

# Customary Justice: Perspectives on Legal Empowerment

Janine Ubink, Editor

Thomas McInerney, Series Editor



Universiteit Leiden  
Faculty of Law

Van Vollenhoven Institute  
for Law, Governance, and Development



International Development Law Organization  
Organisation Internationale de Droit du Développement

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## International Development Law Organization (IDLO)

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## Message from the Director of Research, Policy & Strategic Initiatives, IDLO

Rule of law practitioners from around the world are keenly aware that customary justice systems are a potentially important means of improving access to justice. Whether by choice or because they have no alternative options, the world's poor overwhelmingly favor customary justice systems over their formal counterparts. While the quality and equity of the outcomes delivered may vary, the sheer volume of outcomes suggests that there is significant opportunity to enhance legal empowerment by improving the quality of the justice processes that disadvantaged individuals and communities already use. At the same time, it is clear that customary justice systems can also restrict access to justice, particularly for marginalized and vulnerable groups. These processes can reinforce power imbalances, and outcomes can contravene human rights and justice standards. A central conundrum of engaging with customary justice systems is therefore how to support their many important positive aspects and enhance their capacity to protect the human rights of the most vulnerable members of society, notably women, minorities, indigenous peoples, disabled people and children. Despite these obvious linkages, the question of the role that customary justice systems should play in rule of law development programming remains poorly understood. In particular, there is scant knowledge on the extent to which assistance has translated into behavioral change among actors involved or on methodologies for evaluating impact and drawing lessons for future activities.

This volume stems out of a broad IDLO research program featuring activities in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda, aimed at expanding the knowledge base regarding the relationship between the operation of customary justice systems on the one hand and the legal empowerment of poor and marginalized populations on the other. The volume, featuring articles by leading authors, country specialists and practitioners working in the areas of traditional justice and legal empowerment, discusses key aspects of traditional justice, such as for example the rise of customary law in justice sector reform, the effectiveness of hybrid justice systems, access to justice through community courts, customary law and land tenure, land rights and nature conservation, and the analysis of policy proposals for justice reforms based on traditional justice. Discussions are informed by case studies in a number of countries, including Liberia, Eritrea, the Solomon Islands, Indonesia and the Peruvian Amazon.

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**Thomas F. McNerney**

*International Development Law Organization*



Janine Ubink, Benjamin van Rooij\*

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<sup>1</sup> 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.<sup>2</sup> Also, in many Asian and Latin American countries, customary justice systems are vital. See for instance the role of *adat* in Indonesia;<sup>3</sup> the *Lok Adalat* tribunals in India;<sup>4</sup> and the disputes over recognition of customary indigenous group rights in Bolivia or Columbia.<sup>5</sup> 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.<sup>6</sup>

Over the last decade or more, customary justice systems have become an increasing priority for international organizations working in legal development cooperation.<sup>7</sup> Examples include support for the re-constitution of *Gacaca* courts to deal with the immense number of suspects of the Rwandan genocide,<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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

\* Dr Janine Ubink is a Senior Lecturer and Africa coordinator at the Van Vollenhoven Institute for Law, Governance and Development, Faculty of Law, Leiden University. She holds a Bachelor of Law together with a Master of international Law from Leiden University, the Netherlands. In 2008, she published her PhD thesis entitled 'In the Land of the Chiefs: Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana'. Since 2006, she has been involved as researcher, project coordinator, and editor, in a research project on legalization of informal land tenure in nine countries in Africa, Asia and Latin-America. Ms Ubink's areas of specialization include customary law; traditional leadership; land tenure; legal reform; and legal empowerment. From 2010 she has held the position of a Hauser Global Faculty Professor at New York University, School of Law. She can be reached at [J.ubink@law.leidenuniv.nl](mailto:J.ubink@law.leidenuniv.nl).

Benjamin van Rooij is a Professor of Law at Amsterdam Law School, Amsterdam University. He is also director of the Netherlands China Law Center. Prior he has worked as a senior lecturer at Leiden University, where he studied law and Chinese language and cultures, and did a PhD (2006, *cum laude*) on the implementation of environmental and land law in Southwest China. His current research focuses both broadly on law and development and legal empowerment, and more specifically on implementation of regulation. His most recent publications include B. Van Rooij and C. Wing Hung-Lo, 'A Fragile Convergence, Understanding Variation in the Enforcement of China's Industrial Pollution Law' (2010) 32(1) *Law & Policy* 14-37; B. Van Rooij, 'Greening Industry without Enforcement? An Assessment of the World Bank's Pollution Regulation Model for Developing Countries' (2010) 32(1) *Law & Policy* 127-52; B. Van Rooij, 'The People Vs. Pollution: Understanding Citizen Action against Pollution in China' (2010) 19(63) *The Journal of Contemporary China*; and B. Van Rooij, 'Regulating Land and Pollution at Lake Dianchi: Lawmaking, Compliance and Enforcement in a Chinese and Comparative Perspective' in Mattias Burell and Marina Svenson (eds), *Making Law Work, Chinese Laws in Context* (2011) 367-403. Van Rooij's contribution to this chapter was made possible by a generous grant from the Netherlands Organization for Scientific Research (NWO) under their WOTRO Science for Global Development grant scheme.



strengthened or engaged with.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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”,<sup>14</sup> while according to one author, “up to 90 percent of cases in Nigeria are settled by customary courts”.<sup>15</sup>

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 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.<sup>16</sup>

- 8 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.<sup>17</sup>

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,<sup>18</sup> 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.

## 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."<sup>19</sup> 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".<sup>20</sup> 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."<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.

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.<sup>24</sup> 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."<sup>25</sup> 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."<sup>26</sup> 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.<sup>27</sup> Others reason that customary systems will not disappear in the near future, and therefore the issue of reform should be taken seriously.<sup>28</sup> 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.<sup>29</sup> Proponents of this view hold that “[e]conomic transactions remain unpredictable, insecure, and limited”<sup>30</sup> 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.<sup>31</sup> De Soto’s work, while often criticized,<sup>32</sup> 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.

## 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.

10 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.<sup>33</sup> 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<sup>34</sup> or which norms are observed in daily life outside of exceptional dispute cases.<sup>35</sup> Asking directly or hypothetically, however, may lead to answers that portray an idealized norm that is seldom practiced.<sup>36</sup> Further, norms derived from dispute practices may be different and exceptional when compared to those observed in daily life.<sup>37</sup> In addition, it may be difficult to distill customary norms solely by investigating disputes or observed behavior.<sup>38</sup> 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.

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

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; 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.<sup>42</sup>

#### 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.<sup>43</sup> 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)<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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

12 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 lacking. Second, appeal judgments may do little to affect the work of customary dispute resolution mechanisms outside of the case in question.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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 customary administrators.<sup>52</sup> There are four main ways in which state and customary administration can be linked.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.

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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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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 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,<sup>59</sup> 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.

- 14 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.<sup>60</sup> Such interventions can stimulate a demand for rights within the community, as proposed by Ignatieff,<sup>61</sup> 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.

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;<sup>62</sup>
- 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;<sup>63</sup>
- 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).<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> These studies, however, also show that interventions are no panacea and that persistent problems remain, including lack of capacity among paralegals,<sup>67</sup> resistant local elites who fear the undermining of their power base,<sup>68</sup> donor dependency and lack of sustainability,<sup>69</sup> community lack of confidence and trust,<sup>70</sup> and 'cut-throat antagonism' between weak and/or poor communities and powerful outside investors.<sup>71</sup> Of these 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

16 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.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> 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 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 chapters focus on the possible involvement of donors, while other chapters 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 "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.

18 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 neglect 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 chapter 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 Innovative Approach to the 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.

- 20 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 identify 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<sup>75</sup> 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.

21

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 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.<sup>76</sup>

## 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 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 also describe a focus on the customary reality and 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.

22 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 Paj 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.<sup>77</sup>

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<sup>78</sup> and 'customary administration'.<sup>79</sup>

### 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 chapter, 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 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.

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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. If not, state recognition will in fact 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.<sup>80</sup> 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.

## footnotes

- 1 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.
- 2 B. Oomen, *Chiefs in South Africa: Law, Power, and Culture in the Post-Apartheid Era* (2005).
- 3 T. Murray Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot' (2000) 1 *Comparative Studies in Society and History* 42.
- 4 M. Galanter and J.K. Krishnan, 'Debased Informalism: Lok Adalats and Legal Rights in Modern India' in E.G. Jensen and T.C. Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003).
- 5 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).
- 6 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*.
- 7 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).
- 8 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*.
- 9 H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2001).
- 10 Wojkowska, above n 8.
- 11 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.
- 12 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).
- 13 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).
- 14 C. Sage and M. Woolcock (eds), *The World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006).
- 15 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.
- 16 W. Schärf, *Non-state justice systems in Southern Africa: how should governments respond?*, University of Cape Town (2003) 7, 8.
- 17 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.
- 18 B. Van Rooij, *Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation*, Working Paper (2009).
- 19 L. Nader, 'The Underside of Conflict Management in Africa and Elsewhere' (2001) 32(1) *IDS Bulletin*.
- 20 Ibid.
- 21 UNDP, above n 8, 101.
- 22 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.
- 23 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*.
- 24 UNDP, above n 8.
- 25 Chirayath, Sage, and Woolcock, above n 12.
- 26 ADB, above n 23, 31-32.

- 27 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.
- 28 C. Nyamu-Musembi, *Review of experience in engaging with 'non-state' justice systems in East Africa*, paper commissioned by the Governance Division, DFID (UK) (2003) 27.
- 29 De Soto, above n 10.
- 30 CLEP, above n 8, 26.
- 31 De Soto, above n 10.
- 32 The vast body of mainly specialist land tenure related work remains outside the scope of this chapter.
- 33 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.
- 34 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).
- 35 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*.
- 36 Ibid.
- 37 Ibid.
- 38 J.L. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981).
- 39 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*.
- 40 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.
- 41 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.
- 42 Chanock, above n 40.
- 43 D. Fitzpatrick, 'Best Practice' Options for the Legal Recognition of Customary Tenure' (2005) 36(3) *Development and Change*, 457.
- 44 For an explanation of this see B. Van Rooij, 'Falū de Weidu, Cong Kongjianshang Jiedu Falū Shibai (Law's Dimension, Understanding Legal Failure Spatially) (Translated by Yao Yan)' (2004) 4 *Sixiang Zhanxian (Thinking)*.
- 45 Ubink, above n 34; J. Ubink, *The Quest For Customary Law in African State Courts* (forthcoming).
- 46 Ubink, above n 34.
- 47 J. Ubink, 'Courts and peri-urban practice: Customary land law in Ghana' (2002-2004) 22 *University of Ghana Law Journal*.
- 48 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).
- 49 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).
- 50 Llewellyn and Adamson Hoebel, above n 35.
- 51 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.
- 52 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).
- 53 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).
- 54 Bako-Arifari, above n 54, 5-15; Hlatshwayo, above n 54.
- 55 Such linkage can be found, for instance, in Cameroon, see Bako-Arifari, above n 54.
- 56 Englebert, above n 53.
- 57 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).
- 58 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*.
- 59 Ubink, above n 53.
- 60 Wojkowska, above n 8.
- 61 Ibid 33.
- 62 Ibid 38-39.
- 63 Ibid 33.
- 64 Ibid 35-39.
- 65 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.
- 66 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.
- 67 Mndeme, above n 67, 97.
- 68 A.K.P. Kludze, *Restatement of African Law, Ghana. Volume I: Ewe Law of Property* (1973).
- 69 S. Roberts, *Restatement of African Law, Botswana. Volume I: Tswana Family Law* (1972).
- 70 N.N. Rubin, 'The Swazi law of succession: A restatement' (1965) 9(2) *Journal of African Law*.
- 71 W. Twining, 'The restatement of African customary law: A comment' (1963) 1(2) *The Journal of Modern African Studies*.
- 72 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).
- 73 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.
- 74 ABD, above n 23.
- 75 S. Moore, 'Law and social change: The semi-autonomous social field as an appropriate subject of study' (1973) 7(4) *Law and Society Review*.
- 76 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.
- 77 See A. Hoekema, (presentation at the con-

ference *Bringing Justice to the Poor? A Socio-Legal Look at Bottom-up Law and Development*, Amsterdam, 7-8 February 2001).

- <sup>78</sup> M.J. Esman, *Management Dimensions of Development: Perspectives and Strategies* (1991); F.W. Riggs, *Administration in Developing Countries: The Theory of Prismatic Society* (1964).

- <sup>79</sup> 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) 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*.

- <sup>80</sup> 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).



Erica Harper\*

### Introduction

Any discussion of the features of, and the opportunities and constraints inherent in, customary justice systems raises important questions about the role that they should play in the programming of national governments, international organizations and non-governmental organizations (NGOs) operating in development, post-conflict or post-natural disaster contexts. Principally, should aid agencies engage with customary justice systems when they operate outside the formal legal sector and may fail to uphold accepted international human rights and criminal justice standards, even though they may be the only functional or preferred mechanism for dispute resolution? If the answer is yes, what are the aims of and principles underpinning such engagement? Should attention focus on enhancing the protection of marginalized groups, either by eliminating the negative aspects of customary justice or strengthening the links between the formal and informal justice sectors? Alternatively, should the aim be to modify our thinking with respect to the customary justice sector; to approach it less as a problem that needs to be resolved and instead as an integral part of the solution to providing access to fair and equitable justice for all — a system that needs to be supported and strengthened in all its aspects?

Although such questions were first posed only in recent years, a rich policy debate has evolved. The following chapter provides insight into this discourse, taking into account policy and donor imperatives, the extent to which engagement with customary justice aligns with dominant models of justice sector reform, and the role that customary justice systems might play in the achievement of other development objectives. A thorough understanding of these factors should guide how the rule of law community approaches programming in plural contexts, including by identifying some of the challenges that need to be overcome and by situating customary law within a framework that takes into account the socio-economic, cultural and security context in which community-level dispute resolution takes place.

\* Dr Erica Harper is a Senior Rule of Advisor at the International Development Law Organization. Dr Harper has a Bachelor of Commerce and Bachelor of Laws (honours Macquarie University, Australia) and a PhD (University of Melbourne, Australia). Her areas of specialization include post-conflict judicial rehabilitation; international criminal law and transitional justice; and alternative and customary dispute resolution. Prior to joining IDLO, Dr Harper worked at the United Nations High Commissioner for Refugees (Geneva, Timor Leste and the Philippines) and various field-based NGOs. The ideas expressed in this chapter are drawn from a Practitioner's Manual on Programming for Customary Justice (IDLO, 2011); the author wishes to thank the various scholars and practitioners who have contributed to the development of these works, in particular Chris Morris, Deborah Isser, Johanna Cunningham, Janine Ubink, Thomas McInerney and Ilaria Bottigliero.

## 1. Mainstream development theory and ‘rule of law orthodoxy’

Dubbed the ‘rule of law orthodoxy’, it is well established that the international community concentrates its legal development activities on the reform of formal justice sector institutions: the courts, legislature, police and correctional facilities.<sup>1</sup> And while legal assistance programs are expanding rapidly, assistance to customary dispute resolution processes has been largely neglected by UN agencies as well as under other multi-lateral and bi-lateral programs.<sup>2</sup> There are three primary reasons for this, as discussed below.

