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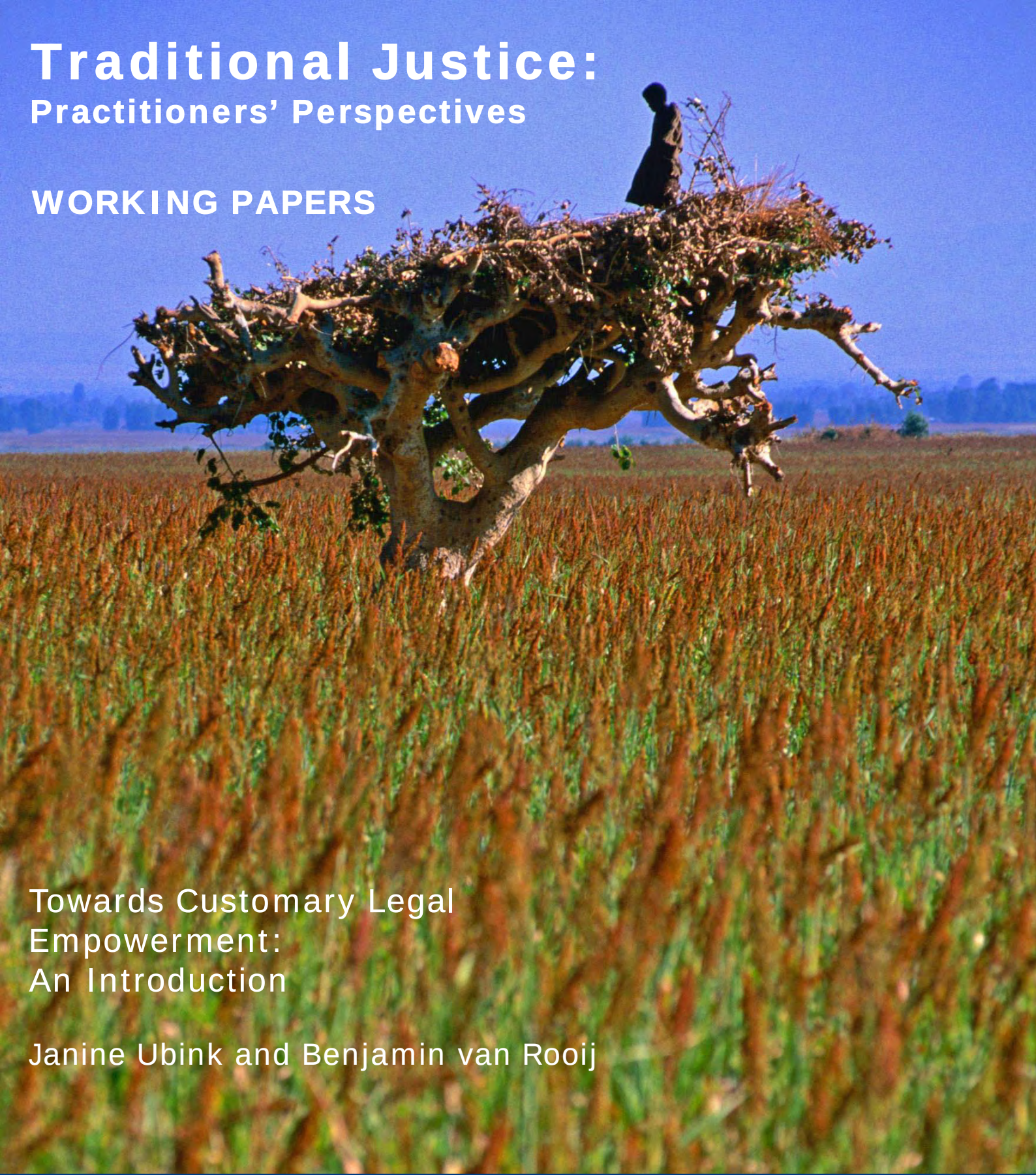

Towards Customary Legal Empowerment: An Introduction

Janine Ubink and Benjamin van Rooij

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Towards Customary Legal Empowerment:

An Introduction

Janine Ubink, Benjamin van Rooij[1]

In the last few decades, tradition, or at least what has always been portrayed as such, has proven resilient, and in many countries, customary justice systems[2] have returned to the fore. Africa is a prime example of where chiefs and customary justice systems continue to dominate or made a comeback in the last decades.[3] Also, in many Asian and Latin American countries, customary justice systems are vital. See for instance the role of *adat* in Indonesia;[4] the *Lok Adalat* tribunals in India;[5] and the disputes over recognition of customary indigenous group rights in Bolivia or Columbia.[6] Customary justice systems even play a role in Northern America and Australia, where there have been intense struggles surrounding the recognition of 'native' group rights.[7]

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[2] There is no generally accepted definition of what constitutes customary law. In general, customary systems of justice refer to the types of justice systems that exist at the local or community level, that have not been set up by the state, and that derive their legitimacy from the mores, values and traditions of the indigenous ethnic group. Although they are often indicated by the term 'informal' or 'non-state', they do not exist unrelated to, and function independently from, state legal systems. On the contrary, customary and state legal systems define each other in their many interactions.

[3] B Oomen, *Chiefs in South Africa: Law, Power, and Culture in the Post-Apartheid Era* (2005).

[4] T Murray Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot' (2000) 1 *Comparative Studies in Society and History* 42.

[5] M Galanter and J K Krishnan, 'Debased Informalism: Lok Adalats and Legal Rightsin Modern India' in E G Jensen and T C Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003).

[6] R Sieder (ed), *Multiculturalism in latin America, Indigenous Rights, Diversity and Democracy* (2002); W Assies, G van der Haar, and A Hoekema (eds), *The Challenge of Diversity, Indigenous Peoples and Reform of the State in Latin America* (2000).

[7] A Kuper, 'The Return of the Native' (2003) 44(3) *Current Anthropology*; C Machlachlan, 'The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm-A review article' (1998) 37(2) *International and Comparative Law Quarterly*; M J Matsuda, 'Native Custom and Official Law in Hawaii' (1998) 3 *Internationales Jahrbuch für Rechtsanthropologie*.

Over the last decade or more, customary justice systems have become an increasing priority for international organizations working in legal development cooperation.[8] Examples include support for the re-constitution of *Gacaca* courts to deal with the immense number of suspects of the Rwandan genocide,[9] and projects aimed at bridging customary and state tenure systems to try to capitalize on customary land resources following the influential work of Peruvian economist Hernando de Soto.[10] Other examples are development projects that seek to improve the position of women in customary settings, for instance, through changes in national legislation governing customary law, legal awareness training, or local level civil society engagement by paralegals.[11] How can this interest to engage with customary justice systems be explained?

Traditionally, donor-led legal reform projects have emphasized formal institutions, such as the judiciary, legislators, the police and prisons, and paid less attention to customary justice systems. The prominence of customary justice systems has often been regarded as incompatible with the modern nation-state and therefore as something to be discouraged or ignored rather than strengthened or engaged with.[12] However, a growing body of evidence suggests that poor people in developing countries have limited access to the formal legal system and that their lives are largely governed by customary norms and institutions.[13]

As such, customary justice systems play a much more important role in the lives of many of the world's poor than do state justice systems. One study refers to figures collected by development cooperation departments in the United Kingdom and Denmark, indicating that, in some countries, up to 80 percent of the population is governed by customary justice systems and has little to no contact with state law.[14] These figures are corroborated by findings from academics who study African law, showing that customary justice "governs the daily lives of more than three quarters of the populations of most African countries",[15] while according to one author, "up to 90 percent of cases in Nigeria are settled by customary courts".[16]

Customary justice systems are thus the lived reality of most people in developing countries, especially in rural areas. On the one hand, it is a choice, in cases where people select customary justice institutions over state institutions for their perceived positive attributes. On the other hand, it is a need, in localities and cases where limited

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[8] See for instance E Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute*, UNDP Oslo Governance Center (2006); UNDP, *Programming for Justice: Access for All. A practitioner's guide to a human rights-based approach to access to justice* (2005); Commission on Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone* (Vol. 1, 2008); Department For International Development UK (DFID), *Non-state Justice and Security Systems: DFID Briefing* (2004).

[9] See for instance, H Cobban, 'The legacies of collective violence' (2002) *Boston Review*; A Corey and S Joireman, 'Retributive justice: The gacaca courts in Rwanda' (2004) 103(410) *African Affairs*; B Oomen, 'Donor-driven Justice: The case of Rwanda' (2005) 36(5) *Development & Change*; M Rettig, 'Truth, justice and reconciliation in post-conflict Rwanda' (2008) 51(3) *The African Studies Review*; S Power, 'The two faces of justice' (2003) *The New York Review of Books*.

[10] H De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2001).

[11] Wojkowska, above n 8.

[12] L Chirayath, C Sage, and M Woolcock, *Customary law and policy reform: Engaging with the plurality of justice systems*, prepared as a background paper for the 'World Development Report 2006: Equity and Development' (2005) 4.

[13] Poor people's use of customary justice systems may reflect the limited access to and weakness of the formal justice systems, rather than an active choice for the former based on their satisfaction with them (Swiss Agency for Development and Cooperation (SDC), *Rule of law, justice sector reforms and development cooperation* concept paper (2008) 3.

