary and religious law – i.e., reference to the will of a deity vs. reference to long established rules of conduct – might be of interest primarily because of its effects on rule compliance and the costs of modifying rules.

It is also noteworthy that the same rule can exist simultaneously in different institutions in our matrix and this may often be the case in practice. If, for example, the state chooses to adopt state law that is perfectly congruent with religious or customary law, then the same rule that was previously enforced spontaneously or by private actors is now also enforced by agents of the state. In such cases, economists often refer to the risk of crowding out (see, for example, Rodrik 2008). Being aware that there is a matching state law that is enforced by state actors, private actors may be tempted to reduce their enforcement efforts over time, forcing the state to invest even more resources to maintain high levels of compliance. Rule creation is not meant to refer to who invented a rule in the first place; legal transplants or implemented EU directives, for example, are state law no matter where the idea for these rules was born.

3 Determinants of the Use and Quality of Traditional law

3.1 Important Strands in the Literature

In the introduction, we already alluded to Weber's belief that the demise (or, as we called it above, crowding out) of traditional law was just a question of time. How did he imagine this process? Weber (1919) distinguishes between three types of authority, namely: authority based on tradition, on charisma, and on rationality. Whereas traditional law relies on tradition and possibly charisma, state-enforced law relies on rationality. Traditional authority rests on a belief in the sanctity of tradition and is connected to the authority of a *person*, rational authority, in contrast, rests on a legally produced *impersonal order*. Weber speculated that over time authority based on rationality would dominate authority based on tradition and charisma. Weber describes the administration of the state as the realization of rational authority. Thus, law created and enforced by representatives of the state would, in the long run, drive out other, more primitive, forms of law.

If one follows Weber, it is only a question of time until most non-state law ceases to exist. Yet, even a century after Weber published his theory, traditional law is still widely used. If traditional and rational orders continue to coexist, a number of questions regarding the compatibility between the rule of law and the authority underlying traditional law suggest themselves. To what degree can we expect personal authority to be compatible with the universalizability characteristic of the rule of law? From the point of view of the NIE, one could ask to what degree coexisting legal orders can increase transaction costs. The coexistence of competing rule systems typically does not help to reduce uncertainty, but, to the contrary, is likely to increase it.⁴

This is not the only way to think about legal systems that rely on more than one type of law. In a study on the emergence of the Western legal tradition, Berman (1983) describes how competition between different types of law (such as feudal, canonical, merchant, city) in combination with the ability to choose between legal systems (for example by exiting one jurisdiction and settling in a neighboring one) led to the emergence of law systems that increased individual security. More specifically, Berman writes about the coexistence and competition of different legal

⁴ Williamson (2010) proposes a rule of thumb for the frequency with which various types of institutions change. According to that rule of thumb, "informal institutions, customs, traditions, norms", and religion only change every 100 to 1,000 years, whereas the formal rules of the game change every 10 to 100 years.

orders as “perhaps the most characteristic trait of Western legal tradition” (p. 28) and continues by claiming that “this plurality of legal systems made the rule of law necessary on the one hand and possible on the other” (p. 29).⁵ Berman’s conclusion follows from observing the effects of multiple legal systems that simultaneously claim to be valid. The simultaneous availability of various legal systems implies competition for power and influence, for example, between church and crown, between the city and feudal lords, between feudal lords and merchants, and so on. Berman interprets the legal order that includes all of these different legal systems and is also a result of all of them as a “solution to political and economic conflicts” (Berman 1983, p. 29f.). He, thus, argues that the coexistence of competing legal systems, including traditional law systems, can have highly beneficial consequences. Whereas Berman highlights the possible substitution between coexisting legal norms, Nakabayashi (2018) stresses the possible complementarity between private and public institutions when private transactions take place in the shadow of formal state law. A study by Ellickson (1986) reports how cattle farmers and grain growers in Shasta County, California, settle their disputes without relying on and irrespective of the contents of state-provided law. It is, thus, a contemporaneous example for how limited the reach of state-enforced law can be, even in such economically affluent places as California.

The prevalence of traditional law implies that some transactions are structured according to rules other than those promulgated by legislators, and non-compliance with these other rules is sanctioned by actors different from the agents of the state. In other words, the prevalence of traditional law indicates a limited reach of the state. The next paragraphs serve to spell out a number of likely reasons for this limited reach in many countries around the world.

