

NOTIONS OF COEXISTENCE BETWEEN CUSTOM AND LAW:  
A CURRENT EXPERIMENT IN THE EMERGENT STATE OF ABKHAZIA

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Abkhazia requires its own Renaissance to allow the cultural nucleus of *apsuara* [code of honour, practice and etiquette] to be joined to the pragmatic values of modern civilisations. (Arshba et al. 2003: 4)

**Introduction**

Arshba et al. assert that traditional ways, or custom, may be retained in a society in which the government has set out to govern by means of a written constitution, laws and state enforcement agencies. My presentation of findings in the Abkhazian society of the south Caucasus demonstrates that their proposition invites scrutiny. I shall be presenting ethnographic data on current dispute resolution procedures to provide raw data on notions of custom and law and the ways in which they are expressed today.

The generally held, if at times vague and contradictory conceptions and beliefs about how or whether notions of traditional culture may operate within a capitalist state is a question that is of more than parochial interest. My research in Abkhazia has therefore involved examining a contemporary issue, but one which is in part determined by the Abkhazian past and how this is 'read'; it is a matter of 'moving forward while looking backwards' in the words of Paula Garb, who has studied Abkhaz customs (2000: 7).

Whereas a little short of three years ago one could write of Abkhazia as part of a region which had been in ferment since the collapse of the Soviet Union, of which it had been a constituent part for over seventy years, this is no longer the case. In 2008 Russia lifted the economic blockade that, together with Georgia, it had imposed on Abkhazia in 1995 in a failed attempt to prevent the Abkhazians from gaining independent statehood. This has allowed me to examine the topic of relations between law and custom in conditions of relative social and economic stability, ones which are now unlikely to be upset by any new Georgian military adventures.

The close of the Soviet period ended full employment, cheap housing and communal services, universal comprehensive education and the national health system

and slashed the value of pensions and other social provision. The disappearance of past economic certainties, of what was familiar to Abkhazians, has opened up a space in which notions of custom and law are contesting for dominance. While ethnic Abkhazians do not form a majority of the population of the Republic of Abkhazia, they are the largest single group among several, and they dominate the process of building the state and its institutions.

The collapse of the Soviet Union was followed in Abkhazia by a breakdown of law and order during and after the 18 months' war of 1992-93 against Georgia's attempt to deny Abkhazia independence and to incorporate it. Economic ruin and social dislocation were prolonged by years of an economic blockade that was applied by bordering Russia and Georgia, the EU and other states.

Some Abkhazians are delving into the past to find applicable 'traditional' values and practices – the *apsuara* and *apsua tsas* of customary rule, elements of which had survived the tsarist and then Soviet periods. The Abkhazian state is seeking a place within the globalizing world while allowing for customary practices whose essence is largely rooted in kinship and conceptions of a communally based economy which have survived from pre-capitalist periods. The consolidation of the Abkhazian state is bolstered by a history of battling against foreign domination, the latest being Georgian, during which nationalist convictions put down strong roots that underlie much of Abkhazian anthropological and literary writing.

### **Constructing an order of custom in a new state**

The compendium of the country's laws has been designed by its authors to underwrite the Republic's post-Soviet construction of a capitalist state, and its wording has borrowed extensively from the laws and constitutions of the liberal democracies of 'the West'.<sup>1</sup> Their attempts to reconcile custom and law<sup>2</sup> in its local application would deny the universality of John Merryman's opinion that 'the importance of custom as a source of law is slight and decreasing' (1985: 24). Limiting the state in the performance of what Merryman saw as one of its central characteristics – exercising the sole right to impose legal sanctions (ibid.: 70) – protects custom from state legislation. I do not set

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<sup>1</sup> 'The West' and 'western', and sometimes 'modern' or 'civilized', are terms used to denote 'capitalist' or 'bourgeois' in Marx's sense, i.e. capitalism, and their use in the present text will be so understood. A justification for this can be found in Wood 1992.

<sup>2</sup> It might be noted that the term for 'customary law', *obychnoye pravo*, which is used in Abkhazia in the literature written by Russians and Abkhazians, itself carries a contradiction as it means both Common Law and uncoded law.

out to provide a list of Abkhazian customary practices, which are extensively listed in the literature, notably by Fatima Kamkiya<sup>3</sup> (2008) and in an extensive literature review by Rimma Chitasheva (2005). In this article I concentrate on some of them, namely those that display notions of ‘tradition’ which run counter to the spirit of law as understood by Merryman and, I suggest, are more in line with the views of Stanley Diamond, who perceived a fundamental contradiction between ‘the rules of law and the order of custom’ (1974). My not listing the elements of custom is also dictated by recognising that customs as such are dynamic, changing and contingent.

The Abkhazians intend their laws to permit law and custom to coexist without the former subjugating the latter. My observations from fieldwork in Abkhazia within the past three years contributes to the comparative study of processes that have been attempted over the latter years of colonial empires and are still on-going in many parts of the world, contrasting those with the Abkhazian experiment, which is very different from the route chosen in any other historically newly independent country. Yet, with the exception of Paula Garb (1984, 1995), there are no western-educated anthropologists who are consistently pursuing anthropological research into Abkhazian practices today, and none who have addressed the theme of this article. I intend to demonstrate the renewed relevance to today of the discussions of law and custom in ‘Western’ anthropology of the 1970s and the first years of the current decade.

### **Abkhazians and Abkhazia**

In this section I give some details about the Abkhazians themselves, their history and the cultural system of beliefs which they conceive as providing their ethnic self-identity by bringing in the relevance of kinship, religion and other elements that come into play in daily practices.

The peoples of Abkhazia, numbering 242,826 (State Statistical Office 2011), constitute an independent state wedged between the north-east shores of the Black Sea and the central range of the Caucasus Mountains, bordering the Russian Federation to the north and Georgia to the east. The country is today going through great social changes brought about by wars and demographic shifts that are depopulating its villages, which ‘... fulfil [] the important function of preserving traditions, customs and

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<sup>3</sup> Erroneously transliterated in the article as ‘Kamkiia’. I have left this error in the bibliography for this work while elsewhere in my text using the spelling ‘Kamkiya’, which the author acknowledges as correct (personal communication, Sukhum, July 2010).

the peoples' culture, which have been shaped by the centuries' (Akaba, 2010). Abkhazia is part of the Caucasian chequerboard of statelets, where custom and claims on history are weapons in the battle for statehood.

*Legacies of the past*

Kin-based clan structures largely survived into the twentieth century, as independent princedoms coalesced under a sovereign prince. They have held on to many beliefs in the powers of deities and spirits, the guardians of every living and inanimate natural phenomenon, and of social practices. Abkhazian religion embraces beliefs in guardians of stones, trees, rivers, diseases, animals, rain, fire and iron-making.

Language and custom were rooted in a past egalitarian structure of which relics still remain in notions of an ideal society today. Ethnic identity dates, according to Inalipa (1965: 360ff.), from the early nineteenth century. Kin groups exploited the land and had common pasturage and hunting territories which were defended against the encroachments of neighbours. Like the populations of other statelets in the Caucasus, they accepted Christianity and Islam on their own terms.

The Soviet practice of implementing positive discrimination in education and in the allocation of administrative posts through quotas reserved for titular national minorities did, to different degrees at different times, favour Abkhazians within the Georgian Soviet Socialist Republic, which incorporated Abkhazia as a nominally autonomous unit in 1931 (Lakoba 1998: 94). Despite persecution of what were deemed anachronistic and harmful practices, 'survivals' of the past, and at times severe persecution of practitioners, custom, however modified, continued to govern much in the areas of property relations and individual conduct in the Soviet period, through the upheavals that accompanied industrialisation and the collectivisation of the peasants' land holdings in the 1930s (Krylov 1999: 44 and personal communications) and was often protected with the connivance of local Abkhazian Soviet authorities.