[14] S Golub, 'A House without Foundation' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace (2006).

[15] C Sage and M Woolcock (eds), *The World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006).

[16] C Anselm Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' in C Sage and M Woolcock (eds), *The World Bank Legal Review: Law, Equity, and Development* (2006) 143-44.

penetration of state institutions or lack of access to them is combined with a strong or at least a stronger local presence of customary institutions.

Positive attributes associated with customary dispute settlement include physical accessibility, the use of familiar procedures and language, the limited costs of dispute settlement procedures, the short duration of case resolution, knowledge of the local context among the dispute settlers, and the more restorative nature of the process. Less positive aspects include social pressure on disputants not to refer a dispute to a state court and disputants' fear of reprisal or social ostracism should they enter the formal justice system.

Notwithstanding the importance of customary dispute settlement for the majority of the poor, the prominence of customary justice systems in first instance lies more in the regulation of important aspects of daily life, such as access to land and natural resource management, and family issues such as inheritance and marriage, than in the settlement of occasional disputes. In fact, the administrative and dispute settlement powers of traditional leaders are intrinsically connected:

> (a)ny resident living under their jurisdiction who wishes to appeal a 'judgment' of theirs must think very carefully what the cost of that decision is going to be. Given the fact that they and their extended family may need the chief's goodwill for a future decision in relation to local government functions — allocation of land, invitation to be an *nduna* (advisor), inclusion in a development project, referral to any other government service — all these decisions are interrelated.[17]

Several of the positive attributes of customary dispute settlement mentioned — including physical presence, familiarity with local context and limited costs — are also applicable to customary administration. In particular, in debates regarding natural resource management, food availability, and natural resource depletion and degradation, there are strong proponents of customary administration. They contend that the involvement of local people and their local normative systems enhance sustainable development. Local communities have a tradition of living close to nature and can thus provide insights into resource allocation, development and management that would not be exploited if a purely state-centric approach were adopted. In addition, the study of common pool resources management argues that customary, communal and natural resource management systems are more efficient and effective than their private or state alternatives.[18]

The limited effect of reforms in the state justice sector on the majority of the poor, combined with increased recognition of the wide reach and accessibility of customary justice systems have led to a changing attitude among donors towards customary justice systems and towards an interest in building on their positive elements for the benefit of the poor. This approach is consistent with the rise of 'bottom-up' legal development cooperation approaches,[19] which seek to directly reach the poor or marginalized groups through their interventions, instead of hoping that state law reform projects 'trickle down' to benefit those at the bottom of developing societies.

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[17] W Schärf, *Non-state justice systems in Southern Africa: how should governments respond?*, University of Cape Town (2003) 7, 8.
[18] F Von Benda-Beckmann, 'The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice' in C. Sage and M. Woolcock (eds), *The World Bank Legal Review: Law, Equity, and Development* (2006) 57-58; E Ostrom, 'Private and Common Property Rights' in B Bouckaert and G De Geest (eds), *Encyclopedia of Law and Economics* (1999); UNDP, above n 8, 100-103.
[19] B Van Rooij, *Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation*, Working Paper (2009)

1. Overcoming the negative aspects

This new donor engagement not only focuses on enhancing the positive aspects of customary justice systems, but also tries to overcome a number of their negative aspects. Customary justice systems can be susceptible to elite capture. In a setting of mediated or negotiated dispute settlement, domination by power holders can be detrimental to the poor and disempowered. Discussing options for alternative dispute resolution based on customary institutions in Africa, Nader states "if there is any single generalization that has ensued from the anthropological research on disputing processes it is that mediation and negotiation require conditions of relatively equal power."[20] She therefore argues that customary dispute resolution can only work if it is backed up by state law and if there is a possibility of state law as a last resort: "The ideal of equal justice is incompatible with the social realities of unequal power so that disputing without the force of law is doomed for failure".[21] In its study of access to justice based law reforms, the United Nations Development Programme (UNDP) similarly finds that traditional and indigenous justice systems are susceptible to elite capture and may "serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups."[22] A World Bank-sponsored study of dispute resolution in Indonesia carried out within the World Bank's Justice for All program, made similar conclusions. It found that while villagers preferred to solve disputes informally and outside of state structures, such dispute resolution was not successful in cases where there were large power imbalances between the parties.[23] Elite capture is especially problematic when customary checks and balances have eroded, such as procedures to depose malfunctioning chiefs.

In studies dealing with customary land management, the danger of elite capture has also been widely recognized. A number of studies regarding customary tenure in African countries reveal the social differentiation within communities and emphasize the importance of power structures. They describe internal processes of contestation, assertion and transformation, and portray political struggles to define and redefine social relations in the customary sphere. A number of these studies demonstrate that local elites have been able to use their position and the ambiguities of customary law to appropriate land to further their own economic and political interests. This includes traditional leaders who have ruled arbitrarily, with few checks and balances on their administration, giving power considerations precedence over objectives of development.[24] Given that state systems can equally be captured by particular elites, a switch from customary to state law or disputing systems will not automatically solve this problem. Instead, both justice systems need to be harnessed against elite capture, incorporating proper checks and balances, stronger participation in norm formation, and guarantees for impartiality of adjudicators; this may be equally if not more challenging to do in customary than in state justice systems.

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[20] L Nader, 'The Underside of Conflict Management — in Africa and Elsewhere' (2001) 32(1) *IDS Bulletin*.
[21] Ibid.
[22] UNDP, above n 8, 101.
[23] World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (2004); Asian Development Bank (ADB), *Law and Policy Reform at the Asian Development Bank* (2001) 66.
[24] K S Amanor, *Land, Labour and the Family in Southern Ghana: a Critique of Land Policy under Neo-Liberalisation* (2001); K S Amanor, *Global Restructuring and Land Rights in Ghana*, Nordiska Afrikainstitutet Research Report No. 108 (1999); S Berry, 'Chiefs Know Their Boundaries: Essays on Property, Power, and the Past in Asante, 1896-1996' in A Isaacman and J Allman (eds), *Social history of Africa* (2001); J Carney and M Watts, 'Manufacturing dissent: work, gender and the politics of meaning in a peasant society' (1990) 60(2) *Africa*; E Daley and M Hobley, *Land: Changing Contexts, Changing Relationships, Changing Rights. Paper for the Urban-Rural Change Team*, DFID (2005); K Juul and C Lund, *Negotiating Property in Africa* (2002); Oomen, above n 3; P E Peters, 'The limits of negotiability: Security, equity and class formation in Africa's legal systems' in K Juul and C Lund (eds), *Negotiating Property in Africa* (2002); J C Ribot, 'Local actors, powers and accountability in African decentralisation: A review of issues' (2001) *Georgetown International Environmental Law Review*; A Whitehead and D Tsikata, 'Policy discourses on women's land rights in sub-Saharan Africa: The implications of the re-turn to the customary' (2003) 3(1-2) *Journal of Agrarian Change*; P Woodhouse, 'African enclosures: A default mode of development' (2003) 31(10) *World Development*.

A second issue is that customary law and customary dispute settlement and administration may violate human rights standards and constitutional provisions. This is partly caused by the fact that judges and community members are often not aware of human rights standards such as the right to equality and non-discrimination. Another problem is that customary criminal procedures do not necessarily provide victims and suspects with minimum fair trial and redress standards.[25] Further, some local norms and practices, such as public humiliation and physical violence, or institutionalized discrimination of certain groups derived from traditional values and hierarchal notions may directly contradict human rights standards. A typical example is where customary justice systems lack gender equality and violate rights of non-discrimination. Customary systems are widely regarded as patriarchal and therefore "systematically deny women's rights to assets or opportunities".[26] Customary gender perspectives may even be so deeply inculcated that they "leave many women … resigned to being treated as inferior as a matter of fate, with no alternative but to accept their situation."[27] This critique is leveled both against processes of customary dispute settlement and customary administration. Dispute settlement issues include the fact that courts lack women judges, women face cultural impediments to participate in court debates, and in some cases are even required to have their interests represented by their husbands or male relatives. Customary administration issues include that most leadership positions are held by men and that land ownership is often vested in men, while women exercise only derived rights. Such norms and practices operate to create a gender bias, for instance in cases of inheritance and divorce. Some studies see the gender bias of customary justice systems as an incorrigible trait, and advocate for a complete disengagement with customary justice.[28] Others reason that customary systems will not disappear in the near future, and therefore the issue of reform should be taken seriously.[29] The latter view is well received by legal reformers.

A third problem is that customary systems are deemed of limited effect in stimulating economic development. This view has been debated since the colonial period, but is now commonly linked to the Peruvian economist Hernando de Soto. He argues that most property and businesses of the poor are regulated in informal (non-state) normative systems and are not formally recognized by state law. This excludes them from participation in larger markets and hampers their access to formal loans.[30] Proponents of this view hold that "[e]conomic transactions remain unpredictable, insecure, and limited"[31] and that assets regulated under a customary regime will not be linked to capital markets and thus remain underdeveloped. De Soto thus propounds the idea of finding bridges between informal non-state property arrangements and an accessible system of formal state law.[32] De Soto's work, while often criticized,[33] has become influential in law and development studies, and even more so among policy makers.