### i) Institutionalizing poor justice for the poor

Strengthening customary justice systems may be deemed inconsistent with broader rule of law goals. Some argue that high usage of customary processes is symptomatic of poor access to the formal system, as opposed to a normative or ethical preference for customary justice.<sup>3</sup> It follows that interventions should focus on expanding the reach of courts and enhancing their efficiency. Efforts to reform or strengthen customary justice systems, by contrast, will distract and divert limited resources away from the development of the state system, while at the same time institutionalizing sub-standard justice for the poor.<sup>4</sup> The result can be “a two-track system that reinforces ... unequal access to legal justice” whereby courts are reserved for the wealthy and the victims of serious crime, while the poor and victims of minor cases are forced to accept ‘secondary’ forms of justice.<sup>5</sup>

### ii) Incompatibility with programming approaches of development agencies

Supporting or working through customary legal systems can be incompatible with the programming approach of some development agencies. Such interventions may be considered antiquated or unprincipled by lawyers schooled in more formalistic settings: work that falls more in the domain of anthropologists and social scientists than legal practitioners. Programs involving customary processes may even lie outside of some organizations’ terms of reference. As Isser explains, “... most multilateral and bilateral international actors are mandated to work through state bodies. Customary justice systems which function outside of, or as an alternative to, the state, are often seen as incompatible with this mission”.<sup>6</sup>

Other agencies find it unacceptable to engage with systems that tolerate discriminatory treatment or fail to uphold international legal standards. For example, the United Kingdom Department for International Development’s (DFID) Policy on Non-State Justice and Security Systems (NSJS) states that working with customary systems “is not applicable in situations where NSJS violate basic human rights such that donor engagement is both inappropriate and unlikely to achieve reform”.<sup>7</sup> Beyond the question of whether to engage at all, that aspects of customary justice processes may be inconsistent with international standards has implications for the question of ‘how’ to engage. As will be discussed, this presents a particular dilemma for United Nations agencies, which are required to operate within a normative framework of human rights, international law and internationally accepted criminal justice standards.<sup>8</sup>

### iii) Interface with the formal legal system

Finally, some argue that strengthening the customary system can result in a competing and overlapping set of laws which, while giving choice, can “obstruct claim-holders’ access to justice and impede effective handling of grievances”.<sup>9</sup> This may create confusion or promote instability.<sup>10</sup> It can also encourage forum shopping and, in turn, facilitate manipulation of the system by more powerful, wealthy or more informed disputants.<sup>11</sup> Pluralism offers such groups the option of ignoring customary norms and asserting their right to refer disputes to the formal legal system in an attempt to avoid traditional responsibilities, to ‘get a better deal’ or when seeking revenge.

## 2. The case for engagement with customary justice systems

Despite the arguments cautioning a partnership with customary justice systems, there is growing support for the position that, while there are certainly challenges to be overcome, engagement with

them is an essential ingredient for ensuring access to justice for disadvantaged populations, and should be prioritized by development agencies implementing programs of justice sector assistance or reform.

### 2.1 Lack of appropriate options in some contexts

In certain contexts, the customary justice system may be the only or most strategic entry point for enhancing access to justice. Particularly in post-conflict and post-natural disaster situations, state courts may be non-operational, or the delivery of services stymied by a lack of resources, inefficiency and/or case back-logs. In the immediate aftermath of the 2004 Indian Ocean tsunami, for example, the only functioning dispute resolution apparatus in Aceh, Indonesia was the customary system. Even after courts re-opened, they were incapable of processing the huge number of inheritance, property and guardianship cases that were generated. As such, strengthening and utilizing customary fora was deemed the most cost-effective means of resolving small-scale disputes while not congesting the courts and correctional facilities.

In other situations, engagement with the state justice system might be considered inappropriate, for example, where the state is a known conspirator in the perpetration of rights violations, or unlikely to yield effective results, such as where corruption is endemic or there is little or no state support for reform. There may also be scope for reform at the customary level that does not exist within the formal justice sector. As will be discussed, the dynamic nature of customary justice systems allows them to grow and adapt to social and economic imperatives in interesting ways, opening up fertile ground for certain types of normative reforms.<sup>12</sup>

### 2.2 Heightening protections for marginalized groups

A further basis for engagement is that customary justice systems are simply too important to ignore. As the cornerstone of dispute resolution for the poor and disadvantaged in developing countries,<sup>13</sup> how these mechanisms operate has a critical impact on livelihoods, security and order. Moreover, the ‘bread and butter’ work of customary fora — disputes involving access to land and productive resources, property, marriage, succession, and criminal offences such as rape — have important social and economic implications for those involved. Where customary justice is fair and rights respecting, it can support the marginalized and promote stability; where it is discriminatory and nepotistic, the results can be inequality, disenfranchisement and heightened potential for conflict.<sup>14</sup>

A related rationale concerns the human rights protections offered to users of customary justice systems. Since customary fora operate outside of state regulation and without formal accountability mechanisms, users are more vulnerable to nepotism, discrimination and sanctions that violate accepted human rights standards. It is well established that women and minority groups are among those most disadvantaged and least protected under customary dispute resolution. Further, those whose livelihoods are dependent upon customary land holdings or whose marital rights derive from a customary union, have little or no recourse or state protection. Ignoring these realities, or (worse) using them as grounds for non-involvement will not correct the violations that can occur through the operation of customary legal systems. Instead, it is the number of people who have no choice but to rely upon such systems that makes the case for active involvement compelling.<sup>15</sup>

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### 2.3 Delivering access to justice for all

Perhaps the most salient argument presented in support of engagement is that if the objective is to make justice accessible for all, this is unlikely to be achieved in the short-term without customary justice systems forming part of the solution. In most developing countries, the state cannot provide accessible justice services to the entire population, and nor is it the most efficient provider of such services. In the context of competing development imperatives, expanding the reach of state courts may have little economic appeal *vis-à-vis* making the best use of existing grassroots mechanisms.<sup>16</sup> Further, a decentralization of legal services to, *inter alia*, customary systems may be a cost-effective means of reaching more beneficiaries and heightening the efficiency of the formal sector.<sup>17</sup>



The limitations of state justice systems can be contrasted to the scope of work that customary justice systems can and do handle.<sup>18</sup> While noting that precise calculations are difficult, Golub purports that “one can reasonably conclude that perhaps 90 percent or more of the law-orientated problems involving the poor are handled outside of the courts in much of the developing world”.<sup>19</sup> Whether this is voluntary or due to limited access to the state system is largely irrelevant. A large body of justice is being meted out through customary systems, with the implication that far-reaching reforms can be made through engagement with such fora. When seen in this light, enhanced access to the customary system becomes a tool for women, the poor, the marginalized and other vulnerable groups to uphold their rights.

## **2.4 Strengthening the rule of law**

Finally, even if they are not the object of reform, expanding approaches to include customary systems may have positive spillover effects. Effective formal justice sector reform, for example, may to some extent lie in understanding what occurs at the customary level. Customary justice systems exhibit remarkable resilience, outlasting changes in government, conflict, natural disaster and state-based attempts to abolish them.<sup>20</sup> They are also popular. Customary processes are often perceived as fair, cheap and efficient, are steeped in local legitimacy and authority, and respond to the social, legal and material needs of the populace in a way that the formal system is unable to do. While neither resilience nor popularity is a valid ground for engagement per se (asserted preference does not necessarily indicate that customary outcomes are beneficial for all users), such features demonstrate a level of effectiveness and a connection to the people that use them. Understanding how and why this is the case may provide some of the answers to developing a rule of law culture and making the formal justice system more attractive.

## **3. ‘Fix it’ approaches to engaging with customary justice systems**

The above discussion reveals a growing consensus that despite some obvious challenges, excluding customary justice systems from reform strategies is not the best approach for enhancing access to justice and protecting the rights of vulnerable groups. Appeal is growing for strategies that aim to improve the quality of outcomes resolved at the community level by building on the positive aspects of customary systems — particularly their reach and popularity — and attempting to reform negative practices.

But partnering with customary justice systems raises new and important concerns. Principally, how can a decentralization of legal services be supported while ensuring that this does not equate to a formalization of inequitable or rights-abrogating practices that occur at the customary level?<sup>21</sup> A further concern relates to how programming objectives can best be achieved given the normative frameworks within which many international development organizations operate. As discussed, United Nations agencies (and others) are obligated to uphold human rights in all aspects of their work. At the same time, it is clear that where customary norms do not align with international human rights standards, there are often complex rationales in play, touching upon issues such as culture, socio-economics and security. In such contexts, approaches that concentrate on bringing customary systems into alignment with international norms might be, at best, ineffective and, at worst, harmful.

A review of the programmatic landscape over the past decade suggests that the combination of the above concerns has skewed programming towards interventions that aim to ‘fix’ customary justice systems and better align them with international standards and/or state models of justice. Such approaches might include efforts to enhance participation in customary decision-making, eliminate negative customary practices, harmonize customary and statutory laws, and/or link customary and state adjudicatory fora. As will be discussed below, there are certain challenges inherent in such approaches. Above all, strategies that aim to directly address flaws or constraints inherent in customary justice systems 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.

### 3.1 Expanding participation in customary decision-making

One means of promoting downward accountability and enhancing the protection of marginalized groups is to promote their participation in dispute resolution processes. This might involve vesting such groups with leadership responsibilities, or expanding the dispute resolution 'circle' to include representatives of women, youths or other traditionally excluded groups. Proponents argue that female interpretation and application of customary law is likely to better factor in the needs of, and protections required by, *all* groups and that youth may be more inclined to challenge traditional norms and embrace modern notions of human rights and good governance.<sup>22</sup>

The principal drawback of this approach is that power-holders are unlikely to give up their monopoly over dispute resolution easily; devolution of authority usually requires external intervention. To this end, some governments have introduced legislation requiring that community leaders be democratically elected. In certain cases, this has been seen as unwelcomed interference in local governance, and elections have been boycotted. Another potential outcome is that elections do not alter the profile of the leadership, either due to local-level political interference in the election or the strength of support for the existing power hierarchy.<sup>23</sup> An alternative approach is the stipulation of quotas for participation by certain groups. It is not necessarily the case, however, that appointment is followed by meaningful participation; those selected are sometimes chosen specifically because they are unlikely to question dominant norms; in other cases, prevailing social attitudes constrain appointees' freedom to act independently.<sup>24</sup> This should not be all that surprising. Customary justice systems function on the basis that decision-makers are regarded as legitimate; it is their social authority that ensures that disputants participate, enter into negotiated agreements and abide by outcomes reached. Where leaders lack legitimacy, the integrity of the system may be compromised.<sup>25</sup>

While there are certainly examples of where customary mechanisms have been expanded to better reflect the composition of society, it would appear that coercive change to leadership structures is rarely an effective means of promoting the substantive participation of marginalized groups. How to get local leaders interested in diluting or devolving their authority is a key challenge. Prompting open debate at the local level on issues of participation may be one entry point; when election or appointment is the strategy adopted, incremental reforms, such as installing women and youths in advisory roles rather than as decision-makers as a first step, may have greater impact over the longer term.<sup>26</sup>

### 3.2 Codification of customary law

The codification of customary law is proposed by some as a means of enhancing predictability in decision-making and reducing the flexibility and negotiability inherent in customary law. Codification is particularly appealing to proponents of harmonizing or linking formal and customary systems; if customary law cases are to be heard at or appealed to statutory courts, there is a strong argument that applicable norms need to be reduced to written form.

Projects of codification, however, have had limited success. Customary laws are less rule frameworks than sets of principles tailored to specific contexts and malleable in changing circumstances. As such, they do not lend themselves easily to codification. Moreover, the effectiveness of customary systems is premised upon their capacity to facilitate negotiated solutions, a feature that may be extinguished through codification.<sup>27</sup>

Codification also poses practical difficulties. Customary systems are dynamic and may exhibit wide variation over small areas. Written codes may quickly become obsolete and risk locking diverse groups into a single interpretation of norms.<sup>28</sup> Even if codification could capture one system

adequately, customary law is almost always internally contested. Codification thus raises the question of whose version of customary law is to be adopted. The obvious risk is that the norms presented discriminate against weaker groups and overlook important needs.<sup>29</sup>

Finally, codification may have less than anticipated impact in areas where literacy is low. Codified rule sets may even be used as a tool to discriminate against those groups least likely to have literacy skills (also those with the highest vulnerability), namely women, the poor and the under-educated.

An increasingly popular alternative to codification is self-statements or ascertainties of customary law. These are written documents that describe (but usually not prescribe) key customary law principles.<sup>30</sup> They are produced and used by communities to guide dispute resolution; as rules are not fixed, such processes avoid a crystallization of laws and the associated loss in flexibility. While there is no set procedure for ascertainties, a main feature is that processes are participatory and that principles are adopted with a level of group consensus.

In summary, codification may be a suitable means of enhancing predictability and protections in specific contexts, such as where there is a relationship between customary and statutory courts, where large population shifts have brought unfamiliar groups into close proximity, and where communities are no longer homogenous, and traditional means of communicating knowledge have broken down.<sup>31</sup> Codification may also be successful in contexts where customary rules lend themselves naturally to codification, for example where rules are not disputed and have remained constant over long periods. In other situations, self-recording may be more appropriate. Under either method, the principal risk is that the version of customary law adopted – whether it is popularly accepted or contested – reflects discriminatory attitudes or power imbalances. In such circumstances, codification or ascertainment may formalize such norms, entrenching poor justice for the poor and marginalized. However, where adequate safeguards are in place, such as participatory processes and mechanisms for 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.

### 3.3 Eliminating harmful customary practices

A common approach for eliminating negative customary norms is using legislation to either proscribe certain practices or introduce specific rights for vulnerable groups. There are noteworthy cases where legislative pronouncements have impacted on norms at the customary level. However, legislation may have less than the desired impact where there are barriers to accessing the formal justice system, where customary norms are deeply entrenched, or where 'negative' customary practices have important social, economic or security rationales. Similarly, when legislation is designed to suppress a practice that is attached to a widely held belief set, the only result may be to drive the norm underground, where less regulation leaves marginalized groups even more vulnerable to exploitation and unsatisfactory outcomes.

A further issue that should be considered is that, where features of customary justice are said to violate human rights and criminal justice standards, these may be grounded in context-specific rationales. Two practices — customary solutions that violate the rights of women and collective responsibility — can be used to illustrate this argument. In many developing country contexts, rape and widowhood have specific social and economic implications for the women involved. Entrenched discriminatory attitudes may dictate that rape victims are unable to marry, forcing them to rely on their families or the wider community for social, livelihoods and financial protection. Such women, and any children involved, are more vulnerable to poverty and homelessness, and often suffer lifelong discrimination. In this context, a common solution to crimes of rape is for the victim to marry the perpetrator. Although this clearly abrogates the victim's right to a remedy and freedom of marriage (and arguably to protection from treatment that is cruel, inhumane or degrading), marriage may provide the victim with a degree of social and economic security that she would not otherwise enjoy.

A further example relates to the limited inheritance and property ownership rights granted to women under some customary systems. While such rules are clearly discriminatory, there may be security-related or social rationale for keeping land within male lineages. In Somalia, the size and strength of the clan is the basic unit of security. Key to the clan's strength is its wealth, including property holdings. As women may marry outside of their own tribe (or may be traded as part of compensation agreements), it is considered contrary to clan interests to permit them to own or inherit property, as to do so would dilute the group's collective strength and defensive power.<sup>32</sup>

This is not to suggest that such practices are justifiable or should be sustained, simply that in situations of generalized discrimination, poverty and limited (or non-existent) social security, the importance of basic safeguards including financial, social and security protections, must be taken into account when developing customary reform strategies.

The limitations of the above approaches to reforming customary law have led development practitioners to experiment with a range of bottom-up strategies, including exploring ways to promote self-regulation or internally-generated reforms. Two characteristics of many customary justice systems suggest that such approaches are promising. First, their dynamism and flexibility: while this is often presented as an entry point for discrimination and abuse, such fluidity also makes customary systems capable of modernization and change, thus opening up inroads for progressive reforms.<sup>33</sup> Second, while customary leaders are often among those who benefit from discriminatory norms and maintenance of the status quo, they also have incentives to be responsive to changing community expectations as their ability to maintain order and social harmony is closely linked to their authority.<sup>34</sup> Whether this makes them the gatekeepers to rights protection, or potential agents of reform, they are clearly important partners in any strategy to improve the quality of customary adjudication. Building upon this, the next section discusses a range of approaches that aim to support the legal empowerment of users and encourage the self-reform of customary justice systems.

## 4. Expanding access to alternative dispute resolution fora

Where there are impediments to accessing just and equitable solutions through customary fora, an alternate solution to reforming customary systems directly is to support the creation of new institutions that offer other forms of dispute resolution. Such institutions operate in parallel to customary justice systems, complementing or supplementing them, with a view to promoting access to justice and improving its operation through heightened competition. A related approach is to expand the reach of the formal justice sector and to make it more accessible and attractive to users of the customary justice, while again creating indirect pressure for internal reform. Such alternate mediating institutions may be created by communities themselves, NGOs or the state, as explored below.