Clan linkages held together the networks of Abkhazian society in their village communities, with its institutions of respected elders and the worship of local deities that validated customary practices. Today these are being challenged by the process of state-building and its commercialisation of the economy (Yamskov 2007: 500-511). The displacement of large sections of the population, especially young people, has opened society up to new perspectives and expectations derived from experiences away from the tutelage of elders and customary rules, as a result of army service during the fight

for independence and having been forced to seek work in the towns, where the sway of village-based customary practices is weaker (Krylov 1998: 26). The parlous state of the economy has also forced tens of thousands of young people to leave for work in Russia, where not only is the arm of tradition weaker, but circumstances have driven some to crime. However, demographic change has been a feature of Abkhazian reality for a long time.

Twenty years ago the Abkhazians in the capital, Sukhum, were a small proportion of the town's then population of 120,000. The well over 60% of its present-day population of 64,478 (State Statistical Office 2011) is a result of an influx of Abkhazians from rural areas and the exodus of the vast majority of Mingrelians and Georgians following the 1992/93 war with Georgia.

#### *Abkhazianness or apsuara*

Abkhazians insist that the law should be based on or accommodate Abkhazian custom. A two-way pull is evident between 'traditionalists', who hold aloft the banner of what they identify as customary practices, and 'modernisers', who want to sweep these away, since they view them as barriers to building a 'modern' state. But to leave it at that, to present only the extreme polarities of opinion, would be grossly to oversimplify the true picture. In reality, within a boiling cauldron of contradictory approaches that at times threaten open conflict and national disunity, there remain two unifying foci. The first is agreement that there is such a phenomenon as Abkhazian ethnicity, based on *apsuara*, which includes etiquette and self-perception, as well as a set of beliefs about Abkhazian language, history, religion and myths that exerts a strong influence on much daily conduct. Coupled with *apsuara* is *apsua tsas*, the customary rules for relations among Abkhazians (Kamkiia 2008). Chitasheva goes so far as to argue that the components of 'abkhazianness', taken all together, provide a conceptual system that can intrinsically serve as 'a theoretical and practical nucleus, the methodological basis' for being prepared for all eventualities and permit an understanding of Abkhaz society (2005: 163). This scholar gives detailed references to interpretations of abkhazianness in Abkhazian scientific works and literature.

The evidence of the retention of customary practices was evident throughout Abkhazia, and I will focus on a number of them, viewed mainly through the lens furnished by the management of disputes. Responsibility for looking after all children and the elderly belongs to extended families that are defined by their surnames. The

rules of exogamy forbid marriage with anyone who carries the same surname or with anyone who is traceable through the patrilineages or matrilineages of affines. In the villages Abkhazians bury their relatives in family plots by their houses. The clans (*azhvla*), which I will translate as *names*,<sup>4</sup> and the patrilineages (Dasania 2006) function as linkages between the traditional co-operative units (*kiaraz*) that bring families together on a residential basis for ploughing, harvesting, helping the poorest in the villages and war. Such structures are shared by other peoples in the Caucasus (Inal-IPA 1965: 399-413), as they are to some degree by the *zadruga* of the Balkans described by Eugene Hammel (1968: 17-38). In Abkhazia the *kiaraz*, like the Balkan *zadruga*, was the term used for collective farms in the Soviet period. Abkhazians retain holy sanctuaries dedicated to *Antsva*, the God of creation (Kunacheva 2006: 35), whose keepers have a place of honour at state functions. People hold celebrations around the family-linked holy hearths and at local holy groves for their deities (Solovieva 2007: 521). There is extensive syncretism, and followers of the pre-Christian 'traditional' religion, Christians and Moslems share mutually recognised shrines and festivals. The Orthodox (Eastern) Christian Church's premises are still used for pre-Christian festivals, and the old deities double up as Christian saints. The Church promises the definite fulfilment of requests that are addressed to the icons of myrrh-weeping saints, and there is widespread belief in miraculous waterfalls, groves and shrines that are associated with spirits and saints in all parts of the country, and are sometimes also venerated by local Armenians and Ossetians (Krylov 1999). The Church identifies itself with nation-building in Abkhazia and ties in with *apsuara*, witness its appeal for orderly conduct on the eve of presidential elections: 'to exclude violation of morality canons and the God-granted code of Apsuara in election speeches and activity' (Appeal 2009: 1).

*Apsuara* and *apsua tsas* make up the traditional network of practices and beliefs, which include the growth in one's social standing with age, what is considered worthy conduct and what unworthy, something often associated with the conduct that is described in the Abkhazian epic tales of ancient heroes, the Narts (Dzhapua 2003, Dzhapua and Hewitt 2008, Abaev 1957, Colarusso and Hewitt 2003), the strict gender relations in society and the general ideas of collectivity alongside individual responsibilities within it. They include the notion of honour (*alamys*), any challenge to

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<sup>4</sup> I use the italicised words *name* and *names* to denote the Abkhazian variation of clan, as do the Abkhazians to cover all people with the same name.

which must be rebutted and punished with retribution. These notions will be examined in this article and compared with the legislation the state is enacting to ‘modernize’ and accommodate custom.

### **Discussion of the issues at stake in anthropology**

This section will show the relevance of some major debates within ‘Western’ anthropology on the relationship of custom and law, after a brief summary of ethnographic writing on the area.

In her study of the relationship of custom and law among the Abkhazians, Fatima Kamkiya (Kamkiia 2008) noted: ‘Scholars continue to debate whether customs can be considered rules of law’ (2008: 39). Kamkiya argued:

some rules of Abkhaz customary law (sic)<sup>5</sup> may include a social norm that is simultaneously moral, religious and legal. In such cases, custom bears the imprint of normative syncretism.... Abkhaz legal customs (sic) regulate social relations involving retribution and compensation, property, and family relations, [and] inheritance. (2008: 46)

Kamikya lists a number of works on Abkhazian custom (2000) published from 1965 to 1998. Other relevant literature on the Abkhazians includes that by Sula Benet (1974), George Hewitt (ed.) (1998) and Shalva Inal-ipa (1965). For our purposes, the value of Kamkiya’s work lies more in her description of law and custom, as the Abkhazians are setting up their institutions to compartmentalize the two structurally, though not by granting different areas of responsibility to higher and lower courts, as under colonial, post-colonial or neo-colonial systems of indirect rule (see Shadle 1999; also Demian 2003). Kamkiya’s work provides a theoretically based study that carries us into a post-Soviet examination of the Abkhazians. There is, in addition, a useful summary of writings on Abkhazian history (including anthropology) from the nineteenth century up to 2007 (Salakaia 2009). The most valuable reviews of the Russian and Soviet schools of anthropology are, in my opinion, an extensive article by Plotnik and Howe (1985: 257-312) and Ernest Gellner’s edited volume on a discussion between Soviet and western anthropologists (1980).

The customary rules of the peoples of the Caucasus have been extensively, if

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<sup>5</sup> A common elision of the terms ‘custom’ and ‘law’ that has been carried over from Western legal thinking into much anthropological writing.

sometimes anecdotally, accorded coverage by travellers and conquerors, principally in the course of and following the Russian conquest.

Modern scholars on Abkhazian custom draw extensively on historical accounts that take the reader up to the early twentieth century and then, in the main, skip over the Soviet period. Outstanding among Abkhazian scholars was Shalva Inal-ipa (1916-1995), who made a brief mention of practices in Soviet times, such as the continuation of mediation (Inal-ipa 1965: 445). A central element of reconciliation that he draws attention to was that it sought to bring about forgiveness, although it also contained punitive elements such as exile and ostracism. A mass ceremony of reconciliation and forgiveness that took place within living memory was described by Ruslan Gozhba (1998: 53-4) and shows similarities with a ceremony described for Montenegro by Hubert Butler (1990: 304-12).<sup>6</sup> A listing of other writings on Abkhazia is given by Marjorie Balzer (2008).