Thus, while there is growing recognition of the importance of customary justice systems, there are a number of issues regarding their operation that need to be addressed, including elite capture, human rights protection, and, in certain cases, the integration of non-state arrangements in wider capital markets.

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[25] UNDP, above n 8.
[26] Chirayath, Sage, and Woolcock, above n 12.
[27] ADB, above n 23, 31-32.
[28] L S Khadiagala, 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights' (2001) 32(1) *Development and Change*; Whitehead and Tsikata, above n 24.
[29] C Nyamu-Musembi, *Review of experience in engaging with 'non-state' justice systems in East Africa*, paper commissioned by the Governance Dvision, DFID (UK) (2003) 27.
[30] De Soto, above n 10.
[31] CLEP, above n 8, 26.
[32] De Soto, above n 10.
[33] The vast body of mainly specialist land tenure related work remains outside the scope of this chapter.

2. The complexity of customary justice systems

If legal reforms targeting customary justice systems are to be effective, development actors must understand and address their complex nature. Central to this complexity is the difficulty in identifying the appropriate norm that applies to certain behavior or to a dispute.

First, there are multiple versions of customary law. In many countries, it is possible to distinguish between codified customary law, judicial customary law, textbook customary law, and living customary law.[34] Codified customary law refers to legislation codifying the customary law of a certain jurisdiction. This provides legal certainty and accessibility to the customary law, while at the same time unifying, simplifying and crystallizing it, often in a formal language that is different from that used in the original community. Judicial customary law refers to the norms developed by judges when applying customary norms in courts and as laid down in national law reports. Here also, customary law is made more certain and accessible, but at the same time can be crystallized, unified and formalized. Textbook customary law refers to authoritative texts written by state administrators or anthropologists, often used by state courts or administrators when trying to ascertain appropriate customary norms. It offers a non-legal and less formalistic source on the appropriate customary law. Some of the drawbacks of textbook customary law are that they only exist for certain groups and therefore fail to provide as much legal certainty as nation-wide codifications, and that they freeze the norms of the groups discussed. Finally, living customary law refers to the norms that govern daily life in the community at the local level. There may be considerable differences between these different versions of customary law, especially between the living and written versions, because living customary norms are inherently dynamic.

Since written versions of customary law may be as alien in local communities as state law, today there is increased recognition that engagement with customary justice systems implies engaging with living customary law. Ascertaining the norms of living customary law presents its own challenges. A first problem lies in what questions to ask in order to determine the living customary law. Different questions may lead to different answers and thus different norms. For example, one could ask a community member directly what the appropriate norm is, or pose a hypothetical question asking what would happen in a fictional case. Alternatively, one could try to ascertain the appropriate norm empirically by gathering data on which norms are applied in disputes[35] or which norms are observed in daily life outside of exceptional dispute cases.[36] Asking directly or hypothetically, however, may lead to answers that portray an idealized norm that is seldom practiced.[37] Further, norms derived from dispute practices may be different and exceptional when compared to those observed in daily life.[38] In addition, it may be difficult to distill customary norms solely by investigating disputes or observed behavior.[39] Ideally, a combination of these methods should be used that is designed in such a way that it offers sufficient representation and validity, a process that can easily become expensive and time consuming. Even when thorough research has been conducted, there is no certainty that a single appropriate norm may be identified as the methods may produce different results.

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[34] For an overview of the literature see J Ubink, *In the Land of the Chiefs, Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana* (2008); Oomen, above n 3.
[35] Following the dispute method, advanced first by Llewellyn and Hoebel. See K N Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941).
[36] See Holleman's trouble-less case method. J F Holleman, 'Trouble-Cases and Trouble-Less Cases in the Study of Customary Law and Legal Reform' (1973) 7(4) *Law and Society Review*.
[37] Ibid.
[38] Ibid.
[39] J L Comaroff and S Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981).

This complexity is compounded by the fact that within living customary law, there may be different or competing versions of particular norms both among and within different communities or customary groups.[40] This is especially true in contexts where large economic or social transformations have occurred that have altered the social fabric and economic structures of the community, giving rise to competing values, for instance, concerning the position of women or what should be done with proceeds from newly available lucrative land deals.[41] For this reason, who within the local community is asked about applicable customary norms, is critical. Relying solely on elite representatives, such as chiefs or elders, may easily lead to a biased representation of living customary norms, not only failing to capture the existing variety, but worse, failing to understand the versions that may benefit sub-altern community members. The unwritten character of living customary law, especially where contested and competing versions exist, imbeds a high level of flexibility in customary justice systems.

In addition to the different versions of customary law, customary justice systems are particular for their flexibility and negotiability, even where norms are clear. It can be generally said that customary justice systems do not aim to resolve disputes through adjudication, deciding who wins and loses, but through mediation, seeking to facilitate a settlement that is acceptable to the parties. In this process, customary norms do not serve to produce direct outcomes, but are the starting points for discussions leading towards settlements. Some see such negotiability and the aims towards settlement and mediation as opening up access to justice even for marginalized community members; others, however, point out that, in practice, not everything is negotiable and that some are in a better bargaining position than others.[42]

Legal development actors, and the state and non-state organizations they work with, often lack knowledge about the different versions of living customary norms, the negotiable nature of customary justice, and the implications this has for engagement with customary justice systems. Time and resource constraints easily result in quick studies that accept elite representations of customary law. Such accounts can overlook the fact that there are different versions of such law or that the elite version is contested. Projects that adopt such norms as their starting point may actually be strengthening the position of elites in the community while weakening the marginalized group they seek to empower. Likewise, power differentials may be strengthened where the negotiable nature of customary law is not taken into account, and efforts subsequently fail to focus on harnessing weaker parties in the negotiated settlement processes.

In the next sections, this chapter discusses two general approaches for facilitating improved functioning and effectiveness of customary justice systems: stimulating linkages between customary and state justice systems, and community-based activities directed at citizens governed by customary justice systems and their leaders. It demonstrates how the different and complex character of customary law impacts on and offers challenges and opportunities for customary legal empowerment.

3. The institutional approach: Linking customary and state justice systems

An important method used to improve the functioning and effectiveness of customary justice systems is to develop institutional links between customary and state justice systems. There are three types of linkages: between state and customary norms;

[40] M Chanock, 'Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 3(1) *International Journal of Law and the Family*.
[41] See for example H Becker, ''New Things after Independence': Gender and Traditional Authorities in Postcolonial Namibia' (2006) 32(1) *Journal of Southern Africa Studies*; Ubink, above n 34.
[42] Peters, above n 24, 46-7; J Ubink, 'Negotiated or negated? The rhetoric and reality of customary tenure in an Ashanti village in Ghana' (2008) 2 *Africa* 78, 264-5; Woodhouse, above n 24, 1705-6.

between state and customary dispute resolution mechanisms; and between state and customary administration. Such linkages have the potential to incorporate human rights into customary norms, dispute resolution and administration, and to create checks and balances against elite capture. Linking customary and state justice systems is also seen as a means of enhancing the certainty and accessibility of local norms, which can help stimulate economic growth in customary settings.[43]

3.1 Linking norms

The weakest institutional normative linkage is when a state recognizes customary law without specifying its contents, for instance through a provision in the constitution or in another relevant law relating to the application of customary law.[44] Such general recognition can improve the effectiveness and strength of customary norms vis-à-vis external parties, but little affects the intra-communal issues mentioned above. A stronger institutional normative linkage can be created through the codification of customary norms into state legislation. This involves a process of selecting between the different versions of customary law (as occurs in any type of codification)[45] through which the norms deemed unfavorable in terms of human rights, protection of marginalized groups or the stimulation of economic activity can be adapted or discarded. Codification has the additional benefit of making complex and varied norms more certain and accessible, including to those outside of local communities or those lacking the research resources necessary to understand local norms. Accordingly, the increased accessibility and certainty of customary norms could theoretically allow for economic transactions at a larger scale, and thus help support economic activities between the community and external markets, hence stimulating economic growth. There are, however, also a number of reasons to be hesitant about codifying living customary law, as this can affect the fluid, informal and accessible character of the original customary norms.[46] Additionally, codification without a proper study of the variations of customary norms within a community, and especially when sub-altern versions are not taken into account, may have the effect to strengthen the norms governing elite interests. Moreover, codification of customary norms faces grave problems of credibility and acceptability, and might be ignored by many as not reflecting their rules of customary law.[47] Ultimately, such codification may lead to another layer of written customary law while doing little to address the problems within the living customary justice system.