⁵ Berman explicitly deals with the emergence of the Western law tradition. However, there are many similarities between Western legal history and countries relying on traditional law today. Regarding Africa, Herbst (2014, p. 37, 88) points out that the power sharing between states and chiefs in Africa displays similarities to the historical power sharing between state and church in Europe, and that exit of entire groups to live under a different set of rules is not uncommon in Africa.

3.2 Reasons for the Prevalence of Traditional law

3.2.1 The Relevance of Power

Assuming power-maximizing representatives of the state, the prevalence of traditional law can be interpreted as indicating the limits of their power over those demanding and supplying alternative legal institutions. After all, the existence of traditional law may imply sacrificed tax revenues, but also limits to the ability of politicians to implement their most preferred ways of structuring interactions. Compared to a situation in which no traditional law exists, the prevalence of traditional law suggests a lower utility level of politicians.

However, utility maximization (as opposed to power maximization) may motivate politicians *not* to strive for control over everything, as the marginal costs of more control might outweigh the gains. Colonizers, as well as others striving to cling to power in a country, may consider the way in which some interactions are structured not to be vital for their political goals.⁶ Since more control in such cases has the potential of producing only small benefits while causing significant (economic or political) losses, politicians might rationally refrain from implementing their most preferred law.

Cost-benefit considerations also play a dominant role when local leaders are influential and eliminating or replacing their justice system would be costly for the central government. These costs arise because once traditional law exists, local elites have a strong interest in keeping it in place, if it generates sufficiently large rents for them (see, e.g., Sarch 2001). It has even been argued that under colonial rule, many “traditions” were genuinely invented on the local level because that was a promising way to refuse compliance with legislation newly established by the respective colonial power (Barnes 1951). Such exemptions were based on the fear that if compliance with newly passed legislation implied committing sacrilege, potential costs for the central government could be substantial. Colson (1974, p. 80) summarizes the argument succinctly: “Men had to cite precedent to justify their demands and necessarily, therefore, they invented precedent.”

Acemoglu and Robinson (2012, p. 242f.) refer to the Sudan as an example for a lack of centralization due to local political interests: “To politically centralize would have meant that some clans would have been subject to the control of others. But they rejected any such dominance, and the surrender of their power that this would

⁶ Family law and commercial law are possible examples.

have entailed.”⁷ The continued existence of traditional law, hence, could indicate that local leaders are, compared to the central government, relatively powerful.

Until now, the argument has been focused on the interests of the political elites, be they colonizers, national politicians or local leaders. Yet, the function of institutions is to structure recurrent interactions between many actors far beyond the elites. Those actors constitute the demand side for traditional law, and are an important factor in explaining the prevalence of traditional law. Acemoglu et al. (2018), for example, show that informal adjudication might be used largely because the formal judiciary of the state is perceived to be ineffective by citizens.

We now propose to look at three types of situations in which the likelihood that traditional law prevails is a function of the power the central government enjoys, both vis-à-vis local leaders as well as the citizens at large. All three situations show the potential relevance of traditional law as a set of second-best institutions in a second-best world (Rodrik 2008).

The first situation is one without a state. This implies the absence of any power of a central government over local leaders. If there is no state to enforce property rights, huge gains from trade could remain unrealized. To be able to reap such gains, private parties will create organizations and institutions that help others enforce their contracts. Milgrom et al. (1990) show that medieval institutions offer empirical evidence for such a narrative. As long as the use of such institutions is voluntary, they can be expected to be at least as compatible with the rule of law as formal state law or alternative private law mechanisms.

Second, a state might exist, but offers institutions that are not in line with the needs of private law subjects. In this case, the prevalence of traditional law is a consequence of state-enforced law not reflecting the interests of its private users. If the state and its government are very powerful, they can force the private law subjects to draw on external institutions, even if they are not designed to the liking of private law subjects. Logan (2013), for example, argues that traditional law survives because it enjoys legitimacy and not because the state is particularly weak.⁸

⁷ Lange (2004) argues that indirect rule gave chiefs leeway to describe and even invent customs as they saw fit. This leeway considerably weakened traditional control mechanisms and, thereby, also the degree of accountability of the chiefs.