*How tradition and law are perceived to be related inside Abkhazia*

Victor Avidzba, MA, Deputy Dean of the History Faculty, Abkhazian State University, noted that the Soviet authorities tolerated the use of mediation even when the law did not provide for it. Mediators were initially respected elders, but later, in each village, the Soviet authorities created ‘reconciliation commissions and councils of elders’ to fulfil that function, and these continue today in the post-Soviet period (Avidzba 2008: 184), with the addition of a nationally, state-incorporated council of elders. He argued that today ‘There is a pressing need for traditional Abkhazian legal proceedings and the full-blooded functioning of its principles to be underpinned by laws’ as a means to achieve ‘harmonious correspondence of state and individual interests’ (ibid.: 186). He noted that at the ancestral shrines (*anykha*), families and clans, and cross-clan associations appeal to guardian spirits when seeking justice in disputes. Such a case of appeal to the spirit has been described in detail by another modern Abkhazian researcher, Bartsyts (1999a: 41), who also notes:

Abkhaz society, dissatisfied with official law (sic), maintains the practice of third party intervention through its reconciliation commissions and councils of elders that for over 100 years have served as a buffer between the people and non-traditional state law. These practices can be traced back to previous centuries when Abkhazia was governed only by indigenous law. (Bartsyts 1999b: 4)

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<sup>6</sup> I thank Justin Otten, a research student at the University of Kent, for drawing my attention to this.



However, ten years later she found: ‘There is a danger that Abkhazian ideology will become dissolved in the market economy; one notices an estrangement from our own culture, contempt for traditions in society’ (Bartsyts 16.6.2009). That resonates with a much earlier observation about a similar process that was underway in the British colonies: ‘...the basis of holding land is changing from one of community and custom to one of individualism and contract; wealthy native capitalists are appearing...’ (Meek 1946: v).

Councils of elders are not truly free of the world of law in Abkhazia, nor outside the battles for political control over the state, as is borne out by a description of struggles within the elders’ national council over candidates who were standing for election to the country’s presidency (Krylov, 2004: 1-2).

The literature illustrates the different approaches to custom and law that are taken by Abkhazian scholars, including those who favour ‘the codification of the traditional system of rules [and] the arising need for juridical recognition of several de facto operating subsystems of common law [and] their integration into law’ (Bartsyts n.d. 2008). Bartsyts has written extensively on the Abkhazian tradition of avoiding the use of force in dispute resolution, which she saw as deriving from a collectivist outlook in society (Bartsyts 2006).

#### *Relevance of major discussions in ‘Western’ anthropology*

These different takes on the issue inside Abkhazia resonate with those found in Western anthropology. Among the wider discussions on custom and law, we may note the different approaches taken by, for instance, Stanley Diamond and Paul Bohannan, by Brabadzan and Aitkin, and by Louis Assier-Andrieu and Sally Falk Moore. The concentration on ‘customary practices’ in the anthropological literature on law and custom, sometimes called ‘customary law’ or just ‘custom’, and sometimes using the term ‘tradition’, with all its baggage of invention, reinvention and post factum revision, has been confusing. It has at times blurred the fundamental differences between law and custom that were argued to exist by Diamond (1974) and Assier-Andrieu (1983) and something that was understood by British colonial administrators, such as Brett Shadle writing about Kenya (1999). Yet even the latter confused the displaced dominance of the order of custom with relics of its practices that the British rulers of Kenya were grappling with, while modifying them in their own interest through law. A

consideration of ‘customary practices’ that continue outside the law in industrialised ‘western’ countries is outside the scope of this article.

In the literature on custom and law there are two immediate problems, one of definitions, the other the dominance of ‘Western’ concepts of law in much anthropological writing. These have treated the rules that govern conduct in pre-stratified and pre-law-based societies as a stage in a continuum from custom to law, that is, to societies which have specialist state enforcement agencies that take precedence over institutions from within a community. The latter would place emphasis on the resolution of disputes through reconciliation of the disputants and forgiveness, sometimes including punishment, but not by the specialised state agencies, which are a feature of law. State agencies enforce laws and, more to the point today, meet capitalist state requirements (see Bohannan 1965, Babadzan 1998, Keesing and Strathern 1998, discussion in Babadzan 2004 and Aikin 2004, 2005). It is to a great extent within the paradigm or Procrustean bed eliding custom and law and not clearly delimiting their distinctions that the subject is often fitted. It was within that paradigm that Bohannan<sup>7</sup> could write about ‘law’ among the Tiv of Nigeria, without placing it in the context of the overarching power of British state law – a legacy of the structural-functionalist writings that have been with us since the early twentieth-century giants of anthropology that included Evans-Pritchard (1969) and Malinowski (1959). This paradigm has been applied to the topic of law and custom in writings about different societies, whether those where pre-state custom dominates, or where there are attempts to produce hybrids with state-regulated law, but also where there is straightforward enforcement of law at the expense of custom.

However, as the presentation of cases of disputes resolution from research in the field show us, the Abkhazians are attempting to find a way to have their cake and eat it, that is, to have custom and law accommodate each other, conceiving them as different and separable, and capable of existing side by side.

In some of the literature specifically related to law and custom, the latter is seen as the property of societies that are pre-literate or pre-state (Shershenevich 1911: 369) and law as ‘custom that has been restated in order to make it amenable to the activities of the legal institutions’ (Bohannan 1965: 36). For the sake of our analysis of what is

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<sup>7</sup> Only one among many that included Malinowski and Evans-Pritchard, who would describe native (i.e. colonially subjugated) societies, their regulation and mechanisms for settling disputes without discussing the law that was in the hands of the rulers, and which still today justifies central ‘Western’-style government interference in customary practices whenever the government wishes.

actually taking place in Abkhazia, I will now consider some contrasting approaches from among those I have mentioned. In his essay *The Role of Law and the Order of Custom*, Diamond (1974: 255-80) argued that custom and law are mutually exclusive social institutions; thus contesting Bohannan's view (1968: 73-8).

Bohannan held that common law was a transitory stage between custom and law, embodying many of the former's practices. There are many variants and much blending at the margins. Thus Malinowski had earlier written that 'the rules of law form but one well-defined category within the body of custom' (1959 [1926]: 54), which was 'designate[d as] the sum total of rules, conventions and patterns of behaviour' (ibid.: 51), an opinion differing radically from those of Diamond (ibid.) and Assier-Andrieu (1983: 86-94).

Diamond (1974: 256) also took issue with Bohannan (1965: 33) for stating that the incorporation of custom into law represents 'the 'double institutionalization' of norms and customs that comprises all legal systems', again stressing his own view that law, by its very nature, is a social phenomenon defined as a set of regulations that are enforced by agencies of the state within a hierarchically divided society by powers emanating from outside the flexible, shifting and ever contingent and mutually agreed conventions among members of a custom-regulated non-hierarchical sociality. I would suggest that Clifford Geertz's words about religious ritual being 'the model *for* and the model *of* aspects of religious belief' (1966: 34) might be applied to the beliefs and practices of societies which conduct themselves according to custom. In these the rules are understood and enacted by all their members to regulate their own affairs, including dispute management, thus making of custom the *for* and *by* of society. Diamond (1974: 259) approvingly cites Maine (1889: 230): 'Civilization is nothing more than the name for the...order [which has] substituted several property for collective ownership', and Jeremy Bentham<sup>8</sup> to support his argument that 'law is symptomatic of the emergence of the state; the legal sanction is not simply the cutting edge of institutions at all times and in all places' (1965: 259), *pace* Bohannan. According to Max Gluckman:

Bohannan has insisted that each people has its own folk system of concepts in terms of which the study of non-Western juridical processes and institutions should be made. He has insisted that it is essential not to use the folk concepts of Western jurisprudence to handle the folk systems of other cultures, for, being a folk system themselves, they cannot constitute an analytical system. In contrast, Gluckman and Epstein (and to a lesser extent

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<sup>8</sup> Bentham, J. cited by Diamond (1974: 259) n.d.