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### 4.1 NGO-led alternative dispute resolution

Dispute resolution services provided by NGOs is a recent but growing response to access to justice vacuums caused when formal and/or customary justice systems are unsatisfactory or ineffective. Such fora, sometimes labeled 'popular justice mechanisms', can take a variety of forms but are often grafted upon customary dispute resolution methodologies and then adjusted to offer enhanced procedural and rights guarantees. They are generally free, and decisions are usually non-binding. Staff may be local or external to the communities in which they operate, but receive training, *inter alia*, in mediation, legal skills, human rights and gender equality. Services provided might include investigation, mediation, post-mediation monitoring of the outcome as well as complementary functions such as community legal education and dispute resolution training for community leaders. Where most effective, NGOs are linked to legal aid services that can assist with disputes that are either unsuitable for, or cannot be resolved through, mediation.

## Box 1

### Bangladesh: Mardaripur Case study

In response to the difficulties faced by poor and marginalized groups accessing the formal legal system, Madaripur, a Bangladeshi NGO, developed a multi-tiered structure of village mediation committees. The methodology employed is an adaptation on Bangladeshi customary mediation but modified to eliminate some of the negative practices characteristic of traditional 'shalish' and to better address the needs of users. In each village where the program operates, an 8-10 person Mediation Committee, reflecting the gender and ethnic composition of the community, is selected in consultation with local power-holders and elites (such as elected officials, teachers and other socially influential persons). The Committees meet twice a month to mediate village disputes, free of charge. Oversight is provided by a mediation worker trained by Madaripur from the Union-level Central Mediation Committee.

Criminal cases, including rape and murder, as well as complex land cases are not mediated, but are referred to the formal legal system; Madaripur provides assistance through its legal aid division where required. Where mediation is successful, the agreement is recorded and signed by the parties. If mediation is not successful, the dispute is referred to a higher level in the Madaripur structure for further mediation. Disputes that still cannot be resolved are referred to the courts, again with legal aid assistance if required. Madaripur mediates approximately 5,000 disputes annually across 487 committees. Of these disputes, between 66 and 88 percent are said to be successfully settled without going to court. Although mediation is voluntary and decisions are not enforceable, rates of compliance are also high. There may be several reasons for this, such as the perceptions of officialdom and authority attached to NGO-mediated and/or written decisions, post-agreement monitoring of the decision; or, most likely, parties' knowledge that if an agreement is not reached or abided by, the complainant has a very real option of litigation.<sup>35</sup>

Initiatives like Madaripur represent an innovative model for resolving disputes in a way that is culturally appealing but offers better protection to vulnerable groups by eliminating the corruption and discrimination inherent in the customary and (sometimes) formal justice system. This model, however, is not free from complication. NGO-facilitated mediation, unlike most customary systems, is rarely financially sustainable; operations require either financial support or a fee schedule. NGO mediation also does not possess all of the tools of customary justice, such as the social authority of its leadership, participation and compliance driven by social pressure, and the facility to re-establish social harmony through its decision-making.

36 A further challenge is how to balance the need to distinguish the justice provided from that which is available through customary fora, with the need for the forum to establish itself as a legitimate and credible option for disputants. Phrased another way: while the objective of NGO-facilitated mediation is to better protect marginalized groups from discrimination and corruption, a forum that offers solutions that are too dissimilar from social and gender norms risks being rejected or boycotted.<sup>36</sup> Madaripur's response to this was a subtle and progressive realization of norm modification; modalities included providing education to local mediators and disputants, the gradual introduction of women mediators, and encouraging female participation in dispute resolution, both as committee members and as disputants. Processes were still male dominated, but advancements were made. Women mediators mitigated some of the discrimination against women through both their interpretation of customary law, and the existence of Madaripur provided women with more options for upholding their rights.<sup>37</sup> While this may seem like a logical approach, where this balance is struck is not always clear and may involve some trial and error; moreover, such change models are slow and significant developments are unlikely to be seen for many years.

The NGO-mediation model also raises some questions. Mediation led by Madaripur appeared to enjoy high rates of both obtaining a solution and compliance. Given that mediation was voluntary

and that respondent parties may have been able to get a more advantageous solution through traditional *shalish* (where they could have taken advantage of discriminatory gender norms, power biases and corrupt practices), it is reasonable to connect this to the threat of litigation. On the one hand, where the NGO offering the mediation service upholds human rights standards, provides procedural protections and processes are not affected by elite capture, this could be seen as an effective means of leveling the playing field. On the other, in contexts where the formal justice system is expensive, intimidating and/or corrupt — a place to be avoided by both the innocent and the guilty — the threat of litigation enjoyed by the NGO-assisted party may be seen as giving them an unfair advantage over their opponent.<sup>38</sup>

## 4.2 Community-based paralegals

Paralegals are laypersons that have legal literacy skills; they usually have knowledge of substantive laws as well as skills in how to negotiate the court system.<sup>39</sup> Their function is to provide a bridge between the formal legal system and society, thus demystifying the law and making justice more accessible.<sup>40</sup> Paralegals can offer a range of legal services that do not necessarily need to be provided by a lawyer, such as: advice on whether a rights violation has occurred; what are an individual's legal rights in a particular situation; how to access government or NGO legal aid; and how to file a claim in court or at an administrative tribunal. In some contexts they also provide quasi- or complementary legal services such as mediation, community legal education or advocacy work.

In most cases, paralegals operate out of city-based legal aid centers, and thus are less accessible for community members in rural areas. Recently, however, the notion of community-based paralegals has increased in popularity. They not only provide a means of accessing the formal justice system, but may also enhance the quality of justice at the customary level, either indirectly by increasing competition in the provision of legal services, or directly by working in partnership with customary leaders in the resolution of disputes.

There are many advantages of using paralegals in this manner, as described by Maru. They are a cost-effective means of providing a variety of legal services to communities that cannot otherwise access the state system. In contrast to lawyers, they can be quickly and easily trained in large groups and do not need to have a pre-existing or specific skills set.<sup>41</sup> The paralegal approach may be particularly suited to rural community contexts. First, paralegals sit between the customary and formal systems, using the advantages of both strategically and according to the situation; they are not limited to an adversarial approach, but can adopt a flexible and creative approach to solving problems using a range of tools including mediation, conciliation or adjudication at a court. They can also integrate reconciliation practices into dispute resolution and evoke the centrality of community harmony. Second, since they are community-based, they are familiar with community power-holdings and dynamics, may be more accessible and approachable, and better understand the backgrounds of disputes. Such insights, combined with their flexibility, make them well placed to craft workable, socially legitimate and enforceable solutions. Third, where paralegals are connected to a legal aid service, they may be able to overcome problems of elite capture in the customary system since they have the option of litigation and high-level advocacy.<sup>42</sup>

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The biggest challenge associated with paralegal models is how to obtain the support of customary justice leaders. To have impact, paralegals must represent a source of competition and threaten leaders' monopoly on judicial power; however, where this potential encroachment on power is too large, leaders may obstruct their work completely. One approach is to vest paralegals with wider functions. For example, it might be better to 'market' paralegals as custodians of information on all issues to do with state administration, such as benefits and services that communities might profit from, including those of a legal nature. An alternative approach is to bond paralegals to community leaders as assistants; paralegals might collect background information on a dispute, organize dispute resolution sessions, make records of proceedings, or provide advice to the customary leader on issues such as statutory law or the role of police. Finally, where customary law leaders are

open to paralegals working independently, for example, undertaking mediation or advising community members about their rights, their work might be overseen by a board of community members or leaders.

### 4.3 Enhancing access to the formal justice system

A final strategy for presenting communities with alternatives to customary justice is to enhance access to the formal justice system, either by expanding the reach of state justice services or by modifying court processes to make them more appealing to customary disputants. While the principal objective is to enhance local communities' understanding of and access to state justice, a secondary benefit may be improved customary processes as a result of enhanced competition<sup>43</sup> and the state acting as a check and balance on customary leaders.

The most common means of expanding state justice services to reach the community level is through legal aid services and the establishment of mobile courts. Mobile courts are staffed by court judges, often assisted by translators, who travel periodically to communities to overcome cost and distance factors that otherwise make the court system inaccessible. Judges can deal with a range of issues including resolving criminal and civil cases, or performing civil services such as marriages and the issuance of personal documentation. A closely related measure is to provide incentives to judges and magistrates to work in rural areas, including through financial and career advancement possibilities. A final entry point is to appoint Justices of the Peace within communities, or who service a selection of communities. Justices of the Peace are usually lay magistrates who are authorized to mediate or conciliate disputes, and have limited jurisdiction to adjudicate minor criminal and civil matters.

Steps to make the formal justice sector more appealing to customary justice users might include reducing and simplifying filing procedures, streamlining case processing to reduce the number of times that disputants need to appear in court, eliminating or reducing case filing costs (particularly for indigent persons), providing free legal aid services, employing translators or multilingual court staff, and allowing cases to be heard in local dialects. Policy-makers also might explore importing modalities, principles or features of customary justice into the operation of state courts with a view to making them more user-friendly and to promote decision-making that is more likely to address the needs and perspectives of parties. Examples include:

- the use of conciliatory techniques aimed at mediated rather than adjudicated outcomes;
- facilitating the greater participation of customary law actors in court proceedings such as by inviting them to provide their views on appropriate sanctions (particularly as to punishments already or likely to be applied at the customary level), the background to the dispute, or expert advice on customary law;
- promoting greater procedural flexibility, such as taking into account customary rules of evidence;
- promoting non-custodial and restorative sanctions consistent with customary law norms such as compensation, restitution, community service work, and sentencing that takes into account the future relationship between the parties and punishments already or likely to be applied at the community level; and
- training magistrates in customary law norms and principles to encourage judgments that better respond to community needs and conceptions of justice, and in laws that allow them to take customary or social context into account.

### 4.4 Key challenges and lessons learned

First, when assessing the value added of expanding the number of dispute resolution fora, the secondary implications this might have for the effectiveness of customary justice and broader questions of access to justice must be assessed and taken into account. Having multiple pathways to justice can weaken or corrupt the internal integrity of the customary justice system, the



workability of which is dependent on its social power to command user participation and respect. When newly introduced 'options' undermine the functionality of the customary system, but are not strong enough or sufficiently accessible to replace it, access to justice may be reduced; if this creates a situation where no reliable justice options are available, the results can be increased vigilantism, violence and criminality.<sup>44</sup>

A second challenge relates to the pace and nature of change that can be expected to flow from such 'alternatives'. The options described in this chapter for vesting customary justice users with more choice as to where they resolve disputes each require that they voluntarily step outside of the more familiar and culturally dominant customary 'sphere'. As will be discussed below, while complainants often have incentives to make use of alternate fora (as they offer greater protections), they may confront various social barriers when doing so. Respondents on the other hand, have fewer incentives to voluntarily submit themselves to such mechanisms, particularly where they may be less able to use their gender, power or wealth to engineer outcomes in their favor. In many cases, it is only the threat of litigation that makes such models workable.

Given these complex social and vested interests in play, the approaches adopted and outcomes delivered by alternate justice providers generally need to be not too far removed from customary norms. As described in the Madaripur case study, in order to encourage disputants to reject traditional *shalish* and submit their disputes to village mediation committees, decisions and modalities need to offer sufficiently better protections, while not representing too radical a shift in social convention that Committees would be 'pariahed'. The point to be emphasized is that for alternative dispute resolution fora to be voluntarily accepted and utilized, what they offer in terms of procedural protections and outcomes will generally be quite measured. Normative reform will be slow, and in the near term, those applying or supporting such reforms may need to accept that some level of harm will continue. Such a balancing of 'less harm' against 'no harm' may not be a strategy that all donors or policy-makers can endorse.

A final challenge to be addressed is the reality that customary leaders often hold a monopoly over dispute resolution and have a strong vested interest for holding onto such power. The introduction of alternative pathways to justice may thus be strongly resisted; leaders may attempt to dissuade or obstruct users from referring matters to either NGOs or the formal legal system. While this is often for self-interested reasons, for example, to preserve their capacity to extort bribes, there may also be strong social factors in play. In Indonesia, leaders actively discourage community members from approaching the formal justice system because this is perceived as a sign that they are unable to maintain order in their villages, weakening their credibility as leaders.<sup>45</sup>

Regardless of the underlying rationale, users of customary justice systems will generally need to weigh up the benefits of approaching an alternate forum with the potential negative consequences. These might include the risk that an offended customary law leader may discriminate against them in subsequent decision, or that, if the dispute is ultimately resolved customarily, they might receive a larger penalty. Disputants who leave the customary realm may also receive social sanctions for disregarding norms of community harmony and cohesion.

Such resistance by customary leaders and the ramifications or barriers disputants may face in accessing alternate fora must be thoroughly understood and integrated into any reform strategy. In particular, strategies aimed at gaining the acceptance or support of customary justice leaders should run in parallel to any intervention. Bonding paralegals to customary leaders as assistants, or 'marketing' them as holders of a range of useful skills and information about the state system, including legal information, are examples of entry points that could also be applied to NGOs offering mediation services. In situations where resistance cannot be completely overcome, opposition may be mollified by involving leaders in decision-making or vesting them with oversight responsibilities.

## 5. Conclusions

This chapter began by exposing some of the difficulties associated with mainstream ‘top-down’ approaches to reforming customary justice systems. Such strategies tend to focus on eliminating negative customary practices and align customary systems with international standards and/or state models of justice. A key issue is that the customary and state justice systems greatly differ in aims and *raison d’être* (reasons for existence). Efforts to make customary justice better resemble the state are often limited as they are predicted on assumptions that, when applied to customary models, compromise their internal logic. Interventions that are devised and led by customary actors and users themselves, it was argued, are more likely to be effective and sustainable.

The chapter then discussed a new and sparsely analyzed approach for enhancing the empowerment and access to justice of customary justice users: the introduction of community-level alternatives to customary dispute resolution. Perhaps the most interesting aspect of this approach is that it has the potential to enhance access to justice in a number of different ways: disputants may take their disputes to mediating institutions that offer better procedural and rights protection; these new institutions could work in complement to customary fora, particularly where there is an overflow of cases or customary leaders are badly placed or uninterested in resolving certain types of disputes; or the establishment of new fora might create a competition in the provision of dispute resolution services, hence motivating internal reforms in customary legal processes.

This is by no means the only approach for facilitating the reform of customary systems. Other strategies might include linking self-regulation to formal recognition of customary fora. This has occurred in some cases where customary groups have defined their objectives, functions, structure and jurisdiction in the form of regulations, sought out human rights training or lobbied for state endorsement.<sup>46</sup> The conditions supporting or prompting such actions need to be better understood, as well as other steps that might encourage or provide incentives for the better observance of procedural and human rights protections in adjudication processes.

Another approach is to look within customary law and draw on positive norms as a basis for change. Somali customary law, for example, contains basic behavioral prescriptions that apply to all Somalis (*xeer dhagan*) including the protection of certain social groups: women, children, the elderly and guests;<sup>47</sup> in Afghanistan, *Pashtunwali* custom mandates chivalry, hospitality and personal integrity.<sup>48</sup> Such norms could arguably be better exploited with a view to enhancing the protection of vulnerable groups. It may also be possible to draw upon other sources of social influence to prevent harmful customary practices. In Afghanistan, the practice of forced marriage (including the customary practice of *bad*) has been condemned by some religious leaders as in violation of Islamic *shari’a*.<sup>49</sup> Likewise in Somalia, women’s groups have grounded their resistance to female genital mutilation and denial of inheritance rights (both accepted under customary law) as inconsistent with Islamic law.<sup>50</sup>

It is also not to say that these are the only effective means of supporting customary legal systems to operate more effectively and provide greater protection to marginalized groups. A key example is how states can modify, regulate or otherwise utilize the interface between the customary and state systems to influence the manner by which justice is dispensed at the customary level. Moreover, while this chapter has concentrated on customary leaders as potential vehicles of reform, perhaps an even more significant change agent is users themselves. Armed with knowledge about their rights and alternative paths to justice, users are critically positioned to motivate change in their leaders and thus in norms and outcomes. A better understanding of such entry points should be prioritized in all strategies of justice sector reform.