⁸ Berkowitz et al. (2002) argue that when law is transplanted without adjustment to the local context it is unlikely to result in effective legal institutions. But transplants that are adapted to local circumstances and when the local context has a preexisting familiarity

Oto-Peralías and Romero-Ávila (2014) claim that chiefs in some African countries misused their position after the onset of colonization, which lowered their legitimacy, and should have reduced the probability that traditional law continues to play an important role in these countries.

In a third situation, a state might exist and its legislation might even be in line with the preferences of citizens, but reliance on external institutions might be too costly for potential users due to the monetary costs of using the law, the length of court proceedings, uncertainty about the interpretation of rules, judicial corruption, and so on. After the Genocide in Rwanda, for example, a modified traditional court system was introduced that increased access to justice services and reduced the backlog of the formal justice system (O'Reilly and Zhang 2018). As in the previous situation, if the state and its government are very powerful, private law subjects can be forced to draw on external institutions even if they are costly to use.

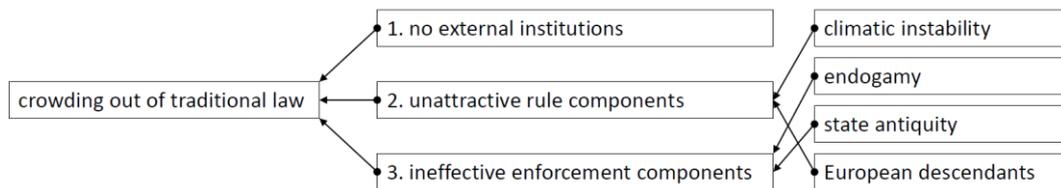
These three scenarios are based on power. The more powerful the public authorities are relative to the citizens, local leaders, etc., the less relevant traditional law is, even if traditional law would be preferred by its potential users. In sum, almost all our arguments are based on power relationships. They refer to the relative power of center and periphery, but also the relationship between politicians and citizens. Power, however, is difficult to ascertain empirically. Nevertheless, the question is whether a number of empirically testable statements can be derived.

3.2.2 Hypotheses

We propose to arrange our hypotheses according to a simple criterion, namely the degree of exogeneity of the explanatory variable. We begin with the most exogenous factor, which is geography, followed by prevalent family structures and the antiquity of the state, before we end with colonial history. Our hypotheses and their relationship to the theoretical arguments presented in the previous subsection are summarized in Figure 2.

with the law to be implemented, there is an increase in the effectiveness of legal institutions (see also Seidler 2014).

Figure 2: Determinants of the relevance of traditional law



We hypothesize that one group of factors determining the ubiquity of traditional law are the prevalent geographic and climatic conditions. Giuliano and Nunn (2017) hypothesize that the adequacy of a people’s customs is a function of the stability of the environment: If the environment is stable, the current generation can profit most from knowledge of previous generations. If, however, the environment is volatile, e.g. with respect to climatic conditions, customs will tend to be less appropriate for the current needs of the population. Giuliano and Nunn show that peoples that were subject to an unstable environment, in terms of variation of temperature over the period from 500 to 1900 A.D., attribute less importance to customs and norms today. These differences in values could function as a causal mechanism linking climatic instability to reliance on traditional law.⁹

We hypothesize that more stable climatic conditions favor a higher relevance of traditional law in modern societies (H1).

Norms supporting both the establishment and maintenance of a state might also be highly important for the development of an efficient formal legal order. Todd (1985), among others, argues that political organization mirrors family structures. He argues that a specific form of endogamy, namely consanguinity, i.e., the practice of cousin marriage, can pose “an insurmountable obstacle to the construction of the state” (Todd 1985, p. 144), as the depersonalization of power is supposedly inimical to endogamous family types.¹⁰ Endogamy would then be linked to traditional law via the emergence of less effective state institutions. Schulz (2019) can indeed demonstrate that consanguinity is causally related to less civicness and less inclusive political institutions in modern-day countries.

⁹ Imhof et al. (2016) demonstrates for the case of constitutional environmental protection that cultural values can be important for the design of legal and political institutions.

¹⁰ Gutmann and Voigt (2019) studies the relevance of family structures for political and legal institutions in more depth.

We hypothesize that the larger the share of endogamous marriages, the higher the relevance of traditional law in modern societies (H2).