Llewellyn and Hoebel, and earlier, Barton) have set their analyses against the type of analyses made of Western judicial processes, in order to highlight both similarities and differences. To pursue this comparison, they have used conceptions, such as the reasonable man and reasonable expectations, right and duty, which are used in Western jurisprudence. (Gluckman 1968: 293)

What is relevant to our topic is not the difference between Gluckman and Bohannan that Gluckman pointed to above, for that is only what amounts to a difference about research methodologies. Of greater import is what they have in common: neither of them detect any fundamental difference between what they refer to as 'Western judicial processes' and (what they are to be compared with) 'non-Western juridical processes', despite the difference over the use of 'the folk system of concepts' for analytical purposes. Both would reduce the difference between custom and law and their practices to 'concepts'. In this lies the nub of the difference with Diamond, who described custom and law as social institutions that are incompatible. Keesing, writing about custom (using the Pacific Pidgin rendering as *Kastom*) in Melanesia, points out that the fact of custom being 'codified in law' demonstrates 'the hegemonic force of colonialism' (1989: 27-8), for which one might read the laws derived from capitalist society. It is my contention that whether Diamond or Bohannan-Gluckman's view prevails in Abkhazia (and other societies that are attempting to keep both custom and law) is relevant to the process of state-building that is going on in numerous countries, and specifically to whether the Abkhazians will be able to marry custom with law. Whether customs are today defined as a collection of relics of the past, as 'survivals' (Inal-IPA 1965) or as 'traditions' (Inal-IPA 1978), or as evolved social instrumentalities that justify the laws of contemporary society by conferring on them the status of being supposedly modernised aspects of 'custom' (the imprimatur of popular 'tradition'), it is generally accepted that custom existed before law. This does suggest that they are at least historically autonomous entities. This understanding of difference retains its hold, as illustrated by the interpretation of case studies in a Papua New Guinea village court and 'an urban national court' within the past decade by Melissa Demian (2003). It may be compared and contrasted with Brett Shadle's survey of the manipulative approach to 'African courts' by British colonial administrators in 1930-60 (1999).

Sally Falk Moore's work on 'an anthropological approach' to the issue I am examining would appear to be unaware of the possibility of any contradiction, but, while criticising Diamond for his alleged 'adherence to the rigidities of an early

evolutionism’, she does accept that he raised questions that ‘have not been thoroughly investigated by other anthropologists (Moore 2000 [1978]). Nor has any consensus on this been reached to this day, and that includes in her own later work, where Diamond no longer merits a mention (Moore ed. 2005). Like most writers in this edited collection of readings on the law and anthropology, she subscribes to the still-reigning school of thought that allows for the gamut of writers from the 1920s onwards to describe custom and law as coexisting in the colonial and now in the post- or neo-colonial periods, through variants of what might I think be called a continuation of ‘indirect rule’ by a state. This neglects the fact that the laws of the colonial power and of its state-builder successors of today had and do have the final say and held and still hold the power to enforce their will, whatever their concessions to what appear to be the relics of customary practices. The difficulty of trying to reconcile two opposites is illustrated by Julio Ruffini’s discussion of how the indigenous Sards of Sardinia settle disputes over sheep-stealing through an ‘indigenous system’, which he describes as ‘an informal legal system’. This continues to be practised even though the Italian legal system has outlawed it and insisted on its own exclusive jurisdiction over disputes involving animals and livestock theft (2005 [1976]: 151). Ruffini writes of this as ‘a plural legal system’ (ibid.: 136). In Abkhazia laws are not enforced against customary practices.

These cases and considerations add thoughts for consideration by scholars who have examined, and still are examining, the workings of local courts in the Third World (the remnants of custom in their modern mutations or straightjackets) and the ways they modulate the laws of the country and operate in ‘gentle violation’ of the law. The problematics of this have been recognised, and Melissa Demian has written that ‘the “problem” of legal pluralism is an especially vexing one for lawyers and anthropologists alike’, citing other authors who have drawn attention to this (Demian 2003: 97).

### **Evidential structures and cases**

I give first some details of some of the features which bind Abkhazians together in their practices and beliefs and then move on to the cases I observed and data from informants to provide basic evidence for the practices of custom in different parts of Abkhazia. It is when one takes beliefs and practices together that the cohesive social structure for ‘the order of custom’ becomes visible, evidencing its validity. The data will be set out under subheadings and given with texts of laws with which they dovetail to meet cultural conceptions of the *apsuara* code of practices and etiquette.

*A mesh of traditions and beliefs*

Conduct is embedded in the influences of the extended family, understandings of honour, valour, revenge, patriarchy, hospitality and, embracing everything, of community. There are networks of clans and families, and of neighbours (carrying a meaning almost as close as ‘blood’<sup>9</sup> relatives). There are the village territorial communities – *obshchinas* in Russian, age categories, especially the elders, all with their elaborate rituals of marriage, birth, death, mourning, and religious feast days. These were based in the villages, which most Abkhazians I met (but not all) refer to as ‘home’ and which they visit to repair the family house, care for parents, look after plots of land and share in communal rituals. In accordance with the prescriptions of religious beliefs that are centred on ever-present sacred deities, Abkhazians call upon the family and locality deities for a good harvest (as witnessed in July 2010), appealing for rain (information from a university-educated woman in 2010 who led a procession through Sukhum during a dry period) and for other interventions by the deities. These practices continue despite the decline in the sizes of families in the villages (Biguaa 2010: 28-36). Alongside the above are institutions which are of more recent vintage, such as loan networks (see Wooster 2005), associations of women and of war veterans, political parties vying with each other in the provision of cultural and social services, and trading networks to obtain goods from across the border with Russia and sell into Russia. There are the Big-Men-type town figures, who may be musclemen who settle disputes for a consideration or simply to bond people in debt to them, as well as the new national holidays that associate Abkhazians with the sacrifices and gains from the struggle for independence.

State-aided campaigns to give primacy to the Abkhazian language over Russian, which is more widely spoken, taking in the other ethnic communities (Chirikba 2008: 9-10) act as unifiers and makers for Abkhazian solidarity.

It was widely said that ‘traditions’ (*apsuara* and *apsua tsas*) can and should be protected or restored, either by enacting laws to insist on this or by not having legislation that would exclude them, while at the same time having a body of laws that could be brought into line with what was universally called ‘a civilised society.’

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<sup>9</sup> The term ‘blood’ is as widely used as it is in English, as in ‘that’s in the blood’, while informants, when pressed on this, did agree, albeit reluctantly, with the cultural and not biological meaning of the word, as when referring to a child of ‘mixed blood’ parentage from an Abkhazian father and a Georgian mother or the other way round.