3.2 Linking dispute resolution mechanisms

A well-known possibility for linking customary and state dispute resolution mechanisms is through incorporating customary dispute resolution mechanisms into the court structure by establishing customary courts presided over by traditional authorities as the first tier of the legal system. Thus incorporated, traditional authorities can then be required to administer justice in accordance with certain procedures and while maintaining human rights standards. When a system of appeal is established, this opens up possibilities for state courts to oversee the adjudicative work of customary courts, and for the development of checks and balances that can ensure adherence to procedural and substantive standards. The question is whether such checks and balances would work in practice. First, citizens may not be able to invoke their rights in state courts even when the right of appeal exists because the basic conditions required for access are still

[43] Chanock, above n 40.
[44] D Fitzpatrick, ''Best Practice' Options for the Legal Recognition of Customary Tenure' (2005) 36(3) *Development and Change*, 457.
[45] For an explanation of this see B Van Rooij, 'Falü de Weidu, Cong Kongjianshang Jiedu Falü Shibai (Law's Dimension, Understanding Legal Failure Spatially) (Translated by Yao Yan)' (2004) 4 *Sixiang Zhanxian (Thinking*).
[46] Ubink, above n 34; J Ubink, *The Quest For Customary Law in African State Courts* (forthcoming).
[47] Ubink, above n 34.

lacking. Second, appeal judgments may do little to affect the work of customary dispute resolution mechanisms outside of the case in question.[48]

Where state courts are allowed to adjudicate cases on the basis of customary rules, a link is created between customary and state justice systems that involves norms as well as dispute settlement mechanisms – and thus straddles the divide between this section and the latter. The advantage of this type of linkage is that state judges may be well placed to safeguard human rights and fair procedural standards when applying customary law. The involvement of state courts also diminishes opportunities for elite cooptation. Due to their written character, state customary judgments may offer increased certainty and accessibility of customary law, which may in turn enhance predictability and security of economic transactions and thus facilitate participation in larger economic markets. On the other hand, state courts are less accessible, especially to marginalized citizens, and their judgments may have limited impact on living customary norms.[49] The formal character of state court decisions is exacerbated because many judges are trained to base their decisions on written texts and thus prefer to apply codified or judicial customary law (based on earlier decisions) rather than attempt to understand and apply living customary law. The South African Constitutional Court has recognized this problem and encourages judges to apply living law by providing that living customary law can overrule codified versions.[50] This opens up an additional set of problems, however, since judges have to identify what the living norms are, often by relying on (expert) witnesses or assessors.[51] Ideally, such aids would have knowledge of local culture, language and customs, and could inform the state judge on a case-by-case basis as to the appropriate norm. While in theory this method could help preserve the original and fluid nature of the customary norms to be practiced in state courts, several problems may impact upon the impartiality of such state adjudication. First, impartiality of local experts may be especially difficult when norms are contested and when there are different customary norms at play. Second, the particular nature of customary norms, with their inherent informality, flexibility and negotiability, in addition to the inherent unpredictability of dispute settlements do not correspond to the precision and certainty generally required by assessors and expert witnesses when testifying about customary norms in court proceedings.[52] The integration of state and non-state law in state courts is thus highly difficult and can lead to situations where court decisions are out of step with local realities and thus have limited impact. Alternatively, they can result in courts strengthening elites who may play a dominant role in providing information, especially about contested norms.

3.3 Linking administration

A third form of state and customary institutional linkages that may improve the functioning of customary justice systems is by linking state and customary administration. Administration needs to be addressed as it plays an important role in the implementation of customary law. Moreover, customary administrators can be involved in local power abuses or human rights violations. Linking customary and state administration should ideally increase the accountability of customary administration, prevent power abuse and human rights violations, and enhance predictability and security of customary administration, and thus facilitate local transactions for external economic actors. However, it should do so without undermining the local legitimacy of

[48] J Ubink, 'Courts and peri-urban practice: Customary land law in Ghana' (2002-2004) 22 *University of Ghana Law Journal*.
[49] J B Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (1928); I Schapera, *A Handbook of Tswana Law and Custom: Compiled for the Bechuanaland Protectorate Administration* (1938).
[50] A Claassens, 'Customary law and zones of chiefly sovereignty: The impact of government policy on whose voices prevail in the making and changing of customary law' in A Claassens and B Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008).
[51] Llewellyn and Adamson Hoebel, above n 35.
[52] A N Allott, 'The people as law-makers: custom, practice, and public opinion as sources of law in Africa and England' (1977) 1 *Journal of African Law* 21.

customary administrators.[53] There are four main ways in which state and customary administration can be linked.[54] First, the state can recognize customary administration without defining official roles for traditional leaders, nor interfering with their activities as long as the law is not broken.[55] This does little to reform customary administration. For this to occur, a more elaborate linkage is necessary, for example, by integrating customary administrators into the state administration system and defining their customary functions and/or delegating them formal state functions.[56] Third, the state can establish a local state structure parallel to the customary administration, aiming to achieve a local balance of power. Fourth, hybrid local structures can be established in which both state and customary administrators are represented.

In the four above-mentioned links, the extent to which customary administration is made subordinate and answerable to state organs varies. Several mechanisms can be employed to boost the accountability of customary administrators. When states formalize customary administration, they can legally define their authority as well as provide details as to the way it should be exercised. Such forms of regulation can then be implemented legally when administrative abuses are questioned in court. Customary authorities may also be bound to regulations through political or administrative means. Payment of salary establishes a certain amount of administrative control, and can also be seen as a way to transform chiefs into civil servants, accountable to senior civil servants and subject to disciplinary sanctions.[57] Additionally, the provision of a salary could diminish chiefs' incentives for self-enrichment or corruption in the discharge of their responsibilities and for holding on to outdated customs that yield financial benefits. Another political mechanism is the state exercising the power to ratify the appointment of traditional leaders, and thus also to withhold such ratification. The history of Ghana shows that in different political constellations, this power can be exercised in different ways. Some Ghanaian regimes have exercised constraint, almost automatically endorsing local selections, while others have used such authority as an important tool for political interference in the selection of chiefs.[58] When no such formal power lies with the state, state organs may seek replacements of customary administrators by exploiting fragmentations within the local polity, aligning themselves with a rival traditional power group to replace the original administrator. It should be noted that the motives for replacing customary administrators often involve power-political considerations as well as issues of customary maladministration.[59]

Formal recognition of the institution of traditional authority by the state can transform the position and legitimacy of traditional leaders. On the one hand, it can strengthen the position of traditional authorities or, in countries where such positions had previously been abolished such as in Guinea and Mozambique, it can assist their resurgence. On the other hand, formal recognition may cause leaders to lose their independence and risk that they be identified with state politics and state failure. State influence on the selection of individual candidates further impacts their independence. Achieving

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[53] J Ubink, *Traditional authorities in Africa: Resurgence in an era of democratisation* (2008) 11. For an elaborate debate about why African states have welcomed the resurgence of traditional authorities see P Englebert, 'Patterns and theories of traditional resurgence in tropical Africa' (2002) 118 *Mondes en Développement* 30; G Lutz and W Linder, *Traditional Structures in Local Governance for Local Development* (2004).

[54] For an overview of this see Ubink, above n 53; N Bako-Arifari, 'Traditional local institutions, social capital and the process of decentralisation: A typology of government policies in developing countries' in *Working Papers on African Societies* (1999) 5-15; B Hlatshwayo, 'Harmonizing traditional and elected structures at the local level: Experiences of four Southern African Development Community countries' in F M d'Engelbronner-Kolff, M O Hinz, and J L Sindano (eds), *Traditional Authority and Democracy in Southern Africa* (1998).

[55] Bako-Arifari, above n 54, 5-15; Hlatshwayo, above n 54.

[56] Such linkage can be found, for instance, in Cameroon, see Bako-Arifari, above n 54.

[57] Englebert, above n 53.

[58] D I Ray, 'Chief-state relations in Ghana - Divided sovereignty and legitimacy' in E A B Van Rouveroy van Nieuwaal and W Zips (eds), *Sovereignty, Legitimacy, and Power in West African Societies: Perspectives from Legal Anthropology* (1998).

[59] See for Togo: E A B Van Rouveroy van Nieuwaal, 'Chiefs and African states: Some introductory notes and an extensive bibliography on African chieftaincy' (1987) 25-26 *Journal of Legal Pluralism*.

accountability can therefore come at a cost of undermining the position of customary administrators. At the same time, there is a real danger that administrative linkages will fail to deliver results in terms of accountability and prevention of power and human rights abuses. Mechanisms to ensure compliance with formalized limits of delegation and standards of administration remain weak, especially since they are often not strongly exercised. Here, local and national power structures are influential. In countries where customary authorities have a strong national power base, either for historical reasons or through their role in national elections as vote brokers,[60] state authorities may not be able or even willing to ensure compliance through legal, administrative or political mechanisms. Even a highly formalized customary-state linkage may have little effect in such situations. Linking customary and state administration may even run the danger that local state institutions aligned with customary administration, and especially hybrid state-customary institutions, are co-opted by customary power holders. Ironically, then, linkages sought to deal with power abuses may only strengthen them.

3.4 A balancing act

Clearly, institutional linkages, whether sought through norms, disputing mechanisms or administration, are important mechanisms for improving the functioning of customary justice systems; however, establishing links that help attain this goal remains difficult. Linkages may alter customary arrangements, changing their nature in such a way that the original strengths of customary justice systems, its informal and accessible character, no longer exist. Alternatively, the effect of linkages may be thwarted or co-opted by customary elites and therefore fail to accomplish its goal. The main challenge for approaches to institutional linkages, therefore, is to find a balance between retaining the informal character, local accessibility and legitimacy of the customary justice system, while making sufficient improvements on its functioning.

It should be noted that donors may find it difficult to make institutional linkages an object of project-type intervention, because they are often bound up in larger historical transformations occurring within national politics, and their reform is usually a national affair where international donors play only a limited role. Linkages remain important, however, because they impact on the functioning of customary justice systems and can serve as entry points for inducing change. International donors should thus be aware of existing institutional links and the extent to which they can be altered within the national or local polity as a means of affecting the functioning of customary systems. Here, reform can also address state institutions that are linked to customary justice institutions, as improvement in the functioning of state institutions may benefit the functioning of the linked customary institution.