## footnotes

- 1 T. Thorne, *Rule of Law through Imperfect Bodies? The Informal Justice Systems of Burundi and Somalia*, Centre for Humanitarian Dialogue Policy Paper (2005) 1.
- 2 E. Wojkowska, *Doing Justice: Informal systems can contribute*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, (2006) 5.
- 3 C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (UK) (2003) 6-7; International Council on Human Rights, *Plural Legal Orders and Human Rights (DRAFT for consultation)*, (2009) 40.
- 4 E. Wojkowska, above n 3, 14.
- 5 R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Blackwell (2002) 37-38.
- 6 D. Isser, 'Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 13).
- 7 United Kingdom Department for International Development (DFID), *Non-State Justice and Security Systems* (May 2004), 4. Note that despite this, DFID's policy on safety, security and access to justice recognizes the importance of traditional and informal systems as complements to formal state systems. It notes that non-state justice and security systems address issues that are of deep concern to the poor, including personal security and local crime, protection of land, property and livestock, and resolution of family and community disputes, and that they need reform in order to become fairer and more effective.
- 8 UNSC, 'Justice and the Rule of Law: The United Nations Role' 4835<sup>th</sup> Meeting of the Security Council (30 September 2003) UN Doc S/PV.4835, 6; UNSC 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616 [10]; UNSC 'On Justice and the Rule of Law: The United Nations' Role' 4833<sup>rd</sup> Meeting of the Security Council (24 September 2003) UN Doc S/PV.4833 3; UNSC, 'On Justice and the Rule of Law: The United Nations Role' 5052<sup>nd</sup> Meeting of the Security Council (6 October 2004) UN Doc S/PV.5052 (Resumption 1), 14.
- 9 UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with BRR Agency for Rehabilitation and Reconstruction, BAPPENAS, UNSYIAH, IAIN, IDLO and the World Bank (2006) 11.
- 10 T. Hohe and R. Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor*, paper prepared for the United States Institute of Peace (2006) 68.
- 11 International Council on Human Rights, *Plural Legal Orders and Human Rights (DRAFT for consultation)* (2009) 73-4.
- 12 World Bank Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, Social Development Unit, Justice for the Poor Program (2008) 44; International Council on Human Rights, above n 11, 43.
- 13 Wojkowska, above n 2, 5.
- 14 World Bank Indonesia, above n 12, 61-62.
- 15 Thorne, above n 1, 7.
- 16 D. Pimentel, 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan', United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 42.
- 17 International Council on Human Rights, above n 11, 78.
- 18 Ibid 41.
- 19 S. Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Endowment for International Peace, Democracy and Rule of Law Project No. 41 (2003) 16.
- 20 International Council on Human Rights, above n 11, 9-10; Penal Reform International, *Access to Justice in sub-Saharan Africa: The role of traditional and informal justice systems*, (2000) 1.
- 21 International Council on Human Rights, above n 11, 71-2, 78.
- 22 R.E. Manning, *The Landscape of Local Authority in Sierra Leone: How 'Traditional' and 'Modern' Justice Systems Interact*, Justice and Development Working Paper Series 1(1) (2009) 12.
- 23 Penal Reform International, above n 20, 141; C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, commissioned by Governance Division, DFID (UK) (2003) 4.
- 24 Wojkowska, above n 2, 41.
- 25 Penal Reform International, above n 20, 141.
- 26 Ibid 143.
- 27 UNDP A2J, *Programming for Justice: Access to All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 103.
- 28 M. Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 151).
- 29 Ibid; see also World Bank Indonesia, above n 12, 26-7.
- 30 The case of northern Namibia, discussed by Ubink in this collection, shows that some self-statements are in fact binding.
- 31 A. Akechak Jok et al, *A Study of Customary Law in Contemporary Southern Sudan*, commissioned by World Vision International and The South Sudan Secretariat of Legal and Constitutional Affairs (2004) 22-3; M.O. Hinz, 'The Ascertainment of Customary Law: What is it and what is it for?' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 136).
- 32 J. Gundel, 'The predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia', Danish Refugee Council and Oxfam-Novib (2006) 9, 12; D.J. Gerstle, 'Under the Acacia Tree: Solving Legal Dilemmas for Children in Somalia' UNDP (2007) 40-41; A Le Sage, 'Stateless Justice in Somalia - Formal and Informal Rule of Law Initiatives.' Centre for Humanitarian Dialogue (2005) 34-5.
- 33 International Council on Human Rights, above n 11, 43; 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) 2.
- 34 T. Mennen, 'Putting Theory into Practice - Improving Customary Justice' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 140).
- 35 USAID, *Alternative Dispute Resolution Practitioners' Guide*, Center for Democracy and Governance (1998) Appendix A-D, 1; S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for the United Kingdom Department for International Development (2003) 10-12, 28; L. Hasle, *Too Poor for Rights? Access to Justice for Poor Women in Bangladesh: A case study*, MSC Human Rights (2003/04) 11-13, 20.
- 36 Hasle, above n 35, 24.
- 37 USAID, above n 35, Appendix B, 8; L. Hasle, *Too poor for rights? Access to Justice for Poor Women in Bangladesh: A case study*, MSC Human Rights (2003/04) 23-4, 32-3.
- 38 Hasle, above n 35, 21-2.
- 39 Open Society Institute Justice Initiative, 'From the Files: Three Justice Problems', *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (2006) 28.
- 40 Ibid 28-30.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 28-30.

<sup>43</sup> G. Corradi, 'Human Rights Promotion in Post-Conflict Sierra Leone: Coming to Grips with Plurality in Customary Justice' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 108).

<sup>44</sup> J. Adoko and S Levine, 'How can we turn legal anarchy into harmonious pluralism? Why integration is the key to legal pluralism

in Northern Uganda' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 83-4).

<sup>45</sup> UNDP, above n 9, 70-1.

<sup>46</sup> J. Faundez, *Non-State Justice Systems in Latin America, Case Studies: Peru and Colombia*, University of Warwick (2003) 26-7.

<sup>47</sup> Le Sage, above n 32, 32-33.

<sup>48</sup> USAID, *Afghanistan Rule of Law Project: Field study of informal and customary justice in*

*Afghanistan and recommendations on improving access to justice and relations between formal courts and informal bodies* (2005) 5.

<sup>49</sup> T. Barfield, N. Nojumi and J.A. Thier, *Afghanistan: State and Non-State Dispute Resolution*, Project on the Rule of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies, United States Institute of Peace and The Fletcher School, Tufts University (DRAFT) 47; USAID, above n 48, 14.

<sup>50</sup> Gundel, above n 32, 43-4.

Ross Clarke\*

## 1. Background

After decades of marginalizing customary justice systems (CJS)<sup>1</sup> in justice sector reform and efforts to improve access to justice, engaging with customary law and its related institutions is gaining more prominence on the policy agenda. This commendable development has arisen from governments in the developing world and aid agencies recognizing what the rural poor have always known: the formal justice system represents only a fraction of the normative framework and justice services on which citizens rely. There is now widespread acceptance that without engagement with CJS, any efforts aimed at leveraging the law for poverty reduction, protecting the vulnerable or safeguarding rights will be limited. As a result, justice sector reform policies expound the virtues of CJS—accessibility, efficiency and legitimacy—yet require the benefits to be balanced against their potential breach of international human rights standards.<sup>2</sup> Justice sector programming is being calibrated accordingly, and in many parts of the developing world, engagement with CJS is becoming a common feature of the justice sector reform landscape.

Under current development parlance, engagement with CJS generally occurs through “legal empowerment”, a relatively new phenomenon that aims to achieve enhanced realization of rights and poverty alleviation for vulnerable social groups through the strengthening of legal process and institutions. Legal empowerment rose to prominence in 2008 when the high-level Commission on the Legal Empowerment of the Poor (CLEP) estimated that four billion people live outside the formal rule of law, leaving them vulnerable to rights violations and unable to advance their interests as economic actors. Engaging with CJS is but one of several strategies to achieve legal empowerment, and despite some progress, the policy focus remains primarily conventional: strengthening and using the formal legal system to assist the poor. Thus, while CJS have yet to take centre stage in legal empowerment policy, the increasing recognition of their significance represents a serious rethinking of the established rule of law orthodoxy.<sup>3</sup> It further demonstrates that engagement with CJS has, to a limited extent, entered mainstream legal development and rule of law programming.

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The rise to prominence of customary legal empowerment has occurred in the absence of a rigorous theoretical debate. In the rush to capitalize on the benefits of CJS, 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. Engaging

\* Ross Clarke is an Australian lawyer with over 8 years experience designing and managing legal empowerment, access to justice and justice sector reform projects. He is co-founder of the Legal Empowerment Initiative. He has extensive experience in Timor-Leste, Indonesia and Sri Lanka with organizations such as the United Nations Development Programme, the International Center for Transitional Justice, the International Development Law Organization and Avocats Sans Frontières. Ross has a LLM with distinction from the University of London's School of Oriental and African Studies and has been published widely on issues such as legal pluralism, transitional justice, climate change law and sustainable development. All opinions expressed within this chapter are the author's own and cannot be attributed to organizations he is associated with.

with CJS raises fundamental conceptual issues that shape the very foundation, legitimacy and accountability of a legal system. All too often these complex questions are ignored, thereby undermining the impact of well-intentioned policies and putting at risk the broader legal empowerment project. Indeed, most customary legal empowerment interventions are implemented in the absence of a sound theoretical framework, undermining project objectives and setting some up to fail. This chapter aims to critique current customary legal empowerment policy and practice. By highlighting the contradictions, tensions and potential consequences of current approaches, the case is made for a more nuanced and theoretically grounded engagement with CJS.

## **1.1 Methodology and structure**

This chapter seeks to address one central hypothesis: current customary legal empowerment policy and practice is limited by its failure to adopt a theoretically grounded approach. Toward this end, significant effort is made to explain the development of legal empowerment discourse. By necessity this analysis is general in nature but is the result of extensive desk review of academic literature, policy papers and practice-oriented research. A comparative case study approach is later adopted, which draws on quantitative research, observation and semi-structured interviews. The quantitative research—project-related baseline and evaluation data—was not developed specifically for this article; however, there is significant overlap and synergy with the current field of enquiry.

The chapter is divided into the following sections: Section II tracks how justice sector reform policies and interventions have increasingly engaged with customary law. Section III examines how current legal empowerment approaches fail to address fundamental challenges raised when integrating CJS into formal legal frameworks. Section IV provides two comparative case studies of legal empowerment interventions—Timor-Leste and Aceh, Indonesia—and analyses the extent to which policy challenges have been addressed. Section V suggests approaches to achieve more effective engagement with customary justice systems. Section VI provides some concluding remarks.

## **2. The rise of customary law in justice sector reform**

Although a relatively recent phenomenon, legal empowerment has antecedents in decades of justice sector reform. A brief overview of the development of the legal empowerment discourse provides useful context for current approaches, particularly the ever-increasing engagement with CJS in the absence of a sound conceptual framework.

### **2.1 The law and development movement**

44 Following independence, sweeping legal reform was considered a vital precondition to achieving development and overturning structural racial discrimination in former colonies. In terms of external assistance, the law and development movement arose to apply Western legal expertise to the socio-economic challenges of the post-colonial era.<sup>4</sup> This involved promoting Western regulatory frameworks as the most effective legal vehicles to facilitate investment, enforce contracts, secure property rights and promote development. Widely regarded as an ethno-centric external imposition of foreign values and norms, law and development assistance has by and large been dismissed as a failure.<sup>5</sup>

Central to the law and development approach was the imposition of Western laws with minimal consideration as to their suitability for post-colonial contexts.<sup>6</sup> Assistance was often channeled through the direct placement of Western lawyers into senior judicial and institutional positions. It was generally conducted with the complicity of local legal elites who had strong economic and power interests in maintaining the status quo. In this framework, customary law was considered incompatible with the modernist aspirations of newly independent post-colonial states and was marginalized in the value-driven push for western-style legal frameworks.<sup>7</sup> As a result, from a law and development standpoint, CJS were considered the antithesis of reform; they represented antiquated, tribal laws that prevented economic growth and modernization.

## 2.2 Rule of law programming

A shift in development policy occurred in the 1990s and gave rise to an increased emphasis on achieving the rule of law as the primary development outcome to be accomplished by justice sector reform.<sup>8</sup> Characterized by Golub as “rule of law orthodoxy”, this approach continues in the tradition of law and development, emphasizing the role of justice systems in providing the legal framework for economic growth.<sup>9</sup> However, while this was the primary motivation, rule of law promotion was put forward as the solution to a broad array of development inhibitors ranging from insecurity, civil conflict and governance to service delivery. Usually characterized by a top-down, institution-focused and technocratic approach, rule of law interventions often seek to establish and reform courts, bar associations and law schools, conduct judicial training and develop human rights compliant legislation.<sup>10</sup>

Despite the emergence of substantial research demonstrating the importance and relevance of CJS across the developing world, rule of law programming maintained a focus on legal centralism. Indeed, from 1994 to 2005, no World Bank justice sector reform project explicitly dealt with customary law.<sup>11</sup> The perception of CJS since the rise of the law and development movement had not changed. It remained incompatible with human rights, archaic, overly localized and inconsistent with modernization. According to Brooks, it is this failure to take account of local norms and culture that explains the minimal impact of rule of law promotion.<sup>12</sup> The values and procedures that are transplanted are inherently Western in nature, generally imposed by external actors and therefore have negligible legitimacy and effectiveness. Rule of law promotion is therefore often perceived as alien, overly complex and designed to serve the interests of elites.

Under rule of law assistance, justice sector reform gained increased prominence on the development agenda. However, despite the recognition that “law matters”, mainstream rule of law orthodoxy fails to appreciate the minimal relevance that state legal processes and institutions have for the majority of citizens. Top-down reform overwhelmingly dominates rule of law policies, and while the flow-on effects of institutional reform are intended to institute tangible community-level change, the poor and marginalized are generally too distant from state structures to experience meaningful benefit.

The continued failure to engage with CJS can be partly explained on conceptual grounds as CJS question the very conceptual foundation of rule of law reforms.<sup>13</sup> Under standard rule of law orthodoxy, law-making, implementation and enforcement are the exclusive domain of the state. To permit or even empower non-state institutions to undertake these functions undermines the positivist, legal centrist conception of the rule of law. Accordingly, reforms to promote the rule of law generally overlooked CJS, thereby marginalizing communities’ most relevant normative frameworks.

## 2.3 Legal empowerment and access to justice

The latest incarnation of justice sector reform is legal empowerment. Golub defines legal empowerment as “the use of legal services and related development activities to increase disadvantaged populations’ control over their lives”.<sup>14</sup> By seeking to use law as a tool to protect and advance the interests of the poor and marginalized, legal empowerment represents a paradigm shift from previous justice sector reform policies. Justice is no longer analyzed with institutional service providers as the main frame of reference, rather a bottom-up approach is employed, prioritizing policies that enable rights-holders to set priorities and claim their rights.<sup>15</sup> Implicit in this approach is the acceptance that prior institution-focused reforms failed to achieve meaningful impact and that community based strategies need to be employed.

Conceptually, legal empowerment is closely linked with access to justice and the provision of fair and accountable mechanisms to protect rights, address grievances and resolve conflict. However, legal empowerment is a broader notion that extends beyond legal process, aiming to capitalize on the transformative, enabling potential of law to assist poverty reduction and safeguard rights. Thus, under a legal empowerment approach, access to justice and the rule of law are considered the “enabling framework” to achieve the full realization of rights.<sup>16</sup>



To a greater extent than previous justice sector reform policies, legal empowerment and access to justice discourse seeks to engage with CJS to achieve its aims. Indeed, in a 2008, DFID-funded conference on access to justice, a key outcome was consensus that “any comprehensive access to justice strategy needs to take greater account of informal justice systems”.<sup>17</sup> Accordingly, a radical change in mainstream thinking about the role of the state in providing justice services has taken place. It is now recognized that in many developing contexts, particularly those affected by conflict or complex emergencies, the formal legal system may be considered illegitimate, abusive and ineffective.<sup>18</sup> Where state legal systems have failed, there is increased space to accept alternative models and use community-based justice systems to advance the interests of the poor and marginalized.