*Cases of the operation of custom instead of law*

The Abkhazian ‘Criminal Code’ states (my translation):

A first time offender [under the categories] of a crime of small or medium degree may be freed from criminal responsibility if it [he/she] has made it up with the victim and made amends for the harm occasioned to the victim. [The two mentioned categories are:] Crimes of *small gravity* [that] are premeditated, and accidental acts for which the maximum penalty ... is not above three years of confinement [and] Crimes of *medium gravity* [that] are premeditated crimes for which the maximum penalty is not more than five years of confinement, and accidental acts for which the maximum penalty is not more than three years of confinement. (Zakon 27.4.2009: 3, clauses 2, 3, and: 15: clause 70)

While these two categories do not at first glance provide for out-of-court settlements of graver crimes such as premeditated murder and others for which the perpetrator would be liable to five years or more of imprisonment, the very many exemptions and the list of mitigating circumstances in other parts of the Criminal Code make it possible in virtually any case to ‘shift’ the assessment of the gravity of the crime into one of the categories for which the matter can be settled between the parties concerned. This resonates with the practice of *straightening* in village courts in Papua New Guinea, ‘which connotes both the means of finding a route through the complexity of a dispute and its desired outcome’ (Demian 2003: 102). And, indeed, in Abkhazia too this is practised, but without separate courts to manage this as in Papua New Guinea, but in the unique form of state deference to custom, to an overarching role for custom over law, allowing it to maintain the rules of society.

In one case, when he was approached by an Abkhazian lawyer for an opinion on whether one could build a defence in court on the authority of custom, ‘the cultural defence’ (Demian 2008: 432), a specialist on Abkhazian custom referred the lawyer to the constitution and codes of laws (personal communication, August 2009). His refusal to give an opinion on the cultural defence, he explained, was not a denial of the importance of custom, but an insistence that in Abkhazia law and custom are separate entities. Indeed, the words of the new criminal code and law on the family accommodate this dualistic approach. The cases I examined in which the law’s tolerance of customary practices guided judges and pre-trial investigators did give warning signals of possible conflicts between the use of law and custom, as not

everyone thought it was proper to leave it up to individual judges to decide where the demarcation line should be drawn and how custom was to be fitted into the growing accumulation of laws, as the following case suggests.

The case about which the lawyer sought guidance was as follows. A woman was arrested on a charge brought by another that she had committed a crime against the latter, and she was held in pre-trial custody for more than a year. The court found in favour of the accused and she was released. She then demanded that the woman who had brought the charges should compensate her for insulting her. The view of my informant was that it was the state should pay compensation to the woman for holding her for over a year, not the woman who had brought the charge.

The judges seek to minimize the use of the laws and often take the initiative in seeing that even criminal charges do not reach the courts but are tackled through what are spoken of as customary mediation and reconciliation procedures. These will be described under the headings of etiquette, the role of clans, reputation (honour), male lineage and adoption, to show how they are fitted into the growing accumulation of laws. While placed under headings, it will be borne in mind that they are all interlinked and make up the whole of a fabric.

a) *Apsuara* or etiquette

One informant told me that '*apsuara* is not just etiquette but a system of beliefs and principles for conduct'. Another called it a code for 'proper behaviour'.

An elder who was active in mediating disputes and effecting reconciliation argued that state-enforced education in the values of *apsuara* was the best way to bring about responsible behaviour. He also illustrated how what he saw as elements of traditional' customs could be given the mantle of law when he said that the elders should be given legal responsibility for bringing harmony to society, despite his expressed opinion that the shape of today's councils for reconciliation was not ancient and was a survival of the way they functioned in Soviet times, when they were subordinate to, and moulded by, the local Communist Party and Young Communist League. He also said that the national council of elders should become a centralised organisation, 'like a Politburo' (personal communication, August 2009).

But what is 'traditional' and the essence of *apsuara*? Nikuola Khashig, a member of the country's Council of Elders, expressed this as follows:



Honour and pride lie at the heart of the matter and a return to the universality of *apsuara* is possible if the laws of the country were to enshrine shaming those who break the rules of proper conduct, rather than handing out punishments which do nothing to teach respect for proper conduct and to reconcile people who feel aggrieved against one another, or one family against another. (personal communication, August 2009)

Some informants spoke in favour of some aspects of the etiquette of *apsuara* evolving when necessary and not just being hallowed by age. But few examples were supplied of how this should take place. Yura Argun, the country's recognized leading academic on *apsuara* and the Abkhazian diaspora, did instance one case in which diasporic ethnic Abkhazians in Turkey (who are held by some traditionalists to have been able to retain traditions which have been lost in Abkhazia itself) agreed, at the request of the Turkish authorities, 'to cease firing off guns on all celebratory occasions' (personal communication, September 2009).

b) *Names* or clans

Custom recognises clans or *names*<sup>10</sup> as corporations, as the 'emic units' of a society (Goodenough 1971: 1151). It is not the individuals who are immediately involved in a dispute who are seen as the main societal units that are parties to disputes and their resolution, but the *name* is. A university professor who shot his son when the latter confessed to abducting, raping and then murdering a neighbour's daughter (Garb 2000: 6) some eleven years ago is spoken of with almost universal approval today: 'He made things right by restoring balance between the two *names* and practicing fairness,' according to an informant who was brought in to explain to doubters the way in which a problem of relationships between *names* had been well dealt with. In the eyes of the girl's family, the father's killing of his son compensated the family for the murder of their girl and thereby ruled out the need to seek blood vengeance, a practice that is spoken of as rare nowadays. The state's prosecutor protested but was unable to take the matter to court.

The *name* includes any person with the same surname or the surname of anyone married into the family over several generations, going back through both male and female lines. It can be small or cover hundreds of people, and marriage among any of its so-defined *name* members is considered incest. It is within the *name* or its sub-groups of

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<sup>10</sup> I use the italicised words *name* and *names* to denote the Abkhazian variation of clan, as do the Abkhazians to cover all people with the same name.

nuclear families that disputes are settled or collective action is decided upon. When the dispute involves members of two or more *names*, matters are nowadays usually pursued through putative customary arbitration procedures. I was told: ‘It is within the *names* that values and duties are inculcated in the young, and everything must be subordinated to the defence of the honour of the *name*’ (personal communication, September 2009). There are instances of the continued and universally approved use of the customary sanctions of ostracism and exile to deal with severe violations of norms, such as incest. These sanctions remove the protection that the *name* is normally said to confer on all its members against being offended by any outsider. The elders or the priests of the sacred shrines often act as conciliators who make for ‘reconciliation washing everything clean’, as I was told (September 2009).

Some informants were quite clear about the family – in its most extended sense the *name* – being the basic institution of social life, settled on the family house of the eldest male in the village and being the pivot of kin ties which privilege the male lineage, despite the law laying down equal rights to each party to a married couple, a matter I shall return to.

### c) Honour

Society tolerates and, indeed, expects individuals to exact retribution for insults, viewing them as committed against the individual’s family reputation. Those who settle scores are held in high esteem. What is more, nowadays, when a member of a family, on the instruction of its elders, carries out an act of retribution on a fellow family member for besmirching the family name through an offence against a member of another family, then a dispute with the offended family is halted without the courts, as illustrated by the case of the professor killing his son. I was told that the vengeance was justified in the Abkhaz saying: ‘A father is responsible for the conduct of his son’.

Here there is more than a hint of the real relationship between customary practices and law: custom centres its attention on restoring harmony. Punishments are decided by the immediate community or *names* that are concerned with the matter, and they prevail over the law. A respected elder from a northern Abkhazian village described to me in June 2010:

A night watchman shot and killed a young man who was caught in the very act of stealing power cable metal. The young man’s family demanded redress, upon hearing which a

respected judge contacted me [my informant, MC] by telephone and asked me to help stop the case going to court. I went to see the father of the boy who had been shot and acted as mediator between the families of the watchman and the young man, and the matter was settled after long deliberations. The family of the victim was spared the shame of losing a court case against a state employee who had acted in the course of carrying out his duty, and compensation was paid by the watchman's family to help the widow and children – an unnecessary court action was avoided.