4. Community-based approaches

Another approach to improve the functioning and effectiveness of customary justice systems is to target activities at marginalized community members. Such activities include the deployment of paralegals, legal literacy training, community mapping of local land rights and rights education campaigns.[61] Such interventions can stimulate a demand for rights within the community, as proposed by Ignatieff,[62] which can then translate into pressure on customary justice systems to better protect human rights. They can also empower marginalized community members and reduce power imbalances and elite capture. Such interventions are promising because they seem better equipped to directly benefit marginalized citizens governed by customary law, and may be able to address issues of power imbalances as they occur within the customary systems, without pushing for an alteration of the system's basic tenets.

[60] Ubink, above n 53.
[61] Wojkowska, above n 8.
[62] Ibid 33.

United Nations Development Programme (UNDP) has summarized its experiences with these kinds of interventions by studying projects in Africa, Asia and Latin America, and by examining what has worked and what has not. It found, for example, that:

- dialogues with elders and community leaders in Somalia helped to improve local dispute resolution mechanisms to make them more aligned with human rights standards and the protection of weaker groups;[63]
- legal awareness training through literacy courses, information groups, education campaigns, the publication of guidebooks on state and non-state laws, and itinerant street theatres helped improve the position of vulnerable groups and provided entry points for human rights in Bangladesh, Malawi, Timor-Leste, Indonesia and Cambodia;[64]
- legal aid was enhanced through paralegals, lawyers' networks, dispute clearing houses, dispute resolution panels and ADR training in Sierra Leone, Thailand, Timor-Leste, Puerto Rico and Cambodia;
- capacity development for informal justice actors in the areas of mediation and citizen's rights worked reasonably well in Burundi, Sierra Leone, Timor-Leste, Rwanda and Bangladesh.

UNDP also discusses challenges encountered and programmatic failures, such as in Thailand, where it was difficult to train lay persons into paralegals. Further, it reports that capacity-building of informal justice institutions brings about challenges when ceremony becomes more important than capacity (encountered in Burundi), when gender quotas for dispute settlers undermine community cohesion (Burundi), when reconciliation emphasis is unsatisfactory for aggrieved parties (East Timor), when strengthening informal dispute mechanisms perpetuates the absence of formal institutions (Peru), and when newly built capacity lacks sustainability (Peru, Bangladesh) and local legitimacy (Bangladesh).[65]

A report on practices to secure land rights in Africa, sponsored by the International Institute for Environment and Development/Food and Agriculture Organization of the United Nations (IIED/FAO) discusses how civil society-type efforts have worked in the context of non-state law systems.[66] The report shows that interventions such as paralegals, legal literacy, public interest litigation, legal clinics, and rights information centers have been successful in improving land tenure security in Africa's customary regimes.[67] These studies, however, also show that interventions are no panacea and that persistent problems remain, including lack of capacity among paralegals,[68] resistant local elites who fear the undermining of their power base,[69] donor dependency and lack of sustainability,[70] community lack of confidence and trust,[71] and 'cut-throat antagonism' between weak and/or poor communities and powerful outside investors.[72] Of these

[63] Ibid 38-39.
[64] Ibid 33.
[65] Ibid 35-39.
[66] R H Aciro-Lakor, 'Land Rights Information Centers in Uganda' in L Cotula and P Mathieu (eds), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* (2008) 75; B Ba, 'Paralegals as Agents of Legal Empowerment in the Banass Area of Mali' in L Cotula and P Mathieu (eds), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* (2008) 58-59.
[67] E Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania' in L Cotula and P Mathieu (eds), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* (2008) 97; L Laurin Barros, 'Legal Clinics and Participatory Law-making for Indigenous Peoples in the Republic of Congo' in L Cotula and P Mathieu (eds), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* (2008) 122.
[68] Mndeme, above n 67, 97.
[69] A K P Kludze, *Restatement of African Law, Ghana. Volume I: Ewe Law of Property* (1973).
[70] S Roberts, *Restatement of African Law, Botswana. Volume I: Tswana Family Law* (1972).
[71] N N Rubin, 'The Swazi law of succession: A restatement' (1965) 9(2) *Journal of African Law*.
[72] W Twining, 'The restatement of African customary law: A comment' (1963) 1(2) *The Journal of Modern African Studies*.

challenges, elite resistance against change is especially troubling because elite dominance of the customary systems is a key impediment that interventions seek to overcome.

Community-based approaches often explore the use of national or international state norms and institutions. They seek to contrast the functioning of customary justice with norms of state justice, for example, by raising awareness of state justice norms, organizing debates among customary authorities about international human rights standards, or providing legal aid to pursue litigation of customary abuses in state courts. Such strategies thus try to improve the functioning of customary justice systems by invoking the authority and power of justice institutions external to the local community.

Community-based approaches can also focus on intra-community institutional changes, with a less explicit recourse to the state, for example, through local activists who work to improve customary dispute procedures and administrative checks and balances or to make structures of customary leadership or dispute settlement more inclusive. Namibia offers two examples of this. In Uukwambi Traditional Authority, efforts have been undertaken to enhance the position of women in the customary justice system by instituting female deputies to male headmen, as well as headwomen. In the same area, around 30 people were trained as community legal activators to enhance the administration of justice in traditional courts. This training included a strong gender component. Another example is how Timap for Justice, a local legal aid NGO in Sierra Leone, deployed paralegals to eliminate adverse practices through negotiations with traditional leaders and educating them on the harmful impact these practices have on communities.

Community-based activities can be most effective when they are able to make use of the opportunities offered by the flexibility and negotiability inherent in customary justice systems. Improvements can be achieved by identifying, voicing and supporting versions of living customary norms that favor marginalized groups, by supporting the marginalized in dispute-related negotiations, or by seeking to reinvigorate customary administrative checks and balances. The full possibility, potential impacts and limits of using the opportunities offered by customary justice systems, however, remain largely understudied.

Community-based activities are an important addition to institutional approaches when seeking to improve the functioning of customary justice systems. They are a critical component of donor-led reforms as they can be initiated more easily than institutional linkages, which are more dependent on national politics. Community-based interventions and institutional linkages reinforce each other. On the one hand, community-based activities help to improve the functioning of institutional linkages, by enhancing awareness of state norms and invoking state rights and related state dispute and administrative procedures in customary settings, and by diminishing resistance against state norms and institutions. On the other hand, community-based interventions often require linkages to strengthen the functioning of customary justice.

5. Customary legal empowerment

It has been observed that improving the functioning of customary justice systems presents certain challenges. Institutional approaches, which link customary and state norms, disputing mechanisms and administration, must find a careful balance between retaining the informal character, local accessibility and legitimacy of the customary justice system, while making sufficient changes to reform its operation. Such balance is not easily found, especially in situations where local elites are able to resist or even co-opt linkages to state institutions. Some community-based activities pose similar questions of legitimacy and flexibility. One can think of attempts to make the institutional

structure of the customary justice system more inclusive or to have communities or traditional leaders put into writing some of their laws. Other community-based activities are less prone to upset this balance because they are unlikely to fundamentally alter the set-up of the customary justice system. Instead, they change its functioning by involving state norms through the provision of legal awareness trainings and legal aid for customary justice users or capacity development for justice providers. All these activities occur, however, within the context of established linkages between state and customary justice institutions, and are often dependent on such linkages for their effectiveness.

The distribution of power plays a vital role in improving the functioning of customary justice systems. Legal reforms that aim to empower marginalized groups may decrease the relative local power base of original elites. However, insufficient knowledge of the complexity of customary justice systems may cause linkages to be forged between state institutions and elite norms and institutions in the customary justice system, thereby strengthening the subordinate position of marginalized community members. Elite power is also a hindrance for institutional and community-based activities as customary power holders have been able to resist and co-opt reforms, especially when they are seen as a threat to the elite power base.

Bottom-up legal development approaches stress the importance of taking into consideration that law and power are intrinsically linked, expressing this most clearly through the concept of 'legal empowerment'. This concept, used (albeit with slightly different meanings) at the international level, including by the Commission for Legal Empowerment of the Poor (CLEP), UNDP, the World Bank, the United States Agency for International Development (USAID) and the FAO, reflects that legal tools may be used to empower marginalized citizens and attain greater control over the decisions and processes that affect their lives.[73] Legal empowerment could also refer to activities undertaken to tackle power asymmetries that undermine the effective functioning of legal tools for marginalized citizens, preventing access to justice and ultimately their development.[74]

Addressing problems in customary justice systems requires a form of legal empowerment. Organizations working on community-based activities have experimented with borrowing from state law attempts at legal empowerment, employing a combination of education and action by enhancing awareness, improving legal aid, and advocating for better rights.[75] It is important to recognize that rights awareness, legal aid or rights advocacy may require rethinking when undertaken in the context of customary justice systems. Such activities often refer to state law: awareness of human rights or national legislation, legal aid to pursue actions in state courts or advocacy to obtain better legal protection under national legislation. However, it is possible to envisage customary legal awareness, customary legal aid or customary rights advocacy that focuses on the norms and institutions in the customary system to press for favorable change from within.