A parallel trend is the increasing recognition that in many areas of law across the developing world, CJS represent the most relevant normative frameworks, particularly for the rural poor. This is especially the case regarding land and property issues, personal and family law, and civil matters more broadly. Yet, while legal empowerment affords greater recognition to CJS than previous policies, legal centralism still tends to dominate.

Accordingly, there is scope for legal empowerment discourse to engage more extensively with CJS. An undercurrent remains that legal empowerment is most effective when achieved through the formal justice system. While calling on practitioners in the field to think “less like lawyers and more like agents of social change”, Golub fails to fully appreciate that for community-level legal change to occur, in many contexts it can only be achieved through extensive engagement with CJS.<sup>19</sup> He further claims that:

although informal systems are the main avenues through which the poor access justice (or injustice), such systems remain programmatic stepchildren to the judiciary and other official institutions.<sup>20</sup>

Effectively integrating CJS into the formal legal framework appears problematic to Golub. Thus by simultaneously recognizing the relevance of CJS while also marginalizing their role in achieving legal empowerment, Golub demonstrates the legal centrist bias of mainstream legal empowerment discourse. Although a limited role for CJS is foreseen, this occurs with CJS considered inferior service providers rather than a context where engagement and integration is actively pursued.

### 2.3.1 Aid agency and donor policy

Although differences exist, legal empowerment policies and programs across aid agencies and donors share several commonalities. The Asian Development Bank has been central in developing the concept, recently defining legal empowerment as the ability of “women and disadvantaged groups ... [to] use legal and administrative processes and structures to access resources, services and opportunities”.<sup>21</sup> Across the board, there is general consensus on the need for a minimal level of community legal awareness, the importance of accessible and effective dispute resolution procedures (whether conducted by state or non-state institutions), and the need to overcome the structural obstacles that prevent marginalized groups from enforcing their rights, accessing services and advancing their economic position. A main point of difference between agency policies is the extent to which CJS are explicitly promoted as a first-line provider of justice services and to a lesser degree how integrated into state structures they should be.

The World Bank’s Justice for the Poor program emphasizes justice sector reform from a user viewpoint and seeks to engage with the social, political and cultural reality faced by communities.<sup>22</sup> It further accepts the importance of civil society organizations implementing community-level activities and recognizes the role CJS must play in securing legal empowerment. In contrast, the International Council on Human Rights Policy states that while CJS “cannot replace the ultimate responsibility of the state for ensuring access to rights, they can be pursued *in addition* to formal state institutions as a way of answering some of the immediate needs of many communities”.<sup>23</sup>

From this conventional human rights perspective, CJS are secondary to formal institutions and perform a practical (although largely undesirable), temporary role until the formal justice system is fully functional.

It should further be noted that increased engagement with CJS is by no means predominately externally driven. On the contrary, customary law has constitutional recognition in countries such as South Africa, Ethiopia and the Solomon Islands, and governments in the developing world are increasingly promoting customary law engagement as an access to justice strategy.<sup>24</sup> Across the spectrum, therefore, CJS are gaining increasing traction as an essential component of effective legal empowerment policies.

### 2.3.2 Commission for the Legal Empowerment of the Poor (CLEP)

The most prominent example of legal empowerment policy is embodied in 'Making the Law Work for Everyone', a report released by the high-level Commission for the Legal Empowerment of the Poor (CLEP) in 2008.<sup>25</sup> Following a two-year global consultative process, the report aimed to conclusively demonstrate the links between legal empowerment, poverty reduction and development. CLEP estimated (on unclear grounds) that four billion people live outside the formal rule of law, leaving them vulnerable to rights violations and unable to advance their interests as economic actors. CLEP's policy prescription under a legal empowerment framework involves expanding:

protection and opportunity for all: protecting poor people from injustice—such as wrongful eviction, expropriation, extortion, and exploitation—and offering them equal opportunity to access local, national and international markets.<sup>26</sup>

On a practical level, this is to be achieved through improving community legal literacy, providing paralegal and legal aid services, and developing sound regulatory frameworks.

Regarding CJS, CLEP adopts a conventional, pragmatic approach, recognizing them as the predominant justice system for the overwhelming majority of the world's poor, but highlighting their flaws from a human rights perspective. Thus, legal empowerment seeks to:

enable more poor people to make the transition from the informal sector to the formal, while at the same time integrating useful norms and practices from informal or customary systems.<sup>27</sup>

Yet perhaps more than any preceding mainstream policy framework, CLEP claims to seek engagement with CJS:

alongside programmes to improve the state justice systems, reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of the formal and informal systems.<sup>28</sup>

The CLEP framework undoubtedly has an economic focus, seeking to use the law to empower citizens as economic actors. In this regard, there is tension between engagement with CJS and the objective of formalizing property, labor and what CLEP terms "business rights". CLEP fails to reconcile this tension and demonstrates significant bias towards formalization as the central route to economic empowerment. Thus, while CLEP attempts to harness CJS to advance the economic interests of the poor, it is too constrained by its reliance on neo-liberal economic policy and the formalization of rights to fully capitalize on its benefits.

While the recognition of CJS' potential contribution to legal empowerment is to be commended, CLEP's position is problematic. Most concerning is the distinct lack of political analysis. There is a substantial body of research that highlights the embedded power structures at play within justice systems,<sup>29</sup> yet

CLEP fails to canvass the interests behind definitions of customary law and control over dispute resolution processes. Although the unfair access and treatment that marginalized groups may receive under CJS is highlighted, an underlying assumption is that these deficiencies can be mitigated through what is commonly termed a political compromise: customary law is formally recognized “in exchange for the rejection of certain customary norms that are repugnant to principles of non-discrimination and gender equality”.<sup>30</sup> This echoes the colonial repugnancy clause that recognized only those customary norms that did not breach European legal values. Now, just as before, scant consideration is given to whose customary law will be recognized and whose interests are served by such a policy.

Far from being well received, CLEP has been criticized on several fronts. Stevens attacks its apolitical analysis, particularly the failure to address barriers that make legal institutions work against poor, its lack of empirical evidence and the minimal guidance on sequencing and prioritization of interventions.<sup>31</sup> While according to Balik, CLEP’s recommendations remain top-down, state-centered and orthodox in nature, marginalizing civil society and bottom-up initiatives.<sup>32</sup> Although Balik fails to give due emphasis to CLEP’s recognition of CJS, he does highlight the inherent bias toward legal centralism.

## 2.4 Superficial engagement with customary law

Current legal empowerment policy seeks to capitalize on the benefits of CJS benefits and mitigate their negative effects but falls well short of advocating for integration into the state legal framework. The positive aspects emphasized include the local legitimacy, social cohesion, community ownership and participatory benefits arising from CJS. Accessibility and efficiency, the ability to provide justice outside of corrupt formal institutions and the use of non-custodial sanctions are also emphasized.<sup>33</sup> However, policy discourse commonly fails to examine the social, political and economic factors that dictate how equitable, accessible and cost-effective CJS are for all constituent groups in a given community. With the exception of analysis on gender-based discrimination, a unified community polity governed by an apolitical community leadership is too often assumed. This is particularly problematic given the prevalence of mediation-like procedures across CJS and the failure to question whether equitable mediated solutions are possible where litigants have gross power differentials. For as Wojkowska has aptly highlighted, community-mediated settlements reflect “what the stronger is willing to concede and the weaker can successfully demand.”<sup>34</sup> Overlooking these issues results in unsophisticated engagement with CJS, which at the furthest extreme appears to romanticize community-level justice processes, discounting the power interests they embody.

48 The negative effects of CJS emphasized under legal empowerment policies include the lack of transparency, minimal accountability and vulnerability to elite capture.<sup>35</sup> Overwhelming emphasis, however, is placed on the human rights implications of customary law. Specifically, these include the propensity for discrimination based on gender, age or ethnicity, the lack of transparency, regular breaches of fair trial and due process guarantees, and the tendency for violent sanctions.<sup>36</sup> Similar to the analysis of potential benefits, there is rarely more than a simplistic, abstract examination of these factors. There is a dearth of empirical evidence on how CJS function, in particular, on the extent to which CJS breach human rights guarantees. Relevant questions that are often ignored include: where does gender discrimination specifically occur? Is it an access issue, caused by unfavorable procedures, or perhaps due to lenient sanctions? Further, what are the specific procedural and evidentiary rules (assuming these can be determined) that constitute human rights violations? When dealing with non-written, fluid systems of justice, answering such questions is as complex as it is resource-intensive. Nevertheless, passing judgment on a particular CJS where these issues remain unclear is premature.

At the furthest extreme, any evaluation of CJS that focuses overwhelmingly on breaches of human rights guarantees appears misguided, ethno-centric and is open to claims of prejudice. To the extent this occurs, legal empowerment can be misconstrued as aiming to protect non-Western people from their own culture and tradition.<sup>37</sup> While debate over the universalism of human rights versus cultural relativism is beyond the scope of this chapter, it does raise pertinent issues that legal empowerment policies must engage with. Legal empowerment critiques of CJS overwhelmingly

employ a universalist approach, focusing on the differences between state and non-state justice systems, particularly how human rights norms are breached. Rather than narrowly seeking uniform adoption of Western legal transplants, a more effective strategy is to engage with areas of convergence.<sup>38</sup> This may include the potential existence in both systems of rights to redress or appeal, and efforts to strengthen CJS through formal oversight—where adopted, such an approach results in a far more sophisticated engagement with CJS.

Further, criticism of CJS based on Western standards of justice is often contradictory. Condemnation of physical sanctions imposed by CJS may emanate from jurisdictions that conduct capital punishment, or the discriminatory practices of CJS criticized by countries where socio-economic barriers severely restrict access to courts for marginalized groups. In short, when viewed through a Western legal prism of an adversarial or inquisitorial system, which prioritize formal over substantive justice, CJS may appear limited. Yet, how relevant are Western fair trial guarantees such as rigid evidentiary procedures and formal impartiality for justice systems of a radically different legal tradition? On the other hand, if accessibility, efficiency and restorative justice are the criteria for evaluation, CJS appear far more positive, trumping their Western counterparts. Crucial to realize is that formal and non-state justice systems have fundamental differences, having arisen from vastly different historical processes. Direct comparisons may provide minimal benefit, especially when human rights standards are the main point of reference.

Any evaluation of a justice system is unavoidably shaped by the values and legal background of the evaluator. Ignoring this reality, as often occurs in legal empowerment discourse, results in unsophisticated, poorly conceived policy. To the fullest extent possible, CJS must be evaluated based on empirical evidence regarding how effectively and equitably they deliver justice services, rather than generalized, abstract analysis as to whether human rights principles are breached. While expensive and time-consuming, detailed information on how particular CJS function is a crucial precondition to effectively promoting legal empowerment. Once a sufficient knowledge base exists, specific entry-points for engaging CJS, as well as strategies to strengthen positive aspects and mitigate risk areas, are more readily apparent.

### 3. Integrating customary justice systems: Unaddressed policy challenges

As current legal empowerment policies engage with CJS on a superficial level, significant policy challenges remain unaddressed. The following section sets out the key factors either overlooked or insufficiently resolved in the integration of CJS into formal justice systems. For this integration to be effective—a prerequisite for making legal empowerment a reality—the challenges outlined below must be overcome.

#### 3.1 Definitional challenges

The very concept of customary law is contested, yet under legal empowerment policy and practice, a substantial body of research that questions the foundation of customary law receives insufficient critical examination.<sup>39</sup> Undoubtedly, although engaging with customary law is a definitional minefield, this cannot excuse the lack of analysis of such a heavily critiqued concept and term. As will be discussed, despite the seemingly unavoidable imperative to analyze what makes some non-state justice systems “customary” or to examine how customary law is constructed, much of legal empowerment discourse employs the term unquestioningly. Indeed the failure to engage in critical analysis of the term “customary” exemplifies the superficial, apolitical engagement with CJS that seems to characterize legal empowerment discourse.

In the field of customary justice, value-laden terminology abounds, constantly shaping the lens through which a legal system is analyzed. Terms as diverse as customary, traditional, informal, indigenous, folk and unofficial are often used interchangeably or refer to similar legal constructs that exist outside the realm of formal state law. Even characterizing non-state normative systems as

“law” leaves one open to attacks of ethnocentrism since fundamental differences in form and procedure may be lost when viewed through the Western concept of law.<sup>40</sup> The matter is further complicated by the wide variety and spectrum of CJS, all of which are highly dependent on localized construction and are continually shaped by political dynamics. Some may have a basis in indigenous custom, others have been distorted beyond recognition for political gain, while still others have been shaped by contemporary dynamics and may reflect more Western notions of alternative dispute resolution. The diversity and contextual specificity of such processes makes categorization inherently dangerous. Indeed, it may be impossible to achieve consensus on the general legal principles within a single normative system, much less the subtle nuances that define it.<sup>41</sup> Yet, in the push to capitalize on the access to justice benefits of CJS, this diversity in form and the wide-ranging historical factors that have shaped customary law have received insufficient attention.

### 3.1.1 The colonial experience

Any meaningful engagement with CJS cannot avoid the widespread manipulation of customary law by colonial administrations across the developing world. Mamdani explored how the indirect rule of British colonial administrations across Africa fundamentally shaped what is today often termed “customary law”.<sup>42</sup> Through indirect rule, the colonial state empowered certain elites to define, enforce and benefit from customary law. The co-option of these “customary” institutions by colonial administrations therefore corrupted and distorted local justice systems, reconstructing them as customary law.<sup>43</sup> Although an oversimplification of the complex interplay between indigenous and colonial systems of justice, at independence, customary law was often more a reflection of colonial power relations than an indigenous normative framework.

The content of customary law, who defines it and its place within state legal frameworks, played a divisive role during and since the colonial era. Whether through co-option or attempted abolishment, both the content of customary law and the pluralistic legal framework inherited at independence reflected colonial power relations.<sup>44</sup> Up until the present, while attempts at unification and codification of customary law have taken place<sup>45</sup> and local justice processes have been altered to some extent, much of the community-level power relations shaped by colonial-era customary law remain intact. Particularly in rural areas, where state penetration is minimal and CJS deal with the majority of legal disputes, this dynamic has profound implications for current policy trends that seek to achieve legal empowerment through engagement with customary law.

The extent of criticism leveled against customary law both as a term and concept have led some to question its validity.<sup>46</sup> Indeed, there is a trend to use “non-state justice systems” over CJS to overcome the post-colonial critique and employ more value-neutral terminology.<sup>47</sup> Yet, despite sustained criticism, the term “customary” is significant both in academic discourse and practice, and accordingly is preferred for this chapter. In a field where alternatives for “customary” all suffer deficiencies, no other term provides greater analytical value. Crucial, however, is to apply the term critically, examine how colonial administrations altered and contemporary political dynamics continue to shape what is today considered customary law. This analysis must frame how we think, engage with and program interventions related to CJS. Yet, by taking customary law at face value, this is something that legal empowerment policy and practice consistently fail to do.

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### 3.2 Lack of political analysis

The uncritical use of the term “customary law” underscores a more general failure of the legal empowerment agenda to position itself within a broader socio-political context. Indeed, legal empowerment policy and practice suffer from an apolitical approach in two key respects. First, the power relations embodied in defining and administering customary law rarely receive any attention. By perpetuating a “myth of traditionalism”, community elites can easily exert undue influence over local justice systems, entrenching their economic and political interests in the process.<sup>48</sup> As a result, community leaders—possibly “decentralized despots”<sup>49</sup>—can receive official recognition but this may perversely have a disempowering effect for disadvantaged groups. Second, engaging with CJS necessitates extensive reform of state-centric justice sector policies. According to Stephens, where

CLEP and legal empowerment fall short is their failure to properly deal with the political economy of reform.<sup>50</sup> As developing contexts are often characterized by mutually reinforcing networks of political patronage, there are powerful vested interests in maintaining the status quo and keeping disadvantaged groups at the margins.<sup>51</sup> Throughout history, political and economic elites have shaped legal frameworks for their own benefit; for engagement with CJS to be successful, the minimal incentives for reform must be overcome. Above all, to achieve legal empowerment, particularly through engaging CJS, reformers must navigate through a highly politicized reform process. By ignoring this reality and disregard the political capital necessary to institute pro-poor justice sector reform, policy is repeatedly not translated into practice.