The judge's fear, my informant explained, had been that the certainty that a court would find in favour of the watchman would have served no useful purpose, as relations between the two families involved would not thereby be restored to 'normal', and a prison sentence would not have prevented the dispute between families from continuing.

Another recent case of the use of customary practices to restore harmony was described to me by the same elder. A young man challenged another to wrestle. When the challenger had been thrown to the ground for the third time, he decided he had been publicly insulted and killed the other with a knife. It would have been an open and shut case had it gone to court, but, my informant explained:

A court sentence would have done nothing to return the dead man, nor left his family less aggrieved, so I was telephoned by a judge and asked to effect a reconciliation (September 2009). Nor would it have mitigated the effects of a family losing its breadwinner. So I was brought in as an elder, and the result of much to-ing and fro-ing was that the matter was smoothed out. The family of the young man who had unfortunately killed the other agreed to help finance the widow to bring up her two orphans. Good relations were restored in the village [in central Abkhazia] where the incident took place. It is true that there is now a danger that the dispute between the families will flare up again because the perpetrator of the killing was soon afterwards careless enough to go to a wedding in the village, a celebration, a joyous occasion, without first clearing this with the dead boy's father, and so soon after the death. There is more conciliatory work to be done there and it will not be easy, as 'loose-tongued women' are stirring things up, as women usually do.

One might note that the elder conducted his substantial negotiations with the widow's father-in-law as head of the family the woman had entered by marriage and brought him together with the father of the boy who 'used the knife'. This was not the incorporation of custom into law but precedence being given to the former, contrary to the literature that sees law absorbing custom (Bohannan 1965: 33-42).

### d) The individual

There are laws that forbid violence and killing, and the courts can mete out jail

sentences to offenders and, at times, do so. Yet the formulations in the Criminal Code allow for avoidance of the automatic intervention of the courts, especially when a matter of 'honour' has arisen. Thus one reads of 'a murder committed when in a sudden state of strong emotional upset (temporary insanity) brought about by force, mockery or gross insult on the part of the victim or by other illegal or amoral actions (or inaction) by the victim...' (Zakon 27.04.2009: 22: clause 101) being accepted as mitigations. This falls well outside the scope allowed for crimes of passion that one finds in many countries. An added indication of how individuals should behave when insulted is found in another clause of the Code. This virtually negates any law being applied against a person who has reacted violently to a perceived slight, as it asserts 'the right of a person to defend him-/herself irrespective of whether there are opportunities to avoid a dangerous infringement of public order or [the availability] of other individuals or organs of the state [i.e. the police, MC] to provide assistance' (Zakon 27.04.09:7: clause 36).

e) Family and patrilineage

The general practice of virilocal residence for a married couple enforces patrilineal ownership of the house the wife goes to live in. A story told to me by one of my hosts in the capital, Sukhum, in September 2009, unambiguously illustrated this:

There was a funny man in Zugdidi who married a woman and decided to live in the home of his wife's family, where she was the only child, hoping that it would give him a claim to the woman's family's house and that he would inherit it on the death of her father [laughter]. The man later divorced the wife and, funny fellow, he wanted to leave the house and asked for a share of its value! What a laugh! Fancy him thinking he could inherit from the wife's family. Was it not enough that by going to live in her family's house no one could understand who the husband was and who was the wife: he had become the 'wife', as it were, by living there, so how could he possibly claim any rights to the property?! [laughter] It all became public knowledge when the crank took the matter to court and the judge, of course, rejected his claim. What a laugh!

According to the law, property that has been accumulated by the partners to a marriage should be divided equally between them on divorce. The laws on marriage describe it as a union between one man and one woman, yet it is not uncommon for a man to take a second 'wife' should there be no children from the first, and for the 'first wife' to remain in residence to help bring up any issue from the 'second wife', acting, as it was expressed, 'like a grandmother to her grandchildren'.

f) Adoption

The new laws on the family (Zakon 2008) provide a detailed list of procedures that potential adoptive parents must go through in order to adopt a child, including registration of intent with the authorities, presenting a list of completed applications and documents, and registration of the lot by various state agencies. However, I was assured that in practice none of that paperwork had to be gone through and that it was sufficient to reach agreement with the child's mother in the nursing home or before the birth and then to take the child home. I met a couple who had adopted a child in a village in the north in this fashion, and they assured me that their case was no different from any others and that neighbours and friends knew all about it. They were surprised to hear that the law laid down procedures for what the adopted father called 'natural behaviour'. They were adopting under accepted customary procedures, that is, by arrangement with the mother. The whole idea that laws should determine adoption procedures was a subject of merriment in the circle in which I met the adoptive parents.

Simplicity in adoption is very much in line with Abkhazian customs, which have traditions that include adoption through milk kinship or *atalyk* (Inal-ipa n.d.), which are shared by other Caucasian peoples. This is so widely known that children who had been orphaned during the Second World War were sent from other parts of the Soviet Union in large numbers to Abkhazia for adoption. One informant in a village in south-east Abkhazia told me (September 2009) that she was the daughter of a Soviet Greek in the Ukraine and had been orphaned when the Nazi army murdered all her relatives. She heard of Abkhazian customs and travelled on her own to Abkhazia, where she was taken in by a family and later married an old Abkhazian, my informant's father.

There are virtually no orphanages in Abkhazia, and the fact that they have recently made a limited appearance is rarely spoken of and is seen as a national shame and a sign of the breakdown of society and values following the war with Georgia.<sup>11</sup> Looking after children is seen as the responsibility of parents and grandparents, and the new law makes this a legal responsibility. Even in the case of divorce, access to children is guaranteed by law to both parents and all grandparents until the child comes of age.

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<sup>11</sup> Abkhazia's vice-president, Alexander Ankvab, estimated the cost of 'the enormous damage to agriculture, industries and holiday resorts...in which whole villages and towns were burnt to the ground' in the war of independence against Georgia in 1992/93 as totalling US\$13-14 billion (Apsnypress 27.5.2010).

g) Ritual

My observation of a ceremony for the mourning of the dead showed how much more simplified it is compared to the way in which it was described as recently as the 1950s, when women tore their faces and men, including those who were present by chance, would violently beat their heads (Lakerbay 1982: 176-87) to show their respect and sadness for the departed. Nowadays even relatives, and that may include those many times removed, may only put in brief appearances and contribute little more than some defraying of costs, a bow and a few words to console the widow and children. But it is still regarded as obligatory for all relatives to be present, and deaths are announced on television. Traditionally runners or *a.shwadzh.hwa.jw* (the *gorevestniki* of Russia) would have informed every relative of the death and the arrangements for mourning. While the law stipulates that the dead are to be buried in municipal sites, there is a derogation 'for those with customary practices' (Zakon 2007: 43), and it would appear that the first stipulation only applies to the minority of urban dwellers who have lost links with the villages. I observed that in the villages the dead are buried alongside the family house, and food and drink are placed on the tables by the graves. The fourteen-year-old boy of my host family in Sukhum expressed amazement: 'Is it really true that you do not feed the dead in England!?' Respect for the ever-present dead, a link with the spiritual world, is an obligatory requirement of *apsuara*.

**Distortions of custom, contradictions in changing times**

The examples I have cited might suggest that disputes are all settled amicably, but that would be to forget that the reality of unequal family standings (and sizes) plays a part in distorting any idealised picture. Thus, the small family of a woman who, during a row with another, was axed about the neck recently took the matter to court. However, according to my informant, a judge in the capital, the axe woman was acquitted after her family packed the court room and interrupted proceedings by shouting and threatening to destroy the metal cage in which the accused had been placed, arguing that the woman who used the axe had been provoked. The judge's comment to me was: 'It is quite likely that what happened in the courtroom influenced the local judge's decision...'.