The conjecture about the relevance of early state development is straightforward and in line with the thinking of Max Weber, as sketched above: The longer a state-like structure has been in existence, the more likely it is that politicians will have established a powerful centralized legal system that does not rely on traditional law. Arguments outlining the advantages of an early state have been put forward by Bockstette et al. (2002), and more recently by Borcan et al. (2018). One causal mechanism linking state antiquity to the contemporaneous prevalence of traditional law would be the earlier development of an effective legal system under the control of the state. Gennaioli and Rainer (2007) find that precolonial centralization predicts the quality of contemporaneous public good provision, implying that having been under the influence of colonizers might not be the most relevant explanation for differences in the provision of public goods today (see also Maseland 2018).

We hypothesize that higher state antiquity is linked to a lower relevance of traditional law in modern societies (H3).

Acemoglu et al. (2001) argue that colonies characterized by an inhospitable environment made the creation of a powerful state with efficient and inclusive institutions less attractive. Based on this argument, the legitimacy of the established central government (relative to more traditional forms of authority) differed depending on whether the colony was treated with inclusive or extractive institutions. Easterly and Levine (2016), in contrast, argue that any adverse effects of extractive institutions established by colonizers should have been more than offset by the human capital and technology brought by Europeans, even in small settlements without inclusive institutions. Gutmann and Voigt (2018) show that the share of European descendants among the population is indeed a powerful predictor of high-quality legal institutions. This observation is consistent with the idea that European populations reduced the need for traditional law because they increased societies' levels of human capital and technology and thereby made it possible to sustain high-quality legal institutions set up by the state. Seidler (2014), for example, demonstrates the need for educated bureaucrats and general education to transplant external institutions effectively.

Thus, we hypothesize that the higher the share of citizens of European descent, the lower the relevance of traditional law in modern societies (H4).

4 Data and Bivariate Correlations

Data on traditional law that is available for and comparable across a large number of countries is scarce. Here, we rely on three sources: the Institutional Profiles Database (Bertho 2013), the World Justice Project (Botero and Ponce 2011), and a report by the World Bank (World Bank 2018).

The World Bank has published its report “Women, Business and the Law” biannually since 2010. We use four *de jure* variables contained in that report to depict the formal recognition of traditional law. The report proposes a distinction between customary law and personal law. According to the report, “personal law refers to non-customary legal systems that stem from tradition or doctrinal texts, which are sometimes uncodified” (World Bank 2018, p. 27). It includes law derived from religious belief, governing areas such as personal status, crime, and commerce. Since religious roots seem of overwhelming importance for this category, we refer to it here as religious law. The legal status of social norms can have important consequences for public policy. Gouda and Gutmann (2019), for example, show that Muslim countries only display increased levels of minority discrimination if their constitutions formally recognize Islamic law.

The four indicators measure the answers to the following questions: “Is customary [/personal] law recognized as a valid source of law under the constitution?”,¹¹ and “Does the law recognize customary [/personal law] courts that adjudicate exclusively on customary law [/personal law]?”¹² Positive responses are coded as 1 and negative responses are given a 0.

11 The answer is “yes”, if the constitution recognizes customary law [/personal law] or customary law courts; or if the constitution refers to methods by which customary law [/personal law] will be aligned with constitutional principles, or by which customary law [/personal law] is to be determined, or the constitution refers to requirements that customary chiefs be consulted before the enactment of legislation [/or provides for a religious council or other body to advise on the passage of personal laws]; or if the constitution allows laws that applied before the constitution came into force to remain valid, if the economy had a robust system of customary law [/personal law] in place at the time. The answer is “no”, if there is no explicit constitutional recognition of customary [/personal law] sources or systems of law, or the constitution recognizes customary law to be applied only for certain peoples in limited territorial areas.

12 The answer is “yes”, if the constitution or another law recognizes a judicial body (e.g., a court or tribunal) that is competent to hear cases and apply customary law [/personal law], codified or not. The answer is “no”, if there is no explicit recognition of customary