CJS are shaped by factors both historical and contemporary: cultural practices passed down through generations, the influence of imposed power structures and imported justice systems, aid interventions, political contestation and social movements. While the constructed nature of customary law is seemingly an unavoidable issue when engaging with CJS, current justice reform policies appear to operate as if in a political vacuum, with questions over what is customary law, who defines it and most importantly, who benefits and loses, clouded by the simplistic balancing of customary law's practical benefits against the possible violation of human rights principles. Engaging with customary legal systems requires careful analysis of the power relations and political dynamics that community-level justice systems embody. To avoid these complex questions risks project failure at best and can be destabilizing at worst.

### 3.3 Challenge to sovereignty

Based on European Enlightenment philosophy, the creation of substantive law in Western liberal states since the late 18<sup>th</sup> century has been considered the sole domain of a democratically elected parliament, while the dispensation of justice was to be administered by an independent judiciary. According to Hobbes and Rawls, justice is dependent and inseparable from a fully sovereign state and can only be dispensed through sovereign institutions.<sup>52</sup> Arguably, any official recognition of CJS, either through the ability to create law or as a state-sanctioned justice process, directly challenges state sovereignty. Where actors in CJS—by definition not agents of the state—dictate the applicable normative framework and adjudicate disputes based on such norms, the state's assumed exclusive authority to create and adjudicate law has been usurped. Further, wherever states seek to integrate CJS into formal justice frameworks, complex sovereignty issues arise regarding what constitutes law, how it is defined and who can legitimately adjudicate disputes.

These fundamental conceptual questions are all too often ignored under legal empowerment policies. Even in contexts where customary law has constitutional recognition, the extent to which non-state actors can create law and administer justice is rarely sufficiently defined. Throughout Western liberal thought, only the sovereign state can legitimately perform law-making functions. Yet, contemporary development models place liberal state-building as the overall objective of political reform while simultaneously providing increased recognition of CJS as a means to achieve legal empowerment. Conceptually, these goals are opposed.

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What is the impact of this conceptual incongruity? How important is it that CJS undermine state sovereignty? In the short term, the impact of empowering CJS primarily affects the state's ability to hold justice actors accountable and its capacity to build legitimacy in judicial affairs. As non-state actors, individuals involved in CJS can still be subject to regulatory control, but ensuring compliance with basic standards is problematic when they are not agents of the state and are subject to minimal oversight. Especially in contexts where states struggle to assert a legitimate presence, empowering CJS runs contrary to conventional state-building. While often a practical necessity to provide access to justice, promoting CJS as a primary dispute resolution process undermines the position of state justice institutions and restricts their influence.

These issues can be overcome if CJS are integrated into the state legal framework, and their jurisdiction and authority are carefully regulated. If this occurs, CJS in many regards lose their non-

state character and, as discussed in more detail below, this undermines their flexibility and adaptive capacity. Important to recognize, however, is that empowering CJS challenges the very foundations of a positivist legal framework. Finding strategies to mitigate these conceptual inconsistencies is crucial to achieving coherent justice sector reform.

### 3.4 Structural inequality

Where legal empowerment includes governmental recognition of CJS, it runs the risk of instituting structural inequality among various population groups within the country. While not an uncommon phenomenon, particularly where indigenous or religious minorities are given limited autonomy over certain areas of law, the potential consequences of recognition of CJS are rarely canvassed in full. Equality before the law is a general presumption of the liberal democratic state, yet this can be undermined wherever customary law is officially recognized. The counter-argument emphasizes the importance of CJS to achieve a limited form of self-determination, and is often raised in relation to indigenous minorities.<sup>53</sup> Conversely, where entrenched CJS receive no official recognition, states can be criticized for failing to protect cultural norms. The problematic situation may also arise where established CJS are widespread in practice but remain unregulated and subject to minimal oversight.

Thus, official recognition of CJS may often result in a trade-off between self-determination and social stability. While the associated risks can be managed, any promotion of separate legal orders for specific social groups will have social impacts, both positive and negative. Yet, in terms of contemporary legal empowerment, these social consequences are rarely taken into account. Lessons can be learned from post-independence sub-Saharan Africa where several countries (most notably Tanzania) attempted to build national unity through implementation of a uniform version of customary law applicable to all citizens.<sup>54</sup> Heavily criticized, Tanzania's codification of customary law excluded the practices of some groups and to that extent was generally ignored as these groups continued to practice their own customary law.<sup>55</sup> Thus, nationalist reform that created a unified customary law, applied regardless of personal, religious or tribal affiliation, failed to change the de facto situation and further marginalized groups whose practices were not contained within the officially recognized customary law. As a result, well-intentioned policy had negative social implications.

Yet, where ethnic or religious groups are marginalized, accommodation of a distinct, culturally specific justice system within the broader legal framework may facilitate the recognition of minorities necessary to achieve a viable state. The Indonesian Government's recognition of Islamic *shariah* in Aceh as part of a provincial autonomy package to quell separatist aspirations provides just one example. Connolly has suggested that such recognition is analogous to federal legal systems where states have jurisdiction over most areas of law but are constrained within a unified federal framework.<sup>56</sup>

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It should come as no surprise that the recognition of different legal orders for different social groups may have profound social consequences. After all, although law has long been considered a form of social engineering inextricably bound in its social context,<sup>57</sup> recent legal empowerment engagement with CJS avoids these complex sociological questions. Whether with positive or negative effect, recognizing CJS can dramatically alter the power structures operating within a legal framework. Policies to achieve legal empowerment must therefore address the socio-political consequences of formally sanctioning non-state actors to exercise judicial power. Until this occurs and legal empowerment adopts a more politically grounded approach, unintended outcomes and adverse results may prove difficult to avoid.

### 3.5 Formalizing the informal

Implicit in any recognition of CJS is integrating informal, often customary, processes into formal legal frameworks. From a conceptual perspective, this may undermine the very constitutive elements of CJS, stripping them of their beneficial attributes. Whether through codification of



customary norms or integration into the court hierarchy, the institutions and processes that constitute the CJS can be profoundly altered. Bryde highlights how codification of customary law removes its adaptive capacity, a commonly referenced benefit of CJS.<sup>58</sup> Unwritten customary rules can reflect rapidly changing social circumstances; however, when codified, they become frozen in time and lack the dynamic flexibility to adapt to social change. Under this analysis all positive law is likewise flawed, and such arguments rarely highlight how legislation is amended to account for changing values. While uncoded normative structures can adapt more quickly, they suffer from a lack of certainty and are open to claims of illegitimacy, especially when compared to codification by a sovereign parliament. A trade-off between loss of adaptive capacity for increased legitimacy may therefore ensue.

Conversely, the local legitimacy of CJS arising from custom and tradition may also be affected by integration into state structures. This charge has been leveled at the *gacaca* community-based trials for the Rwandan genocide where state intervention in customary legal institutions has resulted in the perceived loss of customary legitimacy and minimal impact of the process.<sup>59</sup> Further, where CJS are subject to state regulation, procedural flexibilities that can contribute to greater substantive justice may be lost. Accordingly, there are considerable trade-offs to be made when CJS are brought within formal frameworks; however, any negative effects are rarely canvassed in full by legal empowerment interventions. Therefore, when evaluating policy regarding CJS, a key consideration is whether a suitable balance between formalization and non-formalization has been made.

### 3.6 Jurisdictional issues

Crucial to effective integration of CJS into formal legal systems are clearly and simply defined jurisdictions. This is a key requirement for effective oversight and prevention of abuses of power. Where uncertainty exists, inefficiency has been instituted, claimants may be unclear where to seek justice services, record-keeping issues are exacerbated, and monitoring becomes more complicated.<sup>60</sup> And yet, rarely across legal empowerment policies can anything other than a general jurisdictional delineation be found. A common approach is for CJS to have primary jurisdiction over civil matters while formal justice institutions—the police, prosecution, courts and penal system—have sole jurisdiction over criminal matters. In some cases, the jurisdiction of CJS extends to minor criminal offences. While a relatively simple division of authority, such an approach faces implementation challenges and may contradict the very customary practices that aim to be embraced.

Cases dealt with by CJS may not fit easily within the neat categories of civil and criminal law, nor do these concepts translate easily into non-Western legal systems. Criminal law is generally defined as state-issued rules that prohibit conduct that threatens public safety. As a result, it is highly dependant on knowledge of state law, which is often absent in rural communities with minimal formal education and literacy. In contrast, civil law is usually defined as the body of laws that regulates private rights and governs disputes between individual citizens. This distinction between public and private law is central to definitions of criminal and civil law. In contexts where there is minimal division between public and private domains and civil matters may invoke criminal sanctions, the criminal/civil distinction may hold minimal relevance. Further, the conventional approach fails to recognize that CJS often employ their own normative frameworks that may resemble or overlap with state criminal and civil law but are rarely one and the same. Basing the jurisdiction of CJS on external legal categories therefore poses conceptual and practical challenges.

Mamdani further claims that the distinction between civil and criminal law as it applies to customary legal systems was shaped by the need of colonial administrations to exercise exclusive control over criminal justice.<sup>61</sup> By defining and administering criminal law the colonial state could more readily subjugate threats and support its local power base. Civil law, alternatively, was considered personal in nature and less useful for pursuing colonial interests. As a result, the colonial state, especially in anglophone Africa, made minimal efforts to intervene and regulate civil laws. Legal empowerment policies often perpetuate the same divide. Selecting the limits and methods of defining the jurisdiction of CJS therefore involves political considerations. Under legal empowerment

frameworks, a simplistic approach is usually adopted, often limiting CJS jurisdiction to civil cases without analysis of whether this is locally appropriate or achievable in practice.

### 3.7 Accountability

A clear challenge when engaging with CJS is ensuring the accountability of actors, in most cases community leaders. Nyamu-Musembi highlights the importance of ensuring accountability upward to the state and downward to the community to maximize the potential of CJS.<sup>62</sup> In terms of upward accountability, CJS present difficulties because of their non-state nature. Unlike judicial officers, they operate outside the state legal system and are not subject to contractual obligations, standards of professional responsibility or disciplinary procedures. On a more basic level, CJS actors rarely receive a substantial salary or significant economic incentives that can be used as leverage to encourage performance of their functions to ethical standards. By providing reasonable remuneration for the justice services provided by the community leaders who administer CJS—as is received by all actors in the formal justice sector—the imposition of uniform standards is made more acceptable, and greater accountability can be fostered.

A strategy to rectify the lack of downward accountability is the democratic election of appointees to local tribunals, courts or customary councils. In Uganda, the United Republic of Tanzania and Eritrea, this approach has been adopted allowing communities to elect or vote out appointees after a fixed term if they have not performed to acceptable standards.<sup>63</sup> While a positive trend, community-level power dynamics may impact on the extent to which local elections can promote the accountability of CJS actors. In particular, where adjudicators of customary law derive their authority from tradition, attempting to impose a democratic process onto entrenched power structures may yield minimal results. Nevertheless, where CJS are unresponsive to community needs or plagued with corruption, democratic processes as well as complaints mechanisms can play a useful role.

Providing oversight and improving the accountability of CJS by integrating them into formal appeal structures offers significant potential. Assuming citizens are sufficiently aware of their rights of appeal and the barriers to accessing courts can be overcome, facilitating the appeal of CJS decisions can ensure that minimum standards and core human rights protections have not been breached. The judiciary will, however, face significant challenges in determining the applicable customary law to provide. Where disputes have been mediated by CJS, appeals would generally not be required given joint agreement on the resolution. However, where agreement cannot be reached, one party feels a determination is unjust, or criminal matters are concerned, appeal proceedings could be initiated. Through such a structure, the legal empowerment benefits of utilizing CJS can be achieved while ensuring oversight through appeal procedures.

54 Oversight for CJS garners most attention in relation to potential breaches of human rights guarantees. As discussed previously, these are presumed to include discriminatory practices, violent punishments and breaches of fair trial provisions. Despite human rights being a substantial field in terms of research and practice, there is alarmingly little analysis of how to engage with CJS within a human rights framework. For some scholars, the two concepts are diametrically opposed.<sup>64</sup> Such a simplistic approach unreasonably sidelines CJS, preventing the substantial contribution they could otherwise make to achieving legal empowerment. Yet, policies can seek to engage with CJS and mitigate human rights risk areas. For high-risk cases such as gender-based violence, Nyamu-Musembi suggests routine review of decisions by a higher authority rather than relying on claimant-initiated appeal processes.<sup>65</sup> Further, engaging with CJS actors in human rights norms and seeking a convergence of practices can represent a way forward. Additional practical strategies will be raised in the case studies below, however it is clear that determining how to engage with CJS within a human rights framework is an area requiring substantially more research.

Although faced with significant implementation challenges, facilitating appeal of CJS decisions to first-tier courts has potential to resolve many of the concerns leveled at community-legal processes. Greater accountability of actors is fostered, judicial oversight can ensure that

applicable law and human rights standards have been complied with, and increased professionalism of CJS can be expected due to their interaction with the formal judiciary. Yet, for this to occur, the mistrust and at times hostile relationship between formal and non-state justice systems must be overcome. Caution must therefore be taken to ensure working relationships are developed and any procedures instituted are achievable in practice. With limited exceptions, current engagement with CJS insufficiently examines these vital accountability and oversight issues. Long-term policies are required to ground CJS into appeal structures and to develop effective accountability mechanisms.

### 3.8 Practical constraints

An appropriate starting point for engagement with CJS is that it is almost impossible to replace or completely abolish entrenched community legal processes; any attempt to do so may cause more harm than good.<sup>66</sup> In the post-colonial era, few countries took an abolitionist approach, recognizing that integration is a far more effective and realistic strategy.<sup>67</sup> Engagement is therefore not only the more pragmatic option, but carries the benefits of locally legitimate and accessible justice that are cornerstones of legal empowerment. However, to make this a reality, several critical implementation issues must be overcome.

An often sought first step when aiming to integrate CJS into formal legal frameworks is defining what constitutes non-state law and who it applies to. Unless there is reasonable clarity on essential definitions, effectively integrating CJS into a formal legal framework will prove difficult.<sup>68</sup> Regarding the definition of substantive non-state law, two general approaches have historically been adopted. First is the research approach, characterized by the restatement of customary law in several sub-Saharan African states. This provides legal security and transparency through a written compilation of customary law in a given country. However, negative aspects of written restatements include freezing customary law at one point in time thereby preventing evolution, creating a unified version of customary law thereby excluding some practices and leading to decreased recognition and adherence among certain groups, and difficulties in developing sound research methodology that can claim to accurately cover all elements of CJS.<sup>69</sup>

The second approach utilizes local informants to define customary law. Tanner, critiquing the Tanzanian model, questions whether urban elites with minimal knowledge of customary practices interviewing informants and experts in customary law resulted in a biased version of local norms.<sup>70</sup> He emphasizes the political nature of defining customary law and the need to ask which rules were put forward, for what reason and whose interests they serve. However, any attempt to define unwritten laws is unavoidably shaped by the interests of those involved in the process. A key concern is therefore mitigating personal influence, instituting checks and balances, and wherever possible, facilitating broad public consensus on what principles will be recognized.

Both approaches are flawed and result in trade-offs. Woodman warns that codification can create “lawyer’s customary law”, a distortion of local custom that gets co-opted by the legal profession and bears minimal relevance to community-level norms.<sup>71</sup> Despite the complexities, however, providing clear and accurate definitions of substantive customary norms is the foundation on which integration with the formal justice system rests. Significant resources should therefore be placed at building consensus on definitional issues before long-term engagement with CJS commences.