In the view of my informant, part of the problem was that the courts lacked 'the air of solemnity that I observed on a visit to Scotland' and were unprotected by not having staff to enforce order in the court ('I have seen how there is personnel with truncheons in courtrooms in Germany') and depended on the local police to arrive in

time should a fracas break out – ‘and they can take a long time.’ In my presence, the chairman of the Supreme Court telephoned from his office for police assistance to stop a fight that had arisen in town between two families. A court order that had been issued some months earlier for a family to vacate a flat had not been enforced, and the family on whom the eviction order had been served was physically resisting the efforts of the other family to move in.

A recently retired senior police officer told me how mobilisation of a very large *name* with important connections ‘in many spheres of life’ secured the freedom of a relative, a drunken bus driver who had run down and killed a pedestrian on the verge of a country road. Within hours of the incident, agents of the influential *name* of the driver had re-asphalted the section of the main highway where the death had occurred, removing the skid marks left by the bus’s wheels, ‘persuaded’ the investigating commission to move the point of collision from the side of the road on to the highway, and secured a judgement in which the dead pedestrian was held to be responsible for his own death.

The law is turned to when a person’s family shows weakness in settling scores, or is unable to restore harmony through retribution or gift exchange and ritual commensality. The list of cases to be heard over two weeks in Sukhum’s courthouse when I attended was almost entirely about the ownership of small properties and rights to residence in them.<sup>12</sup> About 70 per cent of all cases heard in local courts are disputes about property or ‘the accommodation question’, as Tamaz Ketsba, a well-known local lawyer, told journalists (10.2.10).

In a trial I sat in on in Sukhum, the state charged several young men with burgling a woman’s flat. The two of the accused who responded to the summons to appear were from single mother families, unemployed and poor and clearly with no *name* to defend them. One of the young men appeared mentally confused. In private the prosecutor impressed on me his concern that, bearing in mind that most of the stolen property had been reclaimed, some way of keeping the accused out of prison should be found.

Statistics on reported crime are very suspect, showing a total for all kinds in 2007 of 692, when a police informant told me that over a thousand cases of car theft took place at around the same time. Debt collecting is generally carried out by the family members of the creditor or ‘people of standing in the community’ using threats and

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<sup>12</sup> Such disputes have in large measure been occasioned by shifts of residence and people moving into flats abandoned by those who fled during the war with Georgia.

violence (port worker, taxi driver, policeman and tour guide among other informants).

Divorce is, according to official statistics, on the increase, being over twice as high a fraction of marriages in towns as in the rural population in 2007 (State Statistical Office 2008: 24), a possible indication of new, unmastered pressures on the high proportion of the population that has become urbanised over the past two decades and for whom traditional practices are not a powerful enough mechanism to maintain cohesion.

A legal obligation has been placed on adult children to care for their parents and grandparents, in an effort by the lawmakers to recognise customary practices. What penalties might apply when the law on these aspects of the family are broken has not been tested. A sign of changing times is the frequency with which I encountered an interest, especially among women, in the smaller nuclear family that we find in Britain and in the social provision of care for the elderly, women being freed from much of what some Abkhazian women saw as the burden of being tied to ailing elders and grown up children in the same house. On several occasions the same women who had spoken with pride in traditional Abkhazian family values turned to cursing the burdens that were placed on them. They spoke of the heavy manual work that Abkhazian women carried out these days, including pulling loaded handcarts across the border with Russia to sell agricultural produce. With another voice they extolled the strictly gendered features of Abkhazian families, especially the view that the man was breadwinner and the woman was house-maker, as if this still applied throughout. It was striking to be told in September 2009 by the vast majority of a group of female students, with whom I had a discussion in the history department of the university, that they did not see their future as working in a profession outside the household.

My own experience of the practice of the correct conduct sought through the *apsuara* social code was being met with much politeness, standing up in my presence and receiving the first handshake when I was the oldest present, even from a complete stranger who joined the company. On more than one occasion a stranger anonymously paid for my coffee in a cafe. On the other hand, I was told, the failure I observed of young people to give up their seats on a bus to an older person was something very new, as was young people shouting in public and noisily racing cars around the streets in town at night. No informant denied that changes were taking place, while at the same time stating as axiomatic that 'abkhazianness' demanded conformity with the old ways of behaviour.



## Conclusion

In my years as president, I have never reacted to any written provocations. No one harassed Inal Khashig [an Abkhazian newspaper editor, MC] when he was criticising the state. It was only when he wrote about my family – and in a vulgar way – that my relatives and a few of my close friends got angry. They sat him in the car, and they said to him: ‘Now it’s not just about the president; now it’s personal.’ But that’s the Caucasus. Around here, you have to answer for insults like that. (Sergei Bagapsh, President of Abkhazia, *SpiegelOnline*, 16.7.09)

We want a state based on a constitution and founded on the norms of international law. That requires new laws and a new way of thinking. (Sergei Bagapsh, President of Abkhazia, *SpiegelOnline*, 16.7.09)

Informants in general saw no contradiction in principle between custom and law, as illustrated by the two statements by Sergei Bagapsh above. Customary practices for dispute resolution were spoken of as deriving from a higher authority than what can be enshrined in law, taking precedence over law through moral imperatives of what they understood by tradition, by *apsuara* and *apsua tsas*. It was something of a play on ‘Render unto Caesar the things which are Caesar’s, and unto God the things that are God’s’ (Matthew 22:21), or on the contradiction between God-given custom and the demands of the state and its law that was posed by Sophocles in his *Antigone* and much debated in the many *Antigones* that have followed it (Steiner 1984).

While Abkhazians orally subscribed to the idea of a need for law enforcement, and for government and police, this was, for most informants, only in order to tackle problems that have arisen in what are described as the extraordinary conditions of the post-war years, which has led to the break-up of communities and resultant crime, disputes over property and damage to traditional gender roles. With hoped-for improvements in living standards and stability and with security reinstated, some informants spoke of their expectations that there would be a return to community-grounded custom, which retains its power as an ideal. These hopes were even expressed by those I observed not keeping to traditional etiquette and gender roles in their daily conduct, by those who were abandoning communal approaches and by women who decried the very inequality of genders they saw as part of custom.

The new laws allow for custom to reconcile the parties to disputes, to keep

disputes out of the courts and to avoid penalising those the law would find guilty but without effecting reconciliation. This is not agreed by those who want to see their society more founded on law. There is, from the evidence, no intention to have in operation a two-tier system of laws and courts as found under colonial indirect rule or some post-colonial systems. At the same time, there are voices calling for the incorporation of ‘factually existing sub-systems of customary laws [sic] into legislation’ (Bartsyts n.d.). This approach suggests that it is worth re-examining the anthropological discussion on formalism and substantivism of the 1960s (Spencer 2004) and to trawl relevant ethnographic texts that might contribute to developing a methodology<sup>13</sup> for research into a society in which there is an attempt to embed law into custom. The work of de Certeau (1988) and Scott (1985) among others on how cultural and social institutions express the manner in which societies and the individuals within them – not necessarily the same – pursue the fulfilment of their needs and desires can also prove relevant. It would be a mistake to omit Karl Marx’s studies on the socio-economic relationship between people’s conceptions and changes in the relations of production in societies (1998), especially as Abkhazia is undergoing radical economic change.

This article has concentrated on the evidence of customary practices in the management of disputes. The cases that have been examined demonstrated aspects of customary practices, etiquette and the rules of behaviour or *apsuara*, as well the ideals of honour, fairness, reconciliation and of direct (participatory) democracy or *apsua tsas*. Even informants who did not agree with the approach shown in the first of President Bagapsh’s citations that head this section revealed in discussion that this was motivated more by their view that the journalist Bagapsh criticized was in the right, as there has been a paucity of prosecutions of known or believed-to-be corrupt officials,<sup>14</sup> rather than by the extra-judicial use of ‘persuasion.’

