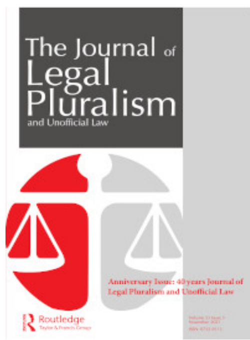

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ESSAY

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Forum shopping and shopping forums: another 40-year anniversary

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ABSTRACT
In the first year of the journal of Legal Pluralism's existence, Keebet von Benda-Beckmann's article *Forum shopping and shopping forums. Dispute processing in a Minangkabau village in West Sumatra* was published. Christian Lund reflects on the continued theoretical and methodological relevance of the article for the social scientific study of law and legal pluralism, property and conflict, institutions and authorities, and the role of claimants.

KEYWORDS
Heuristic theory; social contracts

In the course of an academic life, you read many texts. Books, articles, manuscripts, and assignments all deposit a little sediment in your mind and form your thinking. And then, there are the texts that irreversibly change your mind. Texts that, once you have read them, cannot be unthought and disentangled from the way your mind works from that day on. Keebet von Benda-Beckmann's *Forum shopping and shopping forums. Dispute processing in a Minangkabau village in West Sumatra*, published in this journal in 1981, changed my mind in this way (Lund 2008, 2016, 2020).

The article analyses a property conflict in a Minangkabau village, Bukit Hijau, on Sumatra's west coast in Indonesia. Keebet, and her husband Franz, had been collecting data for their research in 1974-75, and the area remained their favourite joint stomping ground throughout their careers (Benda-Beckmann and Benda-Beckmann 2013). The key point of the article is expressed from the start: "A variety of institutions can deal with disputes in Minangkabau [....] Minangkabau disputants therefore can choose between several institutions. In analogy to private international law, I shall speak of 'forum shopping' here, because disputants have a choice between different institutions and they base their choice on what they hope the outcome of the dispute will be, however vague or ill-founded their expectations might be. There is, however, another side to the problem. Not only do parties shop, but the forums involved use disputes for their own, mainly local political, ends" (p. 117).

The paper starts out by outlining the range of institutions that can be addressed by people in conflict. State institutions such as courts, police, and the civil

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administration in all its different forms are paralleled by customary (Indon. *adat*) institutions from lineage and neighbourhood groups to different levels of village leadership. All these institutions are organised in tentative hierarchies but also in terms of competencies (questions of inheritance, types of land disputes and so on). Consequently, there is a perpetual structural overlap of jurisdictions.

At this point, Keebet demonstrates the structural features of legal and institutional pluralism. Unveiling the multiplication of institutions of political and legal authority is one of anthropology's contributions to the theories of the state. We may share an *idea* of unity of the state, but *empirically*, the political field is more of a bazaar. It is honeycombed with many localised subfields in which an uncertain number of institutions exert authority with more or less talent. It is interesting how the conflict over the fishpond does not seem to be based on a disagreement over facts. There seems to be a relative consensus about whose pond it is, who did what, and so on. There is a very little contestation of the substantive norms in the case. The disagreement, or the competition, is over the institutional competency to interpret the *significance* of the different actions of the parties. Should the owner have been asked to cede the pond to the community in a particular way? Should he have responded in a particular way, and so on? And here, the different forums, or institutions, offer some variation in norms and codes. The forums appear as more or less attractive options for the litigants in their efforts to persuade the relevant public of the justice of their claims (Rose 1994).

Keebet could have stopped her analysis here and simply describe how actors operate in structures as energetic lab mice in a maze searching out different ways to access the big cheese. Then, all forms of self-seeking behaviour inside institutions could have been dismissed as aberrations or corruption where the people who populate the institutions have misunderstood their role as the custodians of structure. However, Keebet remains true to her observations of the different institutions. They are not simply inert structures mechanically guiding and processing disputes. Sometimes, they are themselves litigants, or parties in the conflict. Some of the institutions move in and out of a state of being a party with interests at stake and a seemingly neutral umpire who disaffectedly rules in the affair. She breathes life into the institutions by taking seriously their actions and interests, their competition, and contradictions. By remaining true to the phenomenological observations of acting institutions, the author shows that socio-legal conflicts have more movable parts than just the litigants; the whole institutional context is also always in the making.

As a piece of academic text, *Forum Shopping and Shopping Forums* is theoretical in two distinct ways. First, it offers what you might call a theory of the conflict over the fishpond in Bukit Hijau. It is the author's attempt at an explanation of events in a specific place at a certain moment in time. All our empirical research does this kind of work; it provides what we hope is a plausible explanation of an empirical situation. Such substantive analysis is both a very detailed and very small theory; precise but also very circumscribed. What our work as social scientists does to a much more varied degree is to stimulate a second kind of theoretical undertaking by implicitly raising questions. The heuristic quality of the article is more suggestive, but potentially with a much wider application. It is this, I believe, that

has given the article its longevity and popular use. I believe there is a series of connected questions or fields of investigation that the article opens, so let me dwell on some of the most significant issues we can take to other contexts and develop further.

First, by taking the actions and the interests of the institutions seriously, the article probes at the relations between claimants and institutions. What is the substance of the relationship, so to speak? It can probably be several things, depending on the context, but one generic feature is, I suggest, *recognition*. Claimants look for recognition and validation of their claims with institutions. However, the processes of recognition of claims to land and other resources as property, or of political identity as citizenship with entitlements, simultaneously invest the institution that provides such recognition with recognition of its authority to do so. That is to say, the act of authorizing recursively authorizes the authorizer. Struggles over a fishpond are therefore as much about the scope and constitution of political authority as they are about access to resources and membership of a political community. This is important because it suggests that conflicts are rarely about a single issue only. Both questions of property and authority at stake, and any outcome in terms of property affects questions of authority, and vice versa. Keebet's article, thereby, stimulates a permanently dynamic perspective between claims and institutions, between rights and authority.