Given minimal state reach and the inability to exert significant influence over community legal processes, policies must canvass how change can be practically implemented. Top-down policies have demonstrated minimal results, an apt example being attempts across sub-Saharan Africa to formalize customary land tenure through legislative reform that have been widely dismissed as ineffective.<sup>72</sup> To be sure, despite decades of top-down reform towards formalization, it has been estimated that only 2-10 percent of rural land across Africa has been formally titled.<sup>73</sup> Crucial to achieving effective engagement with CJS is therefore adopting a bottom-up approach.

Relevant practical strategies include: awareness-raising with communities on the benefits of CJS integration; consultation on core elements of procedural law; community-level training sessions for CJS actors; and confidence-building measures between CJS and members of the formal judiciary. Interventions such as these may be costly to implement at scale. Yet, there is a growing body of research to show that effective engagement with CJS requires a bottom-up approach.<sup>74</sup> Indeed, it defies logic to assume that CJS, grounded in local culture and often positioned at considerable distance from state legal structures, can be influenced by anything other than sustained community-level engagement.

## 4. Comparative case studies of legal empowerment interventions: Timor-Leste and Aceh, Indonesia

Given the widespread diversity regarding CJS and the extent to which they are integrated into formal justice systems, case study analysis is necessary to effectively illustrate current approaches. This section employs a comparative design methodology to contrast different approaches to engaging with CJS to achieve legal empowerment.<sup>75</sup> The objective is to explore through two exemplifying case studies on how policy on the integration of CJS into the formal legal systems affects project implementation and outcomes.

The two case studies are drawn from projects in which the author played a prominent role in design and implementation. The first is the Access to Justice Program implemented by Avocats Sans Frontières (ASF) across rural districts of Timor-Leste from 2005-2009. The second is the *adat* or customary law component of the Aceh Justice Project, implemented by the United Nations Development Programme (UNDP) from 2007 until the present. The analysis is drawn from observation, desk review of project documentation, monitoring and evaluation of project implementation, and interviews with project staff. Accordingly, the case study research has a longitudinal element as observation and interviews have been conducted over several years.<sup>76</sup> The case studies lack direct comparability in terms of project type and data collection; nonetheless, the aim was to contrast different approaches and examine policy on CJS as the key variable.

Although differences distinguish each context, there are sufficient commonalities to enable meaningful comparative analysis. Under Indonesian occupation, Timor-Leste—like Aceh—was fully integrated into Indonesia's national justice system, applying the same laws, procedures and language. Following independence in 2002, Timor-Leste's justice system remained shaped by its Indonesian legacy despite sweeping top-down reform aimed at replicating the colonial Portuguese system. Both localities have a well-documented and influential tradition of CJS. Unlike many African countries that dominate research on customary law, colonial penetration in both Aceh and Timor-Leste was less invasive, resulting in reduced colonial co-option of local systems of justice. Further, despite decades of brutal separatist conflict with Indonesian armed forces and with subjugation of local custom forming an element of conflict dynamics, in both contexts CJS remained intact and the most relevant dispute resolution mechanisms. Finally, the place of CJS within justice sector reform has featured in policy debates in both Timor-Leste's and Aceh's post-conflict era, although with significantly different approaches.

### 4.1 Timor-Leste: Marginalizing non-state justice systems

#### 4.1.1 Brief background to justice sector reform

Under Indonesian occupation and during over three decades of separatist conflict, the position of the formal legal system in Timor-Leste was a common one for conflict ravaged societies. The courts and judiciary acted as an instrument of state oppression, aiming to legitimize Indonesian occupation through the prosecution of political opponents and protection of state interests.<sup>77</sup> Following a 1999 referendum that demonstrated overwhelming support for independence, the interim United Nations Transitional Administration commenced rehabilitating the Indonesian-era courthouses with

a view to have them form the foundation of independent Timor-Leste's justice system. Yet, given the widespread destruction of infrastructure during the Indonesian withdrawal and the departure of almost all civil servants, the challenges faced were extreme.

While only one among many nation-building priorities, justice sector reform gained increasing prominence throughout the United Nations administration's three-year mandate. As the importance of justice sector reform in securing law and order became increasingly apparent, additional resources were channeled to legislative reform, selecting and training judicial personnel, and improving court administration. Yet, following independence in 2002, minimal inroads had been made in building a functional justice system: many Timorese still viewed the judiciary and applicable laws as illegitimate relics of Indonesian occupation; case backlogs were up to two years; and severe gaps in qualified personnel remained.<sup>78</sup> In particular, there appeared a growing divide between elite-driven Ministry of Justice policy and what was required to develop accessible justice services. The promotion of Portuguese as the courts' working language alienated lawyers and citizens alike; some estimates place knowledge of only basic Portuguese at between 5-20 percent of the population.<sup>79</sup> Further, the use of expatriate judges and prosecutors from Lusophone jurisdictions served to reinforce perceptions that the formal justice sector was a foreign construct that served elite interests.

#### 4.1.2 Government policy on CJS

Similar to other developing contexts, customary law has general constitutional recognition in Timor-Leste. Despite this, on a practical level there has been minimal state engagement with CJS. Hohe and Nixon characterize state and non-state justice systems in Timor-Leste as existing in "different universes" with the international community denying the relevance of local justice systems.<sup>80</sup> During the United Nations Transitional Administration, there was an absence of policy on CJS, and as a result, the few initiatives that engaged with CJS were ad hoc and had limited application.<sup>81</sup> CJS were therefore used for conflict-related reconciliation processes<sup>82</sup> and land and property disputes,<sup>83</sup> but did not receive broader recognition. Accordingly, given the power vacuum resulting from rapid Indonesian withdrawal and the United Nations' inability to establish a viable judicial presence, under the United Nations Transitional Administration communities relied even more on CJS.

Post-independence government ministries were generally dominated by returned diaspora elites who had lived out the Indonesian occupation in former Portuguese colonies. For many such returnees, particularly those in the Ministry of Justice, recognition of customary law was incompatible with building a modern state.<sup>84</sup> As a result, despite the legitimacy and relevance they still held across Timor-Leste, CJS were marginalized from justice sector reform policy. To the minimal extent CJS were recognized, government policy strictly dictated that civil cases only could be resolved at a community level. At the same time, United Nations reports increasingly recognized the failure of justice sector reform and attributed a political crisis in 2006 partly to deficiencies in this area.<sup>85</sup>

In recent years—consistent with international trends—greater attention has been placed on the potential benefits of CJS in achieving legal empowerment. A change of government in 2007 was the catalyst for the policy shift, and in 2009, the Ministry of Justice in conjunction with the United Nations Development Programme (UNDP) commenced a major research and consultation process to develop legislation and policy guidelines in order to regulate the integration of customary law. While a positive policy change, Perry has questioned the approach of using top-down legislative reform to institute greater integration of CJS.<sup>86</sup> The level of engagement that the new policy will adopt, particularly in relation to accountability and oversight, remains to be seen.

#### 4.1.3 Grassroots justice project

The primary objectives of ASF's Grassroots Justice Project were to provide community-level access to justice, increase respect for fundamental human rights and contribute to justice sector reform. This was to be achieved through two interrelated components: the establishment of a network of Community Legal Liaisons (CLLs) who provide legal information and advice, perform mediation, and refer cases to the formal justice system; and a legal awareness campaign for targeted communities

to increase knowledge of basic rights, laws and institutions and empower marginalized groups to advocate for their interests. Activities included intensive training for CLLs on mediation and the formal legal system, as well as a series of legal awareness workshops implemented at the district, sub-district and village level. CLLs were integrated into legal awareness activities and often presented the modules to their own communities.

CLLs were selected based on criteria such as literacy, education and experience in community leadership. They were generally drawn from elected local governance structures, which under Timor-Leste law had set quotas for women and youth representatives. Only a small minority (18 out of 110 across the three-year project) were traditional customary leaders, or *lia-nain*, literally “owner of the words”.<sup>87</sup> This is despite the prevalence of customary leaders in every village.

ASF’s Grassroots Justice Program did not actively engage with *lia-nain*. This was primarily due to government policy that in 2005 failed to recognize CJS. Indeed, in a project development meeting with the Deputy Minister of Justice in 2005, his main input was that the project could work on all legal issues with target communities *except* those associated with customary law. CJS were minimally understood by ministry elites, considered backward, ill-suited to state-building and possibly even a threat to the formal justice sector. While policy shifted in 2007 together with a change in government, by this time the project was close to completion and the methodology had been established.

Inherent in project design was therefore a tension between providing community legal empowerment but outside the framework of *lia-nain*. As a result, the project established a parallel community-level structure that essentially sought to provide the same services as established customary leaders. No guidance was provided on the role for current *lia-nain* or how the two processes would interact. An independent evaluation of the project conducted by Lowe recognized the contradictions within the project, praising it for building “on the traditional role played by village and hamlet chiefs” by establishing CLLs that “bridge[s] the formal and traditional justice systems”.<sup>88</sup> But it also highlighted the failure to consciously engage with *lia-nain*, which impacted on the project’s ability to improve community-level dispute resolution.<sup>89</sup> The evaluation explains how the project contributed to confused and overlapping processes for primary dispute resolution:

Some CLLs see the mediation as an alternative to the arbitration of the *Lia-nain*. The CLL Chief of one hamlet said that many people come directly to him with their legal problems and disputes instead of going first to the *Lia-nain*. Several villagers said they prefer the CLL mediation because it is free of charge. Some others said they preferred the arbitration of the *Lia-nain* because it inflicts punishments on those who have done wrong.<sup>90</sup>

**58** The project further created confusion as to the boundaries between the formal and customary legal systems:

One village chief CLL stated clearly that when a problem reaches him, it crosses from the traditional to the formal system. However, several of the parties to mediation saw the process as part of the traditional system.<sup>91</sup>

It is likely that this confusion was an inevitable result of a project designed without clarity as to the relationship between CLLs and customary leaders, and the extent to which project dispute resolution should be considered a customary process. Indeed, given the existence and interplay between both processes, and that CLLs infused contemporary mediation practices with customary practices, there was significant scope for ambiguity.

The Project illustrates the power dynamics and possibility for intense competition over dispute resolution within communities. In the absence of clear roles, legal actors with differing sources of authority, whether based on custom, elected village governance positions or through aid

interventions, may compete for control over dispute resolution. Where fees are charged either overtly or indirectly, competition will increase. This has clear implications for building consistency and oversight in community-level processes. It further complicates matters for citizens since overcoming the uncertainty as to where to seek dispute resolution services may be more motivated by personal or political affiliations rather than the quality of the service provided.

The overall point is that the absence of clear policy on how to engage with *lia-nain* and a minimal understanding of community-level power dynamics limited project outcomes and may have generated negative effects. Although this was shaped by misguided and subsequently amended government policy, questions should be asked as to whether project activities should have been modified given the absence of a clear strategy to integrate existing customary forms of dispute resolution. The jurisdictional limits and accountability of CLLs were further insufficiently addressed. As they operated in a middle ground between the formal and customary systems, neither formal accountability mechanisms nor appeals to traditional authority existed. Thus, two key policy considerations—interaction with *lia-nain* and oversight for CLLs—were overlooked. While only operating on a relatively small scale, if such an approach were expanded nationally, it could seriously undermine attempts to achieve legal empowerment.

## 4.2 Aceh: Customary law as a post-conflict recovery strategy

### 4.2.1 Brief background to justice sector reform

Similar to Timor-Leste, Indonesia's western-most province of Aceh suffered decades of protracted separatist conflict. While there were serious deficiencies in the functioning of the formal justice system across Indonesia, the corruption, lack of independence and prosecution of political opponents associated with the Suharto-era judiciary were particularly prevalent in Aceh. The devastation wrought by the Indian Ocean tsunami of 2004 was the catalyst for peace negotiations, which resulted in the Helsinki Memorandum of Understanding (MoU). This agreement ended hostilities between the Free Aceh Movement (GAM) and the Government of Indonesia (GoI), and provided the basis for extensive provincial autonomy for the Acehese administration, including over judicial affairs. Since 2001, increasing levels of autonomy had been granted to Aceh in an attempt to resolve the conflict; however, the autonomy negotiated under the Helsinki MoU represented the most extensive form of provincial self-government contemplated in Indonesian history. This resulted in a distinct Acehese *shariah* jurisdiction that replaced and expanded on the jurisdiction of the national religious courts.

Following initial tsunami relief efforts, justice sector reform formed part of the recovery agenda, particularly as it pertained to rehabilitating justice-related infrastructure and dealing with property and inheritance issues caused by the tsunami. As tsunami recovery progressed, justice sector reform shifted emphasis to focus on broader conflict-related and governance issues, primarily improving service delivery in the courts, reducing corruption, enhancing access to justice and raising community legal awareness. On the basis of provincial autonomy, Acehese officials emphasized engagement with CJS as a means to achieve greater legal empowerment.

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### 4.2.2 Government policy on CJS

Unlike Timor-Leste, the end of conflict in Aceh facilitated a widespread revival of Acehese culture, tradition and custom. The increasing levels of autonomy and end of hostilities allowed the Acehese administration to institute new laws regarding religious life, *shariah* law, traditional authority structures and customary law. Indeed, for the Acehese, embracing *adat*<sup>92</sup> or customary law is a direct expression of Acehese nationalism and harked back to the 17<sup>th</sup> century Acehese Sultanate of Iskandar Muda, where Aceh was a dominant, wealthy regional power free from external subjugation.<sup>93</sup> As the central government attempted to suppress Acehese *adat* throughout the separatist conflict, post-conflict policy sought to reinstate Acehese customary law as a central normative framework, thereby marginalizing the influence of national law. Engaging with CJS has therefore been readily embraced by the Acehese provincial government for political as well as practical purposes.



Acehnese *adat* has been recognized and regulated through several national and provincial regulations, resulting in significant overlap. Most authoritative is Law 11/2006 on the Governance of Aceh, which states that community disputes should be resolved by *adat* institutions. Under provincial law, Regional Regulation 7/2000 requires law enforcement officers to give opportunities to customary leaders to resolve community disputes before they enter the formal justice system; this provides complete jurisdiction to customary processes at first instance regardless of the seriousness or type of case. Further, *Qanun*<sup>94</sup> 5/2003 establishes a two-tiered system with the *keuchik* (chief) and *tuha puet* (elder) resolving cases at the *gampong* (village) level. Cases involving multiple *gampong* are adjudicated by *mukim*,<sup>95</sup> who also hear appeals from disputants dissatisfied with the determination at first instance. The *mukim* is the final level of appeal in the *adat* jurisdiction; however, unresolved disputes and serious criminal cases can be appealed to formal courts. Aceh's regulatory framework, while providing a robust foundation for promoting CJS, contains minimal clarity as to how inconsistencies between the levels of regulation will be resolved and provides scant guidance as to how the policy will be implemented.

In an attempt to overcome the regulatory uncertainty, the peak body overseeing Acehnese customary law, the *Majelis Adat Aceh* (MAA, or Aceh Adat Council) signed an MoU with the Acehnese Governor and Chief of Police on the implementation of *adat*. This required that *adat* decisions be documented in writing and also uphold the mediation, reconciliatory function of *adat* institutions, but excluded serious crimes such as murder, rape and drug offences from its jurisdiction. Accordingly, the MoU is inconsistent with the more authoritative Regional Regulation 7/2000, which provides *adat* with complete first instance jurisdiction. The MoU sets out an exhaustive list of cases suitable for *adat* resolution including disputes related to land, inheritance and agriculture, as well as less serious criminal offences such as minor theft and domestic violence that "is not in the category of serious beating".<sup>96</sup> Since the legal status of the MoU is far from clear, it most likely reflects an operational division of responsibilities between customary authorities at the criminal justice system rather than a definitive statement of law.

Legal pluralism in Aceh is complicated by the presence of legislatively recognized *shariah* law and specific *shariah* courts. Further, the line between customary (*adat*) and religious (*shariah*) law is a grey one, with custom being infused with Islamic principles over centuries of conservative Muslim practice in Aceh. Further, as *imeum meunasah* (religious leaders) are mandatory members of *adat* councils, the distinction between religious and customary law is opaque. Determining jurisdictional limits, especially after the layers of state law (both provincial and national) have been added, is therefore an extremely complicated exercise. Given the possibility of three jurisdictions for a single case, the scope for uncertainty and contestation is significant.