While informants widely expressed support for *apsuara* and *apsua tsas* as representing a time-proven system of values and rules for personal conduct, there were different interpretations of their contents and how these could nowadays be implemented. For some it was a matter of emulating the personal qualities that are personified in the heroes of the Nart epic, while for others it was an idealised picture of

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<sup>13</sup> Using the term in the sense of ‘the systematic study of the principle guiding...anthropological investigation and the ways in which theory finds its application’ (Ellen 2010: 291).

<sup>14</sup> Mr Bagapsh has expressed concern that ‘today many business structures are run by criminal elements’ and recognises that there are cases of corruption among state officials (Apsnypress 26.5.2010).

‘the past’. For yet others it was a project for selecting from the past with the exclusion of, for instance, blood feuding.

Some saw it as simply a matter of maintaining decent and respectful behaviour, promoted by education in the family and school, and underpinned in law; for others, customary practices should be allowed to continue and laws were just a fall-back, to be used as little as possible. It is this last position that is allowed for in the body of today’s Abkhazian laws and that makes the experiment the country is undergoing unique in modern history. This represents a fundamental modification of the experience of most states in that it reverses the relative positioning of the rule of law and the order of custom, which in principle accepts the central argument of, among others, Stanley Diamond – that custom requires that producing harmony is not the business of state agencies from outside the community but can be safeguarded within the community, with the pre-eminent aim of bringing about the reconciliation of the parties in dispute. It was only when I was the one who asked how the differing and conflicting approaches of custom and law were actually to be reconciled that informants had something to say about it. Some suggested that custom should be included in the laws, while others spoke vaguely about ‘making them work together according to the mutual respect embodied in *apsuara*’. In such discussions I came across no supporters for the idea of abandoning the law and leaving all matters of ‘bad behaviour’ to be resolved in the community in today’s circumstances. This was apparently because there was an underlying awareness (which I did not question) that, whatever their stipulations, those who drafted the laws did not spell out in so many words that custom had pre-eminence, but gave it, as it were, the first bite of the cherry in resolving problems.

At the same time, some informants voiced reservations about this being the best way of resolving disagreements when it came to specific cases where physical or other methods of intimidation were used by powerful individuals or *names* to get their way, and where corruption was said to sway some of those in positions of civil responsibility, especially in the state administration. The most important influence on people’s notions was today’s crime wave, which, informants agreed, traditional methods of reconciliation have not been able to prevent or contain, although there are instances when direct action has been used to good effect, such as the accepted gunning down of drug dealers in the most lawless years of the early 1990s. Informants did cite the new growth in extensive private ownership of property, of houses and cars, of a growing divide between those for whom life is very tough and those who have become rich as major factors in this

new situation for Abkhazians, opening up a space for inroads into customary practices to be made by law, especially on property, as instanced by the high proportion of cases of property claims the courts deal with.

President Bagapsh gave weight to this view when he told me: ‘For a person occupied with business, *apsuara* is the last thing he thinks of, and his business comes before everything else’ (personal communication, 10 July 2010). In the same interview he spoke of the strength of a sense of self-respect among Abkhazians: ‘There is no toadying to ranks here, unlike in some countries’. While extolling the virtues of *apsuara* for being ‘in the first instance, respect, respect for elders, respect for the family, for the father, for the mother,’ he added that there was ‘a conflict between the tradition of reconciliation and punishment, [but] the foundation must be the law [...] Today we must have the law, above all else, law which takes into account traditions – something that is very delicate. The time has passed for the President to be the head of a clan or an arbitrator’.

Nonetheless the wording of the laws encourages customary procedures: the principle that all matters that can be resolved outside the courts should be kept out of them. Yet, the cases of car theft and incidences of rape (a rare thing in the past), of drunkenness and the use of drugs, of burglaries and ‘hooliganism’ (rude and intimidating behaviour in public places) and corruption have led informants to seek stronger redress from the laws and protection by its enforcers, especially the police.

The trend is towards demanding that legal agencies be used to curtail anti-social behaviour in the broadest sense, accepting that customary practices are not able to tackle problems linked to the historically new phenomena of the private ownership of property and business, of the means of production, and that widening class differences in wealth and power in the aftermath of the collapse of Soviet collectivism are all narrowing the scope for the resolution of disputes by customary practices that are grounded on principles of egalitarianism. Today the principles of custom are being undermined more than they ever were in the Tsarist and Soviet periods. According to Paula Garb, ‘The Soviet state also objectified indigenous custom that it sanctioned, which has left a powerful legacy in the thinking of post-Soviet anthropology and of the intelligentsia of indigenous peoples’ (2000: 8).

In the first post-Soviet years, there arose a strong revivalist movement to return to ‘tradition’ that continues, as witness a recent characterisation by the leaders of the Abkhaz Orthodox (Christian) Church of the code of *apsuara* as ‘God granted’ (Appeal

of the Abkhaz Orthodox Church, 2009). Whatever the semi-official mediation in disputes that, at times, involve the guardians of the spirit sanctuaries and the presence of these guardians on state ceremonial occasions, the establishment of a consultative Public Chamber in which what is called ‘civil society’ has a voice and the existence of a state-recognised Council of Elders, it is significant that the recent appointment of judges throughout the country was of individuals with qualifications that are legal and not customary. All informants spoke, usually regretfully, of elements of what the literature in Abkhazia describes in glowing terms as the virtues of *apsuara* and *apsua tsas* as becoming lost or as atrophying.

It would appear that states only accommodate customary practices widely when they are weak, as noted among Abkhazians (Garb 2000: 4) and pointed out by Richard Antoun from a study of Jordan (2000: 443). I am led to conclude that the hold of customary practices will decline should the social and economic changes now taking place continue. Certainly President Bagapsh’s words express such an expectation. Shortcomings in the workings of the state’s institutions, especially among its enforcers, have opened up a space for elements of ‘law-lessness’ that are also ‘custom-lessness’, as is the case in other societies with weak state structures. Powerful sections of society – big *names*, the nouveaux riches, gangsters and the rest – by-pass both law and custom, even if they are dressed up in the understandings of some as customary regulators. Abkhazians find that calls for fairness are not answered by the state and that the egalitarian foundations of ‘traditional’ custom (if such a term is permissible) and, indeed, of the Soviet period are fast disappearing. The state is trying to reconcile this with its laws, the wordings of which still allow for the continuation of *apsuara* and *apsua tsas* (without naming them) to the extent to which people are able to apply them. *Apsuara* and *apsua tsas* remain powerful ideals. The contradictions that arise from wanting both custom and law are highlighted in the quotations above from President Bagapsh. For the time being, at least, the Abkhazian approach to custom and law represents a unique attempt to treat them as coexisting entities. This topic must be kept under review by anthropologists. There is also much room for research into other features of Abkhazian practices and conceptions, to dig into ‘the veritable gold mine’ of Abkhazian culture that the interesting Swedish cultural historian Harald von Sicard glimpsed (1961) when he read a 1960 monograph on the Abkhazians by Shalva Inal-ipa.

There is a very real sense in which Abkhazians, through their attempts to hold on to what they perceive as custom, are seeking in a novel way to achieve what Herzfeld

has suggested should be the object of anthropology when he asked: ‘...how can anthropology contribute to a rethinking of the social that will make it, not the space of regulation, punishment, and blame, but rather that of relief, care and acceptance?’ (Herzfeld 2001: 217). There is considerable room for further research on this issue.

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