Therefore, improving the functioning and effectiveness of customary justice systems requires a particular kind of legal empowerment – 'Customary Legal Empowerment'. This can be defined as processes that: i) enhance the operation of customary justice systems by improving the representation and participation of marginalized community members, and by integrating safeguards aimed at protecting the rights and security of marginalized

[73] S Golub, 'Less law and reform, more politics and enforcement: A civil society approach to integrating rights and development' in P Alston and M Robinson (eds), *Human Rights and Development: Towards mutual reinforcement* (2005); ADB, above n 23; USAID, *Legal Empowerment of the Poor: From concepts to assessments* (2007); Commission on Legal Empowerment of the Poor, above n 8; L Cotula, *Legal Empowerment for Local Resource Control. Securing local resource rights within foreign investment projects in Africa* (2007).
[74] K Tuori, 'Law, Power and Critique' in K Tuori, Z Bankowski, and J Uusitalo (eds), *Law and Power: Critical and Socio-Legal essays* (1997); Cotula, above n 73.
[75] ABD, above n 23.

community members; and/or ii) improve the ability of marginalized community members to make use of customary justice systems to uphold their rights and obtain outcomes that are fair and equitable.

6. Discussion of the papers

This edited volume aims to identify and understand the possibilities for customary legal empowerment. The contributions all critically examine change processes in customary justice systems and the role these systems can and do play in the legal empowerment of marginalized groups and individuals. Some articles focus on the possible involvement of donors, while other articles focus largely on domestic actors, viz. governments, traditional authorities and customary justice users. The contributions analyze both intra-communal power relations and the institutional linkages and relationships between customary and state justice systems, in relation to norms, dispute resolution mechanisms and administrative fora. They identify possible entry points for customary legal empowerment, lessons that can be replicated from state-based legal empowerment interventions, and strategies for overcoming the above-listed challenges.

Erica Harper in her contribution "Alternative Models for Engaging with Customary Justice Systems" focuses on the involvement of donors in reform of the customary justice sector. She first discusses the three primary reasons why assistance to customary justice systems has been largely neglected by legal development agencies: fear of institutionalizing sub-standard justice for the poor; incompatibility with the programming approach of some development agencies; and fear of increased legal pluralism and forum shopping, which facilitates manipulation of the justice system by more powerful, wealthy or more informed disputants. Harper nevertheless describes growing support for the engagement with customary justice systems. In certain contexts the state justice system may be non-operational or engagement with it considered inappropriate, for example where the justice sector is highly corrupt or a known conspirator in the perpetration of rights violations. Generally speaking, customary justice systems are simply too important to ignore due to their critical impact on livelihoods, security and order. The fact that certain customary laws or sanctions breach human rights standards makes the case for active involvement only more compelling. Harper then describes two kinds of approaches to customary justice reform programming. Firstly, fix-it approaches, that aim to address certain flaws or constraints inherent in customary justice systems – such as limited participation of women and youth, the unwritten nature of customary law, and certain negative customary practices. Secondly, Harper describes an alternate solution to reforming customary justice systems directly, viz. to support the creation of new institutions that offer other forms of dispute resolution, such as community-based paralegals and NGO-led dispute resolution fora. These institutions will promote access to justice and indirectly improve the operation of customary justice systems through heightened competition. Each approach has its drawbacks. Whereas fix-it approaches tend to overlook or contradict some of the fundamental tenets of customary justice that make such systems workable and responsive to user needs and expectations, alternative dispute resolution fora will generally offer quite measured outcomes, as they need to be voluntarily accepted and utilized and therefore the approaches adopted and outcomes delivered by alternate justice providers generally need to be not too far removed from customary norms. Harper concludes with a number of innovative ideas for reforming customary justice systems, including linking self-regulation to the formal recognition of customary fora, drawing on positive customary norms as a basis for change, and empowering users to be effective change agents.

Ross Clarke in his chapter "Customary Legal Empowerment: Towards a More Critical Approach" underscores the basic tenet of this book in stating that while legal centralism still tends to dominate, engagement with customary justice systems has entered mainstream thinking in legal development and rule of law programming. Clarke states

that the rise to prominence of customary legal empowerment has, occurred in the absence of a rigorous theoretical debate. A superficial engagement with customary justice systems leads most development agencies to put a narrow emphasis on the human rights implications of customary justice, while neglecting other possibly negative attributes of customary justice systems such as a lack of transparency, minimal accountability and vulnerability to elite capture. In considering the rise of customary law in justice sector reform, Clarke concludes that most justice reform policies undertake a simplistic balancing of customary justice systems' practical benefits – including accessibility, efficiency, legitimacy, social cohesion and participation – against the possible violations of human rights. In the rush to capitalize on the benefits of customary justice systems, many complex, fundamental questions as to how two legal systems with radically different traditions, form and operation are to function together, reinforce the other and promote the rule of law have been overlooked. In this process, contemporary legal empowerment policy and practice overlook fundamental conceptual issues regarding sovereignty, jurisdiction, accountability and the political function of law. Two case studies of legal empowerment projects, in Timor-Leste and in Aceh, Indonesia, highlight the superficial engagement with customary justice systems and its consequences, and lead to several practical recommendations to achieve more effective, conceptually grounded customary legal empowerment.

In their contribution "Reducing Injustice? A Grounded approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia", Samuel Clark and Matthew Stephens similarly call for a more grounded approach to engagement with customary justice systems. They argue that developing countries are commonly characterised by an unpopular and distant state as well as debilitated community institutions. Both state courts and local dispute resolution mechanisms suffer from systemic inequalities that reaffirm existing power relations to the detriment of the socially excluded. Rather than idealizing one justice system over the other, a more realistic strategy is to focus on overcoming the specific injustices of both state and customary systems. This can be done by creating 'hybrid' justice institutions through a process of partial incorporation of customary justice systems into the system of state justice. To successfully marry the two systems that draw on different normative traditions, programs should be designed by using a grounded approach. This approach is attuned to the local context, it focuses on reducing tangible injustices and weaknesses in existing arrangements in incremental steps and in accordance with local timetables and opportunities, rather than attempting to achieve an ideal form of justice through a prescription of 'one-size-fits-all' policies and institutional designs. This chapter thus seeks to provide pragmatic guidance to practitioners and policymakers by suggesting a *process* of engagement in five key steps. The authors finally discuss three pilot programs by the World Bank in Indonesia to illustrate their proposed grounded approach.

In "Policy Proposals for Justice Reform in Liberia: Opportunities under the Current Legal Framework to Expand Access to Justice" Amanda Rawls examines policy decisions currently under consideration in Liberia regarding the interaction among customary and statutory law and justice mechanisms. The formal justice system is not the forum of choice for most Liberians as it is plagued by extensive delays and is widely believed to be corrupt. Research shows that, even if the formal system were to operate fairly, the average Liberian would prefer to use the customary system as it is perceived as more holistic, taking account of the underlying causes of the dispute and seeking to repair the tear in the social fabric. However, donors and legal practitioners voice concerns about the customary justice system. These concerns include issues such as gender equality, due process and the separation of power. Rawls looks at how a participatory national consultative process is contributing to the development of policy options, and how the *realpolitik* of maintaining post-conflict peace and establishing a government monopoly on the use of force informs the government participation in the policy debate. In addition, the paper describes the significant sway donor priorities – in particular their preoccupation with human rights – and finances hold over the government. Subsequently,

Rawls explores three concrete policy proposals for providing more acceptable justice outcomes for the Liberian people by: i) incorporating customary resolutions of criminal matters as recommendations for case disposition – by structuring plea agreements – in the formal justice system; ii) developing alternative forms of oath-taking in criminal prosecutions that permit adherence to traditional belief systems while not violating Constitutional requirements; and iii) writing down customary dispute resolution guidelines, rationales, and practices, so that they can be evaluated for application in relevant cases in the formal courts. The paper looks at how the consultative process led to each proposal, how each proposal conforms to the political imperatives of the nation's Justice Ministry, what legal obstacles and other challenges the government might face in implementation of such proposals, and what prospects each proposals has for advancing the development goal of enhancing access to justice.

The chapter "Ensuring Access to Justice through Community Courts in Eritrea" by Senai Andemariam addresses the effectiveness and impact of Eritrea's community court system. Following an historical overview of the evolution of customary justice systems and their interaction with the state justice system in Eritrea, Andemariam provides a description of the current community courts system, which was established in 2003. This system was created with the aim of bringing the state legal system both physically and psychologically closer to the people while integrating and formalizing customary dispute resolution processes into its lowest tier of courts. To achieve this effect, these courts combine the powers of both systems in an attempt to reconcile disputants, most likely on the basis of customary law and practices, and when such negotiations fail, to pass judgement based on national laws. The courts consist of three judges, who are locally elected. The absence of uniform election rules was intended to allow each community to resort to its preferred, most probably customary, processes of electing community leaders and judges. Although not specifically required by law, in practice, it is expected that as far as practicable at least one of the judges of each community court must be a woman. This resulted in 20 percent women judges in 2003 which increased to 28.4 percent in 2008. With a specific focus on community participation, the role of women in the legal process, barriers to justice and out of court settlements, the article highlights the successful role community courts have played in tackling barriers to justice and reaching out of court settlements. The mixed character of community courts, viz. the fact that they can base themselves upon customary laws to settle disputes amicably while also being mandated to apply national laws in delivering judgments, gives them the character of a conduit between the national and the local. As such, they may be effective tools for preserving the nation's rich pool of customary laws and heritage as well as transmitting knowledge of national laws into the local arena.