From CEPII's Institutional Profiles Database, we use one *de facto* variable that indicates the share of rural land administered under traditional law (including its use: grazing, transhumance, exploitation, etc.) measured on a scale from 0 (no land under a traditional rights system) to 4 (very large parts under traditional rights systems). At the moment, this is the only available indicator of the extent to which traditional law is relied upon in practice to structure interactions. Unfortunately, it only covers one very specific area of application, namely the governance of rural land (*land rights*). However, land rights are of particularly high importance in economies relying on agriculture. In addition, Colson (1974, p. 82) observes that appeals to tradition to legitimize behavior fail when people live in circumstances that they have not lived in traditionally. She concludes that people living in urban centers or employed by industry have fewer tools for defending themselves against government officials who try to impose state law on them. This observation would suggest that putting land rights center stage is well justified.¹³ Another argument for focusing on the use of traditional land rights is that they are more easily quantifiable and comparable across countries than other rights. The share of area governed by traditional law is easily observable, whereas the number of criminal law or family law cases decided according to traditional law is not only very difficult to inquire, but it might also be more difficult to compare across countries at different stages of economic development and with a different social organization.

The World Justice Project provides more *de facto* indicators to measure the way in which traditional law is applied. The report asks to what degree the behavior of traditional rulers and that of religious judges is perceived as “impartial and fair”. As impartiality is an important trait of the rule of law, this variable can serve as an

law [/personal law] or if the constitution or another law establishes or recognizes statutory courts that may apply customary law [/personal law].

¹³ There is a sizeable literature that analyzes under which conditions land titling is likely to be successful. Attempts to move conflicts regarding the use of land away from traditional law and into the realm of state law presuppose some sort of register. Very different approaches have been tried in creating such registers and filling them with information regarding landowners. In a case study comparing the U.S. experience with that of the U.K., Miceli and Kieyah (2003) find that the voluntary model of the U.S. was less successful than the mandatory one pursued in the U.K. De Soto (2000) is a broad study dealing with the difficulties of turning “dead capital” into “living capital”. To make land or houses living capital, they need to be properly registered and de Soto describes pitfalls that governments have faced in trying to achieve just that.

important piece of information regarding the (perceived) compatibility between traditional law and the rule of law (*impartial*).

The WJP further reports to what extent the people surveyed agree with the statement that chiefs or traditional rulers respect the fundamental rights of all people and whether people could refuse to be judged by those rulers. Since it has been argued that a minimal protection of fundamental rights is an important component of the rule of law, the answers to these questions shed additional light on the compatibility between traditional law and the rule of law (*basic rights*).

Consider the case in which the state-enforced law of a country is compatible with the rule of law, while its traditional law is not. As long as it is possible to opt out of using traditional law without any negative consequences, the negative effects for individuals are clearly limited. One question the WJP asks is to what degree people believe they can opt out of the traditional law system. Although the question does not explicitly mention potential costs of opting out, the answers convey a sense of whether people believe that they effectively have a choice.

The rule of law is not only concerned with the content of the law, but also with the difficulty of getting court decisions, and getting them enforced. The WJP contains three questions that fall into this category. It asks how long it takes to obtain a judgment from a traditional ruler. It asks further, how long it takes to get an award enforced, and finally it enquires into the relative costs of appealing to traditional rulers. Together, these indicators measure whether the traditional law system offers timely and effective adjudication in practice (*timely*).

Table 1 below shows the correlation matrix of the variables just described. It shows that the share of rural land administered under traditional law is uncorrelated with both the quality indicators from the WJP, as well as the indicators regarding formal recognition of traditional law from the World Bank.

Table 1: Correlation Matrix of Traditional law Indicators

	Customary law	Customary courts	Religious law	Religious courts	Land rights	Timely	Impartial
Customary law	1						
Customary courts	0.54***	1					
Religious law	0.09	-0.18*	1				
Religious courts	0.05	-0.13	0.88***	1			
CEPII-Land rights	0.27**	0.08	0.04	0.02	1		
WJP-Timely	0.17	0.20	0.13	0.10	0.22*	1	
WJP-Impartial	0.10	0.04	0.13	0.09	0.13	0.02	1
WJP-Basic rights	-0.00	0.09	-0.12	-0.14	-0.19	-0.07	0.53***