This perspective also suggests that we can look at different fields in society as spaces for *social contracts*. There is a huge literature on social contracts, and some reserve the notion for macro-phenomena between states and specific classes or entire populations. Such, Magna Carta-size perspective has its merits, no doubt, but Keebet's micro-perspective allows a forensic inspection of social contracts at village level as something tentative, and transient, as something that may or may not endure. This is crucial because if efforts to establish social contracts are ignored or classified as insignificant merely because they may be unsuccessful, then all successful outcomes become endowed with a quality of inevitability, which removes from the historical process its precariousness and multistranded nature. The micro-perspective of people's attempts to claim, entrench and institutionalize – however mundane or foolhardy – at the very least reflect their experience and grasp of opportunities at the time. Keebet's perspective allows us to see law as process where people's efforts to make rules and symbolic orders meet with almost equal efforts to circumvent, remake, and replace them (Moore 1978). And most significantly, the dynamic micro-perspective allows us to see how it is not just the litigants who seek out social contracts to have their interests accommodated; the institutions of potential public authority are equally in search of social contracts and social relations.

This leads to a third and related avenue of inquiry, namely, the very *genesis* of institutions. If institutions feed on the recognition of claimants, it means that their authority can spring from the claimants' appeal for recognition. Claims to rights prompt the exercise of authority. Hence, an organization or an office may have little or no authority within a particular domain unless, and until, claimants invest the institution with this authority in the form of an expectation to weigh in on a question. The question can be about property, but, in fact, questions of citizenship and other forms of enfranchisement are equally relevant. By examining the expressed

need for an authoritative ruling by citizens, we may therefore be able to see how institutions *emerge* as a response to an opportunity. This perspective may be quite unsettling as it puts at least some of the drive for institutionalization outside the institutions themselves. So, not only should we be prepared to see "the state" or "government" as an amorphous assemblage of institutions on the prowl for recognition; we should also be prepared to look for their genesis outside of themselves. Institutions of public authority may emerge because of a need and opportunity and not only by design. Sometimes this may take very subtle forms, where the forum or institution does not make substantial pronouncements about right and wrong but expresses opinions about procedural matters. This way, the institution is not directly usurping the jurisdiction of another forum, but possibly influencing the conduct, the framing and the outcome, all the same.

I will touch upon a final and related path of reflection that the article stimulates. Although the article does not pursue it as such, it suggests that we must pay attention to *legal visibility*. The existence of multiple forums or institutions that people can address with their grievances may at first glance look as an excess of choice. However, in most societies with legal pluralism, access depends on political subjectivity or legal visibility of the plaintiff. Attributes such as gender, race, and caste, as well as class, creed, and conviction give human beings different legal standing or visibility as rights subjects. Not everybody can access the court, and not everybody can take a case of property to a customary institution if this institution does not recognize the capacity to own land of a woman, an immigrant, a ward, a person of a particular caste, faith, or persuasion.

People may be invisible as rights subjects in the eyes of certain institutions and thereby not even enjoy the rights to have rights (Arendt 1973). The choice of forum may therefore be quite limited, and it becomes all the more important that people acquire visibility, a presence in the eyes of other relevant forums and institutions. Such visibility is acquired in many ways. To the state courts, it may be important to present a tax receipt or an official ID card whereas the religious institution will set store by your diligent participation in the congregation's activities. In other contexts, participation in festivals, collective work, or paying respect – in cash or kind – to local dignitaries, may establish your legal standing and visibility. Sometimes it is not the litigant him- or herself who is invisible as a rights subject, however, but rather the grievance which cannot be seen or heard. There simply might not be an appropriate forum where to vent it. In such cases, the original grievance may transform into a different claim and provide indirect recognition to the first one. For example, it may be impossible for a farmer to acquire recognised land rights, but it may, instead, be possible to join a government sponsored programme to try out a new seed variety. The registration of the farmer and the relevant plots in a government file does not produce property rights, but it does establish a trace of a connection and an indirect recognition of the claim. It may be wiped out or overwritten, but it may also set and consolidate.

If actors shop for institutions to recognize their claims, and institutions of authority shop for controversies to settle and claims to grant, then the efforts to establish legal visibility by claimants is most likely mirrored by the institutions' efforts at appearing relevant, effective, and legitimate. This may explain why and

how institutions operate. And it may explain how existing forums or institutions can be re-purposed by accident and contingency to accommodate claimants, and why initial jurisdictions can expand or shrink in ways we would not have anticipated.

The perspectives that Keebet animates with her article force us to be quite open for what institutions are. A lot of ink has passed under the bridge, yet we still must make do with a degree of approximation about the concept in the social sciences. However, we may, possibly, take inspiration from quantum physics at this point. According to this particular scholarship, light is both particles and waves, depending on how you look at it. Maybe we can, similarly, think of institutions as both social rules *and* the organisations engaged in their enforcement. Hence, in addition to social rules that guide behaviour, institutions are arenas for hammering out those very rules, interests, jurisdictions, procedures, and so on. Moreover, institutions are also the actors involved in the competitive enforcement of the social rules and the constant adaptation of the reach of jurisdictions. Finally, they are instances of authority. As such, institutions are eminent manifestations of power relations in society. Not in a monochromatic or mechanical way, though; society's pluralism works against that.

By reading Keebet's article for both its substantive findings – her theory of the fishpond in Bukit Hijau – and its heuristic, suggestive directives, we are better able to investigate the contexts in which we work, whether it be the village once over on Sumatra or as faraway places as Congo, Colombia, or Copenhagen.

Disclosure statement

No potential conflict of interest was reported by the author.

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