In the chapter "Stating the Customary: An Innovate Approach to Locally Legitimate Recording of Custom in Namibia", Janine Ubink discusses a common problem that governments as well as legal development agencies encounter in their dealings with customary justice systems: its unwritten nature. Since the colonial period a number of governments – often aided by researchers – have attempted to put parts of customary law into writing. More recently, legal development agencies have shown an interest in the same exercise. Ubink explores such historical and contemporaneous attempts to record customary laws. She starts with a discussion of the different historical devices that have been developed for recording customary law: codifications, restatements and case law systems. The chapter shows that each of these devices has its own dynamics and opportunities, and that all three devices have serious drawbacks. The most important weaknesses of these recording attempts are the loss of adaptive capacity as well as the resulting gap between the recorded version of customary law and the living customary law. Ubink then discusses the remarkable activities undertaken from the beginning of the 1990s by the Owambo Traditional Authorities in northern Namibia to come to a self-statement of the most important substantive and procedural customary norms, while simultaneously adapting some norms to conform to Namibia's Constitution. She discusses how and why this process took place, who its change agents were, which

norms ended up on paper and what the effects of this process are in one of the Owambo Traditional Authorities, i.e. Uukwambi Traditional Authority. Ubink concludes that the self-statement had a profound impact on the functioning of the customary justice system in Uukwambi, in that it increased the certainty of the justice system by reducing the discretion of traditional courts, especially with regard to sentencing. In addition, the adaptations that were made to align Uukwambi's customary laws with the provision of gender equality in Namibia's Constitution are locally well-known and implemented. Finally, Ubink discusses whether Uukwambi's success can be replicated elsewhere and discusses three important factors that set the Uukwambi self-statement apart from other attempts to record customary laws.

Ellen Desmet's contribution "Interaction between Customary Legal Systems and the Formal Legal System of Peru" analyses the recognition of indigenous rights and administrative and legal structures in Peru. The Peruvian Constitution provides that peasant and native communities are autonomous in their organization, in the use and free disposition of their land, and in the economic and administrative management within the framework established by law. Desmet argues that the qualification "within the framework established by law" strongly limits the apparent organizational autonomy, as Peruvian regulations prescribe an organizational structure consisting of a general assembly and a board of directors, periodically elected by means of a "personal, equal, free, secret and obligatory" vote, which is foreign to indigenous communities' customary organizational forms. Also with respect to land use and economic issues, peasant and native communities are not as autonomous as the Constitution portrays them as being. In reality, economic policies are decided by the national government, with little or no involvement of indigenous peoples. The autonomy in administrative management is furthermore limited by the system of political authorities installed by the Peruvian state, which represent the executive power in the locality and are charged with watching over the implementation of government policies as well as with monitoring compliance with the Constitution and laws. The Peruvian Constitution also establishes the judicial autonomy of peasant and native communities, again under a qualification, viz. "whenever the fundamental rights of the person are not violated". Where judicial institutions are physically remote, the state judicial system has had a limited influence, but this may change in the future. It is the author's opinion that, in the end, one always remains within the logic of state law and there is no real space for customary institutions and decision-making processes to function. The author displays the impact of the same processes of "half-hearted recognitions" of customary norms and practices with respect to land rights and nature conservation. The local implications of such processes are illustrated by the experiences of the Airo Pai, an indigenous people living in the Peruvian Amazon.

In the chapter "Negotiating Land Tenure: Women, Men and the Transformation of Land Tenure in Solomon Islands", Rebecca Monson examines the interaction of the customary and state justice system in two sites in the Solomon Islands. In these sites, the author analyses the transformations in customary land tenure systems occurring since colonization, and their impact on women. The first case study shows how, during the colonial era, missionaries and colonial administrators recognized some male segments of the local polity and disregarded the female segments. The colonial state legal system also facilitated a strategic simplification of the land tenure system, by enabling certain male leaders to consolidate their control over the land. In many instances, the foreigners' perceptions of property and authority enabled male leaders – who historically had been "caretakers" of the land – to claim rights wholesale. The resulting alteration in power relations is currently reified by provisions in the state legal system regulating logging activities on customary land. Legislation provides that any person who is interested in logging customary land must negotiate with the owners of the land. As was the case with traders, missionaries and colonial administrators before them, logging companies desire to indentify and engage with individuals rather than the entire customary community. This is facilitated by the requirements of the state legal system, which provides for the

selection of certain individuals to negotiate with the logging company on behalf of the customary community. This enables a small number of individuals to carve out a 'big man' status and strengthen their power base within their tribe by obtaining and distributing logging revenue. While many men are marginalised by these processes, women as a social group are particularly likely to be excluded. The second case study shows that traditional concepts of the role of men and women in the customary justice system are translated into the state legal system in a manner that turns the male leaders' customary 'right to speak' about land into effective control over land – allowing them for instance to register land in their names and to sell land – while it negates women's customary rights over the land. The state legal system thus converts inequality in decision-making to inequitable distribution of financial benefits. On the basis of these two case studies, Monson agitates against an overly simplistic assessment of customary justice systems as discriminatory towards women, and the conclusion that their interests would be better served by the state legal system. Not only do both cases show that it is exactly at the intersection of the state and the customary that many landowners find themselves losing out, but also that the new power of male leaders is contested by drawing on earlier practices of customary justice systems.

7. Conclusion: Taking customary justice systems seriously

Sally Falk Moore's description of local arenas as semi-autonomous social fields[76] already showed that mere statutory regulation of customary processes and practices often has a limited effect on the locality. Taking this into account leads to a conclusion that the customary 'arena', whether seen as an obstacle for legal empowerment of marginalized groups and community members or as an opportunity for such change, needs to be taken seriously. This is clearly demonstrated in Ubink's chapter. Discussing new norms to protect widows against property grabbing, Ubink shows that the inclusion of such norms in 'self-statements' by Traditional Authorities was highly effective in the Owambo polities in northern Namibia, where it almost eradicated the practice of property grabbing. She shows that this contrasts starkly with attempts in many other African countries to outlaw similar practices by statutory intervention, which have nearly all had a marginal effect on customary practices in rural areas.

Policy and programmes show a hesitant trend in the direction of taking customary justice systems seriously. The contributions to this book mainly demonstrate two approaches, which can be termed as the dialogue approach and the linking approach. Practitioners and policy makers are increasingly trying to engage in a dialogue with customary communities and their leaders to attempt to convince them to undertake a modification of their own customary norms, bringing them into alignment with constitutional provisions, or to at least to accept statutory regulations that contradict local customs. Alternatively, or in conjunction with such efforts, programs focus on the creation of effective linkages between state and customary justice institutions, thereby bringing state justice closer to the people at least to such an extent that it enables real oversight over customary justice systems.[77]

7.1 Dialogue approach

Several of the chapters of this book give examples of governments and donors entering into a dialogue with customary communities and their leaders. For instance Rawls analyses Liberia's efforts to develop alternative forms of oath-taking that permit

[76] S Moore, 'Law and social change: The semi-autonomous social field as an appropriate subject of study' (1973) 7(4) *Law and Society Review*.
[77] The division between the dialogue approach and the linking approach is not absolute. For instance paralegals straddle this divide: in many projects they are in constant dialogue with customary leaders, but also facilitate access to state courts.

adherence to traditional beliefs while not violating human rights provisions. In 1916 Liberia's Supreme Court outlawed trial by ordeal, generally referred to in Liberia as 'sassywood'. Irrespective of the law, many forms of trial by ordeal continue to be practiced throughout the country up to the present day. The perception of many Liberians is that witchcraft is on the rise due to the ban, and as a result public frustration with the ban is high. Participants at the National Conference on Enhancing Access to Justice, held in April 2010, are now proposing that the Government distinguish between 'good sassywood' and 'bad sassywood', and prohibits only ordeals that inflict physical harm or violate the fundamental legal rights guaranteed to a criminal defendant during trial. A second step is to convince traditional leaders to curb the 'bad sassywood' on their own, and improve their ability to do so.

Other contributions describe how the customary reality attempts to achieve change from within through guiding and training. Clarke, for instance, describes how in Aceh, UNDP sought to improve procedural customary law through a research-intensive local process. This process commenced with a quantitative survey among 800 rural and urban respondents and 60 qualitative in-depth interviews with key informants. This research provided the basis for the production of a non-binding manual on best practices for customary dispute resolution procedures. Through consensus-building, training programs for customary leaders and oversight, the project plans to build additional consistency, transparency and compliance with human rights standards.

7.2 Linking approach

Institutional linkages between state and customary justice systems can and do take many forms. Calling the result 'a hybrid justice system', as Clark and Stephens propose, highlights the interconnectedness of institutions and norms with various origins and sources of legitimacy – state and 'tradition'. It marks the indivisibility of the resulting justice system and thereby refutes the constructed dichotomy between state and customary justice systems. In addition, it questions the one-sided attention to incorporating the strengths of customary justice systems into state justice systems (while mitigating their weaknesses), but rather advocates for blending the strengths and mitigating the weaknesses of *both* customary and formal justice systems.