Note: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

The extent to which traditional law is used in the governance of rural land is positively correlated with the formal recognition of customary law. This suggests that the formal recognition of traditional law can be expected to have measurable consequences in practice. Looking at the bivariate correlations among the three quality indicators by the WJP, it turns out that only the correlation between impartiality and the respect for fundamental rights is statistically significant. As there is no logical connection between the timeliness of traditional law and either its impartiality or the respect for fundamental rights, the low correlations between these variables appear plausible. The timeliness and effectiveness of traditional law seems to be better where it is made use of more extensively (in land governance). Causality could run in both directions in this relationship. The correlation of the three *de facto* quality indicators by the WJP with the *de jure* indicators by the World Bank is low, indicating that formally recognizing and enforcing traditional law may not lead to its improvement, and vice versa. Finally, the correlations among the four *de jure* indicators accord well with our intuition: If traditional law is recognized by the constitution, the likelihood is high that courts enforce it. This relationship is even more pronounced regarding religious law and its enforcement. Interestingly, the formal recognition of customary law is not significantly correlated with the formal recognition of religious law and the presence of customary courts is unrelated to the presence of religious courts. These observations provide empirical support for the conceptual distinction we propose between religious and customary law as two separable types of traditional law. Overall, the proxies for the extent of reliance on traditional law, its quality, as well as its legal status are significantly correlated with each other only in select cases.

We now move on to describe the bivariate correlations between the variables representing traditional law and some potential correlates of the contemporaneous relevance of traditional law. Table 2 depicts the correlations with income per capita,

population size, the level of democracy, as well as the rule of law level.¹⁴ The extent to which traditional law is used in the governance of rural land is negatively correlated with contemporaneous measures of income, democracy, and the rule of law. Rich countries whose governments abide by the rule of law do not rely on traditional law to structure transactions.

Interestingly, the proxy indicator for the effectiveness and timeliness of traditional law is also negatively correlated with income and the rule of law. Quite simply, rich and rule of law-abiding countries do not rely on traditional law. Traditional law, hence, is not well developed in these countries, which would explain the negative correlations with its timeliness. In line with our intuition, respect for fundamental rights is positively related to income, the level of democracy, and the rule of law. The *de jure* status of customary law is negatively related with both income and the rule of law, whereas the *de jure* status of religious law is negatively correlated with democracy.

Table 2: Correlation between Traditional law and its Proximate Determinants

	Cust. law	Cust. courts	Relig. law	Relig. courts	Land rights	Timely	Impartial	Basic rights
Log-inc.	-0.43***	-0.27***	-0.05	-0.03	-0.50***	-0.29**	-0.04	0.27*
Log-pop.	0.01	0.01	0.21**	0.20**	0.14	0.05	-0.23*	-0.21
Democ.	-0.03	-0.01	-0.42***	-0.36***	-0.24**	-0.20	-0.10	0.37***
ROL	-0.24**	-0.21**	-0.14	-0.11	-0.40***	-0.20*	0.23*	0.45***

Note: Pearson correlation coefficients, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

¹⁴ Many observers have voiced concerns regarding the compatibility of traditional law with both democracy and the rule of law. Logan (2009) is just one academic dealing with the possibly uneasy relationship between traditional leaders and democratic institutions in Africa. Summarizing the two possible positions as “modernists vs. traditionalists” or “trivializers vs. romanticizers” she spells out two often-heard issues regarding the compatibility of traditional leaders with democracy, namely that in patriarchic systems, the voices of both women and the young are frequently heavily discounted (Logan 2009, p. 105). In addition, it might be that the interests of the community are placed above those of the individuals. On the other, she points out that regularly held community meetings could be conducive to participatory democracy.

Table 3: Correlation between Traditional law and its Fundamental Determinants

	Cust. law	Cust. courts	Relig. law	Relig. courts	Land rights	Timely	Impartial	Basic rights
Cous. Marriage	0.12	0.10	0.34***	0.26***	0.17	0.28**	0.27*	-0.10
State Antiquity	-0.43***	-0.52***	0.17*	0.16	-0.13	-0.05	-0.18	-0.10
European des.	-0.40***	-0.25**	-0.38***	-0.36***	-0.42***	-0.40***	0.03	0.27*
ISI	0.06	-0.16*	0.67***	0.62***	0.22**	0.23*	0.09	-0.23*

Note: Pearson correlation coefficients, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

Table 3 shows correlations between the traditional law indicators and historical as well as geographical variables. Societies that permit cousin marriage, coded according to the instructions by Rijpma and Carmichael (2016) and using data by Giuliano and Nunn (2018), are more likely to recognize religious law, which is consistent with our second hypothesis. However, this result might be driven by Muslim countries, which are known for practicing endogamy. We find a strong positive correlation between the Islamic State Index (ISI) by Gutmann and Voigt (2015) and the formal recognition of religious law.¹⁵ Traditional law also seems to be implemented at a higher quality in endogamous societies, both in terms of its speed and its impartiality.

Countries that developed early statehood, according to Bockstette et al. (2002) and Borcan et al. (2018), are less likely to formally recognize traditional law today, which would be in line with our third hypothesis. However, religious law is more likely to be recognized in these countries and the quality and use of traditional law is not different from other countries.

In line with our fourth hypothesis, the presence of a higher share of European descendants in the population is negatively associated with most of our traditional law indicators. European influence makes the formal recognition of traditional law, as well as land governance under traditional law, less likely. Although traditional law is less timely and effective in these countries (probably due to its limited use), it is not less impartial and even more compatible with fundamental rights.

5 Estimation Approach and Results

In this section, we report results from regression analysis. The choice of variables is motivated by the theoretical conjectures derived in Section 3, but also by the

¹⁵ The index measures the relevance of Islam in politics and society, with higher values indicating more Islamic countries.

availability of data. Unfortunately, we cannot test our first hypothesis at this point, as estimates for the historical stability of climate are not yet publicly available.

The factors determining the degree to which traditional law is recognized by the state-supplied legal order are depicted in Table 4. For simplicity, we estimate linear probability models. State antiquity is significantly correlated with both customary and religious law. Interestingly, however, its role is ambivalent: the older a given state, the less likely it is to formally recognize customary law, whereas it is more likely to formally recognize religious law. This might indicate that the state is more likely to crowd out customary law over time in places where it is still prevalent today. Religious law, however, can be used by the state as a source of legitimacy and is, thus, more likely to prevail. This political economy explanation might be part of the reason why proponents of Max Weber's secularization hypothesis find it hard to empirically validate its predictions.

As observed before, a higher share of European descendants is correlated with a lower probability of both customary and religious law being formally recognized. When the political and societal importance of Islam in a country is taken into account, the permissibility of cousin marriage is no longer linked to the formal recognition of religious law. Islam itself is associated with a higher likelihood that religious law is formally recognized.

Table 4: Legal status (*de jure*)

	Custom. law	Custom. court	Relig. law	Relig. courts
Cousin Marriage Permitted	-0.074 (0.151)	0.207 (0.115)	0.122 (0.133)	0.068 (0.137)
State Antiquity	-0.803*** (0.175)	-0.814*** (0.129)	0.431** (0.162)	0.387* (0.161)
European Descendants	-0.385*** (0.076)	-0.180*** (0.051)	-0.179** (0.067)	-0.184** (0.065)
Islamic State Index	0.012 (0.040)	-0.078** (0.028)	0.112*** (0.033)	0.081* (0.036)
Constant	0.815*** (0.102)	0.677*** (0.101)	-0.107 (0.083)	-0.074 (0.088)
<i>N</i>	134	134	134	134
<i>R</i> ²	0.345	0.345	0.381	0.270

Note: OLS coefficient estimates with robust standard errors in parentheses, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

In Table 5, we explain the extent of use of traditional law based on the specific case of the land tenure system. Early state development is not related to the use of traditional law in rural land governance and neither is the permissibility of endogamous marriages. The finding that a higher share of European descendants is correlated with less reliance on traditional law is not surprising at all. In contrast, a political system in which Islam plays an important role shows significantly more use of traditional law institutions.

Table 5 also explains variation in the three quality-indicators from the WJP. In spite of the limited size of the WJP dataset, these regressions are based on at least 80 observations. Out of our four potential explanatory variables, only the share of European descendants is correlated with timeliness at conventional significance levels; the higher their population share, the less timely the adjudication of traditional courts. We try to make sense of this finding by pointing at the fact that in countries with higher shares of European descendants, traditional courts only play a marginal role to begin with, undermining their ability to utilize (dynamic) economies of scale.

Whereas our hypothesis that countries permitting endogamous marriages are more likely to legally recognize traditional law (or courts) cannot be confirmed, the relationship between countries allowing endogamous marriages and the perceived quality of traditional law courts accords well with our intuition. If traditional courts are used in these countries (no matter whether they enjoy official recognition or

not), they are perceived as impartial and fair. This can be interpreted as the flipside of the general skepticism vis-à-vis an anonymous state.