We have cautioned that making institutional linkages an object of project-type intervention may be difficult for donors, as they occur squarely within national politics and are largely determined by national considerations and actors. This is illustrated by Rawls' analysis of Liberian policy proposals regarding the interaction among customary and statutory law and justice mechanisms. Rawls demonstrates how the post-conflict context of the country and the *realpolitik* of trying to re-establish a government monopoly over the use of force inform the government participation in the policy debate. Furthermore, the influence of legal scholars and the need to balance the power of government branches and individuals within them pose constraints on any policy options that take away too much power from the formal legal system or that might shift power from one part of the government to another.

Desmet, in her discussion of the Airo Pai in the Peruvian Amazon, demonstrates how institutional linkages can place so many restrictions and conditions on customary forms of administration, dispute settlement and management of land and natural resources, that in effect there is no real space for customary institutions and decision-making processes to function. This is done in various ways, such as through the requirement of compatibility of customary law with national state law and/or international human rights law; or through the imposition in the law of norms, organizational structures or decision-making processes that are foreign to the customary legal systems concerned. This case

thus highlights the understudied disempowering effect of conditions and internal conflict rules.[78]

The innovative approach of incorporating customary dispute settlement systems into the formal state justice system taken in Eritrea seems to enhance the quality of the customary as well as the state justice system. Andemariam discusses that the latter's congestion is eased by the cases that are settled amicably, which can lead to a reduction in the duration and the costs of adjudication of cases in state courts. In addition, access to the state justice system, at least to the first tier of the courts system, is significantly enhanced by the fact that the local dispute settler is the same person as the local state judge. This will bring statutory law and fora closer to the people. Knowledge and proximity will increase the 'shadow of state law' which in turn can have a positive effect on the quality of customary dispute settlement. As parties now have the opportunity to opt out of the customary system and seek the protection of the state justice system, they can more easily reject the pressure of accepting what they regard as an unfair settlement. In fact, all they have to do is refuse to settle and they will automatically receive a judgment on the basis of statutory law. Andemariam does not, however, discuss the decisions reached by these local judges, and additional research is needed to analyze them: are they in accordance with statutory law? Do they protect vulnerable groups who might be discriminated against under customary law? Are the parties satisfied with the decision?

Andemariam furthermore suggests that the incorporation of customary dispute settlement into the state justice system allows for innovations to customary dispute settlement, such as the inclusion of women 'judges', and the infusion of ideas and norms emanating from the state justice system. Simultaneously, it seems able to preserve some of the positive attributes of customary dispute settlement, such as proximity, limited financial barriers, local language and basic procedures. By creating such an inseparable linkage between the forum of dispute settlement and the formal court of first instance, the Eritrean approach is thus able to overcome a number of the weaknesses of hybrid justice systems mentioned by Clark and Stephens: that customary justice systems are not effective when powerful third parties are involved, that they fail to protect the rights and interests of women, that they sometimes ignore the punitive and deterrent justice objectives, and the fact that state institutions accidentally or deliberately overlook certain customary cases.

Whereas the dialogue approach demonstrates the importance being given to the role and power of traditional leaders, administrative linkages between customary administrative structures and governmental institutions are often neglected by policymakers and practitioners engaging with customary justice systems. Harper mentions the possibility of making formal recognition of customary fora conditional upon some measure of self-regulation or change. There is no compelling reason why this suggestion should only apply to fora for dispute settlement and not also to administrative institutions. More generally, the regulation or definition of traditional leaders' powers and authority and how these should be exercised could be attached to government recognition of traditional leadership, and similarly to the payment of government salaries. As such they could provide additional ways to increase oversight. Much could be learned here from public administration experts, especially those well-versed in development administration[79] and 'customary administration'.[80]

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[78] See A Hoekema, (presentation at the conference *Bringing Justice to the Poor? A Socio-Legal Look at Bottom-up Law and Development*, Amsterdam, 7-8 February 2001).
[79] M J Esman, *Management Dimensions of Development: Perspectives and Strategies* (1991); F W Riggs, *Administration in Developing Countries: The Theory of Prismatic Society* (1964).
[80] See for instance L Buur and H Maria Kyed (eds), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (2007); C Logan, 'Selected chiefs, elected councillors and hybrid democrats: popular perspectives on the co-existence of democracy and traditional authority' (2009)

7.3 The elusive oral nature of customary law

Various contributions mention the struggle of judges, policy makers, and development agents to come to grips with the unwritten character of customary law. Harper mentions that it is particularly distressing to proponents of the application of customary law in formal courts. In their opinion, if customary law cases are to be heard at or appealed to statutory courts, customary law needs to be documented. This is exactly what happened in Liberia, where the documentation of customary law is one of the main recommendations resulting from the National Conference on Enhancing Access to Justice. Also here, this proposal was put forward to assist and inform the formal courts in their application of customary law. But also in other cases, legal development agencies have shown an interest in the recording of customary law. In Aceh UNDP documented the best practices of procedural customary law, and Clarke laments that the substantive customary law is not also clarified. Clark and Stephens mention that the codification and reform of customary rules and procedures are an integral part of the World Bank's Strengthening Non-State Justice Systems pilot project in two areas of Indonesia (West Nusa Tenggara and West Sumatra).

Harper, Clarke, and Clark/Stephens all warn for the risk of 'over-formalisation'. Clark and Stephens caution that in the process of recognizing local institutions, their flexibility to match the process, remedy and sanction to local realities could be undermined. Clarke highlights that procedural flexibilities that can contribute to greater substantial justice may be lost. Harper furthermore warns that the principal risk is that the version of customary law adapted reflects discriminatory attitudes or power imbalances. In such circumstances, putting customary laws into writing may entrench poor justice for the poor and marginalised. She therefore points to the need for inclusion of adequate safeguards, such as participatory processes and mechanisms for popular endorsement of the principles adopted. Both can be simple ways for all community members to gain better knowledge about customary law and participate in its evolution.

Ubink's chapter deals specifically with the intended and unintended consequences of customary law recordings. She discusses the main historical devices and shows that they have, by and large, all failed to become guidelines for local dispute settlement. Consequently, these efforts have created a large gap between living customary law and the recorded versions of customary law. In contrast, the self-recordings undertaken by the Owambo Traditional Authorities in northern Namibia have become the new local law, informing customary dispute settlement. They are constantly referred to in traditional courts and are widely regarded as the normative framework upon which traditional leaders base their decisions. Obviously, the success of 'self-statements' raises questions in relation to the extent of and manner in which recordings can be stimulated or induced by external actors. An additional question is whether all customary norms are suitable for recording. For instance one can imagine that common procedural norms and criminal norms and sanctions are more easily codified than highly negotiable norms such as those regarding marriage, without locking in one person or group's interpretation of local norms (Clark and Stephens).

7.4 Power

The term customary legal empowerment, posited in this article, highlights that the distribution of power plays a vital role in improving the functioning of customary justice systems. Clarke warns that policy makers too often assume a unified community polity governed by an apolitical community leadership and that powers of definition and administration at the local level are overlooked by a belief in a 'myth of traditionalism'. Monson's analysis of land tenure in the Solomon Islands is a case in point. She highlights

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47(1) *Journal of Modern African Studies*; Ubink, above n 53; T Von Trotha, 'From administrative to civil chieftaincy: Some problems and prospects of African chieftaincy' (1996) 37-38 *Journal of Legal Pluralism*.

the intricacy of identifying representative leaders and spokespeople for customary groups. The acceptance or portrayal of powers of representation and negotiation can profoundly affect power relations within customary communities. This brings to the fore the need for additional requirements for enhancing transparency and accountability, and where possible equal participation of all community members in decision-making or dispute settlement fora. This is especially true when increasing commodification prompts elite attempts to capture the value of land, as widely reported in literature.

In this regard, we also need to highlight the relevance of historical knowledge. Monson discusses the transformations that have occurred in the Solomon Island's customary land tenure systems since colonisation. She shows that when historical processes have disempowered certain segments of customary communities these imbalances must be addressed if state recognition of rights of customary groups is to benefit marginalized community members. In fact, it will reify the power of the leaders as well as the marginalization of excluded community members. This is also one of the main lessons learned from failed attempts to increase tenure security and production through the formalisation of land rights.[81] As processes of disempowerment may have started long ago, this necessitates an approach that understands contemporary practices as embedded in history. The first step of Clark and Stephens' grounded approach to engagement with customary justice systems includes an understanding of the historical political and policy context of formal and customary justice systems. The importance of such an historical approach is underscored by the realization that most encounters with colonial powers as well as missionaries have significantly altered customary justice systems, and almost exclusively in favor of male elders. Clarke specifically mentions that "any meaningful engagement with [customary justice systems] cannot avoid the widespread manipulation of customary law by colonial administration."

Failing to address historical power imbalances can lead to the contradictory result that legal empowerment of a customary community can simultaneously lead to the disempowerment of certain groups or individuals within that community. Recognition of customary justice systems can thus stimulate development as well as have the opposite effect, *viz.* to entrench inequality. Everything depends on the content of customary law and, even more so, on who is granted the power of defining such content.

[81] See J Ubink, A J Hoekema, and W A Assies (eds), *Legalizing Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America* (2009).