Table 5: Use and quality (*de facto*)

	Land rights	Timely	Impartial	Basic rights
Cousin Marriage Permitted	-0.619 (0.389)	0.086 (0.083)	0.263*** (0.067)	0.078 (0.076)
State Antiquity	-0.283 (0.530)	-0.015 (0.085)	-0.179 (0.100)	-0.096 (0.084)
European Descendants	-1.126*** (0.309)	-0.133* (0.056)	0.081 (0.057)	0.089 (0.045)
Islamic State Index	0.236** (0.086)	-0.001 (0.018)	-0.014 (0.017)	-0.024 (0.014)
Constant	2.508*** (0.360)	0.660*** (0.046)	0.584*** (0.043)	0.659*** (0.058)
<i>N</i>	121	87	80	80
<i>R</i> ²	0.251	0.149	0.196	0.106

Note: OLS coefficient estimates with robust standard errors in parentheses, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

6 Conclusions and Outlook

This study has inquired into the factors that determine the *de jure* status of traditional law, the extent to which traditional law is being used today, and its perceived quality. We have proposed to think of traditional law as internal institutions. Conjectures intended to explain the contemporaneous prevalence of traditional law were generated by drawing on different strands of literature. We find that the formal status of traditional law is mainly driven by the proportion of European descendants and state antiquity. The higher the share of European descendants, the lower the likelihood that traditional law will be formally recognized by the state. Regarding state antiquity, it is important to distinguish different forms of traditional law: the likelihood that customary courts will be formally recognized decreases with the age of statehood, whereas the likelihood that religious courts will be recognized increases.

The actual use of traditional law could only be ascertained with regard to land rights. It turns out that people in countries in which Islam plays an important role are more likely to rely on traditional land rights. The opposite holds true regarding the share of European descendants in a country: the higher their share, the less

people rely on traditional land rights. This finding is not unexpected as we know from previous research (Gutmann and Voigt 2018) that the rule of law is more developed in countries with a high population share of European descendants. One conclusion is that traditional law will continue to play an important role in adjudication until formal judicial systems are able to provide high-quality services. As we know from continuous efforts by the World Bank to push through such reforms, this is not an easy task.

This study can only be a first step in identifying the factors causing today's relevance of traditional law. Decades ago, Eisenstadt (1959) proposed a method for systematizing the seemingly infinite heterogeneity of primitive political systems into a limited number of types. In this study, we find that there are important differences between customary law, on the one hand, and religious law on the other. Taking the heterogeneity of the substance of traditional law explicitly into account is a desideratum. *Ex ante*, it is unclear whether this heterogeneity is more significant between countries than within countries. One task, therefore, would entail collecting data on traditional law at the regional level. This would also make meaningful within country studies possible that should be conducted especially in large countries, such as Brazil, India or Nigeria, where a high degree of heterogeneity can be expected.

The relationship between formal and traditional law should also be the subject of further analysis. The extent to which traditional law is relied upon might be a function of the perceived quality of state-enforced law (Acemoglu et al. 2018), if people can choose between these two sets of institutions. In this view, traditional and state law would be substitutes. However, state law and traditional law might also complement each other. One way to think of this is that they could be used to settle different types of conflicts.

All of this requires more and better data. The variable used here to proxy for the extent to which traditional law is used today only covers a specific part of the law. Data covering the entire reach of traditional law are badly needed. In recent years, a number of studies have inquired into the specific colonization strategy employed by the British in each and every one of their colonies. We now have data on the share of cases decided by customary courts decades ago, the number of colonial police officers, the salary of governors, and so on. It would be insightful if such data became available also for other former colonies.

Our results show that the share of today's population who are descendants of Europeans is an important factor in explaining the contemporaneous relevance of traditional law. Now, in the decades to come, a different effect might be caused by sizable Muslim populations in western European countries who were socialized in states lacking a strong rule of law. Experimental research like that of Acemoglu et al. (2018) might be helpful in understanding how effective integration efforts might look like that promote respect for and understanding of state provided legal institutions and services. Imams deciding cases according to the Sharia are a recent phenomenon in quite a few European countries. In the U.K., many of them make use of British procedural law, which means that the decisions of these Sharia courts are enforceable via British state courts. To study the effects of these courts on the rule of law promises to be an exciting and important research topic.

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