60 In the post-disaster, post-conflict context of Aceh, legal pluralism is therefore in a state of flux. The provincial government, in conjunction with the MAA and international actors, has set an extremely progressive and innovative policy of engagement with CJS. However, this is complicated by overlapping regulations, three separate yet imprecisely defined jurisdictions and minimal capacity to institute such an ambitious policy. As a result, limited inroads into implementation have been made; this transformational restructuring of the justice sector has occurred more on paper than in practice.

#### 4.2.3 *Adat* component of UNDP's Aceh Justice Project (AJP)

In this context, UNDP sought to assist the Acehnese Government to clarify *adat* jurisdiction, build more consistency in *adat* procedures and provide a set of minimum standards that *adat* dispute resolution processes must adhere to. This process commenced with a detailed research project to identify and build consensus on common *adat* practices across Aceh's varied districts. As part of a broader baseline survey, quantitative surveys were conducted with 800 respondents (52 percent male, 48 percent female) across four districts in urban and rural areas, and qualitative in-depth interviews were further held with over 60 key informants to verify results. A series of focus group

discussions specifically on customary law were further conducted. Some of the most illustrative findings include the following:

- There was an overwhelmingly poor perception of the formal justice system—53 percent considered it corrupt; 51 percent thought it treated participants unequally; and often, respondents had such minimal interaction with the courts that they did not express an opinion.
- 76 percent of respondents felt *adat* resolved cases fairly, with 66 percent stating that the procedure of *adat* dispute resolution was clear.
- 47 percent of respondents thought crimes such as a rape can be resolved through *adat* processes, while 79 percent of respondents felt that domestic violence cases should not be reported to police if the case is being dealt with under *adat*.

In conjunction with the MAA, the research culminated in the 'General Guidelines on Aceh Adat Justice' (Guidelines),<sup>97</sup> a non-binding manual on best practice for *adat* dispute resolution that attempted to resolve many of the deficiencies raised by the research. A series of public consultations with key government, civil society and customary law stakeholders were held to ensure widespread acceptance of the document as an accurate and viable basis to promote and regulate *adat*. The final Guidelines then formed the basis of an extensive training program for customary leaders aimed at improving the quality and consistency of *adat* processes. At the time of writing, the training program was commencing implementation. The analysis that follows is based on the framework established by the Guidelines.

The form of engagement with CJS embodied in the Guidelines led to the recognition of village-level *adat* councils as primary dispute settlement mechanisms based on customary law. Substantive customary law has not been codified and *adat* procedure, while defined in the Guidelines, does not have legal status and only serves as a reference. The project provides a set of procedural standards common to *adat* across Aceh and aims to build additional consistency, transparency and compliance with human rights standards. This is to occur through consensus-building on procedural standards, an extensive training program for *adat* leaders and substantial oversight. As such, it represents a comprehensive, practical policy to promote CJS as an officially recognized first instance dispute resolution mechanism. However, it faces significant challenges, primarily due to its lack of a conceptual framework, with fundamental issues regarding the applicable law, accountability of actors and human rights compliance left unaddressed.

Although *adat* institutions have jurisdiction over minor criminal matters, there is no certainty as to which substantive law applies. Understanding of the substantive state law on domestic violence or even non-criminal matters such as inheritance differs across the province, and cases will therefore be subject to different treatment. Sanctions, while in theory mutually agreed among parties to the dispute, may also differ widely depending on how the customary leader views the substantive law and related violation. However, it must also be recognized that there is a necessary trade-off between the certainty embodied in substantive state law and the more fluid, locally legitimate and therefore more readily accepted norms of customary law.

Accountability as to the quality of *adat* decision-making is instituted by the possibility of appeal to the *mukim* level and also to the courts. While a positive step, additional administrative and financial strategies could also be employed to enhance the accountability of individual *adat* actors. Given the potential for abuse of power, strategies such as payment, contractual obligations or oversight committees could be adopted, although again, this may result in a trade off with *adat* leaders' local legitimacy. To be effective, such an approach may have to be adopted at a later stage, when institutionalizing administrative structures is realistically achievable and can therefore be expected to provide meaningful oversight. Despite the very real practical constraints, instituting appropriate checks and balances on the exercise of customary judicial power is an important strategy to foster greater integrity, accountability and legitimacy in the process.

In regard to human rights standards, the approach of the Guidelines has been to “soften the edges” of Aceh’s customary system, rather than seek full compliance.<sup>98</sup> A pragmatic consultative approach was adopted to engage with customary leaders on human rights issues rather than impose restrictions. Although this approach resulted in less than complete compliance with established human rights standards, it was thought that a bottom-up, negotiated process would be more effective than the top-down imposition of external norms, particularly given the absence of effective compliance mechanisms. One issue in particular warrants specific attention. Female participation in *adat* councils was a central area of concern. Historically, women have lacked a formal role in *adat* processes except in limited circumstances where a *geuchik*’s wife may provide assistance for female victims.<sup>99</sup> In consultation with customary leaders and given the trend towards greater female participation in other governance institutions, consensus was built that the core reasons to deny women’s involvement no longer existed. Although structural issues mean that equal participation is a distant objective, this does demonstrate that synergies between customary law and human rights can be fostered and successfully inculcated.

In summary, the method adopted in Aceh represents a realistic and pragmatic approach to Aceh’s legal pluralism. It establishes a policy of detailed engagement with CJS, linking them to appeal structures and providing a uniform procedural law. However, substantial conceptual gaps remain. The most important include whether communities can define their own substantive law, whether engagement with human rights standards results in any change in practice, and how accountability can be successfully fostered. These issues present significant challenges and will need to be addressed as the existing project structures become more engrained. As long as they remain unresolved, effectively institutionalizing *adat* dispute resolution within the broader state legal framework will remain a distant objective and *adat* dispute resolution will be limited in terms of its contribution to legal empowerment.

### 4.3 Comparative analysis

In the projects implemented in Timor-Leste and Aceh, there are two contrasting approaches to engaging with CJS. The former, given an uncondusive government framework, failed to engage directly with customary justice actors, establishing parallel dispute resolution institutions and procedures, thereby complicating community-level access to justice and failing to capitalize on the existing capacity of CJS. The latter approach, implemented with the full support of the provincial government and as part of a progressive engagement policy, adopted an overwhelmingly practical approach. While understandable, this resulted in issues of accountability being marginalized and the project lacking a clear regulatory framework on customary law. Given the inherent contradictions and uncertainties in the Acehnese justice sector, there is a risk that the engagement with CJS detracts rather than contribute to community access to justice. Nevertheless, in the face of serious challenges, significant gains have been made, and the first steps to achieving legal empowerment through better administered and more accountable customary justice have been taken.

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In neither case has the political nature of community dispute resolution been actively addressed. In the framework established by the Acehnese example, leaving the definitions of substantive law to customary leaders leaves significant scope for dispute resolution to be manipulated for personal gain. In the absence of effective oversight measures, this issue is compounded. In the Timor-Leste project, empowering non-customary justice actors in a context where *lia-nain* continue to play a legitimate, widely accepted customary role has generated confusion and contributed to tension. Empowering any individual to perform community-level dispute resolution, even in the most neutral forms of mediation, is a political act. Accordingly, there will be winners and losers both in terms of who controls the procedure and how disputes are resolved. Acknowledgment of this political dimension should be forefront in the design of projects that engage with CJS. Where this is achieved, accountability and oversight mechanisms should be integrated as an appropriate countermeasure.

In terms of achieving legal empowerment, engaging with CJS may raise as many issues as it solves. In the Timor-Leste example, the marginalization of customary leaders complicated community-level

dispute resolution — the central problem the project was attempting to resolve. While in Aceh, although additional state-imposed demands were placed on customary leaders — uniform procedures, adherence to certain principles and written decisions were all mandated — they remained outside state authority. Legitimate issues raised by customary leaders included: Were they to be considered agents of the state? Why should they not receive a salary like court officials? Why should they comply with these additional burdens when minimal financial and technical assistance was being provided?

While only a superficial indication of the myriad of issues raised in legally plural contexts, the two case studies demonstrate that when any attempt to engage practically with CJS is made, crucial conceptual challenges arise. This chapter contends that current legal empowerment practice at best fails to address these issues due to practical constraints, or at worst, is so lacking in a theoretical framework that fundamental conceptual issues are simply not recognized.

## 5. Current approaches: Towards closer engagement with customary justice systems

### 5.1 Consequences of current policy

The superficial engagement with CJS that occurs under most legal empowerment initiatives results in several negative effects. First and foremost, it clearly limits the impact of any intervention. While the main concerns are the longer-term consequences of not addressing the interaction between multiple systems of justice, short-term results will also be limited. For example, strengthening CJS in the absence of clearly defined and operational oversight mechanisms can facilitate poor quality dispute resolution and perpetuate potential rights violations. Second, by avoiding complex conceptual and jurisdictional issues, many interventions are set up to fail. In circumstances where the jurisdictions of CJS are not clearly defined or the overall policy objectives are unclear, wastage and inefficiency will likely result and impact lost. Third, a lack of coherence in justice sector policy not only restricts a state's ability to deliver justice services, but also impacts on broader human development.<sup>100</sup>

Wherever superficial engagement with CJS is perpetuated and projects suffer accordingly, governments and donors will be less inclined to provide the investment necessary to fully harness the benefits of CJS. Given the rising interest in engaging with CJS, now is a critical juncture to demonstrate what can be achieved. If results are not forthcoming, however, engagement with CJS may very well be considered a failed experiment with resources shifted back to formal rule of law institutions.

### 5.2 Strategies for closer engagement

To be effective, engagement with CJS cannot occur on a superficial level. Rather, successfully integrating two vastly different systems of justice, born of different traditions and shaped by radically different historical processes, is a long-term, expensive and highly complex undertaking. To be effective, there must be clarity on how the two systems intersect and interact. The following section raises some practical, achievable strategies towards this end.

#### 5.2.1 Detailed assessments

The lack of a knowledge base regarding CJS can too often justify poorly conceived policy. Detailed assessments of the capacity, potential contribution and negative aspects of CJS, based on a participatory research approach, should be integrated into all legal empowerment interventions. While costly and time-consuming, the benefits gained outweigh the resources expended. Further, given the increasing resources being committed to measuring project impact and the recognition that CJS play a crucial legal empowerment role, there is significant scope for preliminary analysis of CJS to be factored into baseline studies and initial evaluation frameworks. Once a sound research base exists, determining effective entry points and areas of engagement can more readily be achieved.

### 5.2.2 Recognize and respond to the political nature of CJS

Overlooking the political nature of engaging with CJS and reform processes toward that end is a consistent flaw of legal empowerment interventions. Strategies to address this must form part of any theoretically grounded approach. Legal empowerment should therefore be contextualized within broader reform processes such as decentralization and the democratization of local government. When analyzed within a broader governance framework, the political interests at play become more apparent, and engagement with CJS may be more feasible when couched in terms of increased local participation in government. An understanding of potential reformers, institutional incentives and constraints for reform, as well as what is politically achievable, will significantly enrich legal empowerment interventions.

### 5.2.3 Engagement as the guiding principle

Constructive engagement, as opposed to modification or substitution, should be the guiding principle when integrating CJS into the formal justice sector. Areas of synergy should be identified, and checks and balances effectively instituted for risk areas. Wherever possible, both actors from the formal and non-state sectors should be involved in jointly identifying jurisdictional limits, procedural standards and lines of appeal. This is more readily achieved if rather than two diametrically opposed systems, state and non-state justice systems are conceived as subsets of the same framework, with CJS potentially forming the first tier of state-sanctioned dispute resolution.

Toward this end, Chirayath *et al* recommend establishing institutional structures to facilitate dialogue between formal and non-state justice systems as an appropriate entry point.<sup>101</sup> As lower courts are closer to communities and accordingly have better knowledge of non-state law, dialogue with judges from these courts should be prioritized. The objective is to create a conducive environment for representatives of both systems to mutually develop and agree on transparent rules to improve the functioning of both systems, particularly where they interact. Nyamu-Musembi similarly emphasizes the importance of building dialogue between both systems and overcoming the engrained preconception that people cannot exercise judicial power.<sup>102</sup>

### 5.2.4 Sustained support to CJS actors

Accountability of CJS actors should be fostered wherever possible. Strategies that should be considered are election of CJS actors for fixed term periods, the payment of a stipend subject to certain benchmarks being met, instituting effective oversight and complaints mechanisms, and providing extensive and ongoing training. In this scenario, CJS actors resemble agents of the state, similar to frontline service-providers in the health or education sectors. Increased emphasis should further be placed on building the consistency and transparency of CJS decision-making. This can be achieved through requiring paper records of decisions and the implementation of filing systems. Such an approach may only be successful if CJS actors receive sufficient resources and incentives to adopt a record-keeping system.

## 6. Conclusion

As the latest trend in justice sector reform, legal empowerment represents a paradigm shift both by reducing the emphasis on formal rule of law institutions and its recognition—to some extent—that CJS must play a role in harnessing the law to empower marginalized communities. However, one thing current legal empowerment policy and practice fails to do is fully appreciate the inherent complexity of effective engagement with customary law. At essence, engaging with CJS seeks to integrate two justice systems with vastly different normative principles and historical development. Such a complex, fraught process in the absence of clear lines of jurisdiction, carefully designed policies as to how the systems interact and without effective mechanisms for oversight and accountability, sets many interventions up to fail. To its detriment, legal empowerment policy often appears to assume a political vacuum, fails to take account of the socio-political construction of CJS, and often perpetuates an idealized version of customary justice, frozen in time and devoid of political contestation.

To make the legal empowerment project a reality, however, the necessity of taking a bottom-up approach and closely engaging with community-based systems of justice is an inevitable conclusion. While legal empowerment discourse recognizes this to a limited extent, the full ramifications of such a policy are not commonly appreciated by practitioners, academics or policy makers. Although the successful integration of CJS into the formal legal framework is an intricate, lengthy, politically-charged process, legal empowerment in practice generally constitutes simplistic, superficial engagement, overlooking fundamental issues of sovereignty, political influence and accountability. A significantly more nuanced approach is required. This will take time and substantially more resources and sits uneasily with output-focused donor priorities — yet transforming customary legal empowerment from concept to reality demands nothing less.

## footnotes

- 1 A caveat is necessary to qualify the use of broad generalizations to cover the number and diversity of customary justice systems across the developing world, even within single states. See section on *Definitional Challenges* later in this chapter for in-depth analysis of the complex definitional issues that arise when engaging with customary law.
- 2 See generally E. Wojkowska, *Doing Justice: How Informal Justice Systems can Contribute*, UNDP Oslo Governance Centre (2006); Commission on the Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor* (2008).
- 3 S. Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Endowment for International Peace Rule of Law Series No. 41 (2003).
- 4 D. Trubek and M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) (4) *Wisconsin Law Review* 1062.
- 5 B. Bryde, *The Politics and Sociology of African Legal Development* (1976).
- 6 Ibid.
- 7 Ibid.
- 8 T. Carothers, 'The Rule of Law Revival' (1998) 77(95) *Foreign Affairs* 9.
- 9 Golub, above n 3.
- 10 Ibid.
- 11 L. Chirayath, C. Sage and M. Woolcock, *Customary Law and Policy Reform: Engaging with Plurality of Justice Systems*, Background Paper for the World Development Report (2005) 3.
- 12 R. Brooks, 'The New Imperialism: Violence, Norms and the "Rule of Law"' (2003) 101(7) *Michigan Law Review* 2275.
- 13 Chirayath et al, above n 11.
- 14 Golub, above n 3.
- 15 S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for DFID (2003).
- 16 CLEP, above n 2, 27.
- 17 Conference Report, *Towards a New Consensus on Access to Justice*, Summary of Brussels Workshop, 29-30 April (2010) 8 <[http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/justice\\_20081124/justice\\_20081124.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/justice_20081124/justice_20081124.pdf)> at 3 November 2010.
- 18 B. Connolly, 'Non-state Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38(2) *Connecticut Law Review* 269.
- 19 Golub, above n 3, 3.
- 20 Ibid 16.
- 21 See for example, Asian Development Bank, *Overview of ADB's Technical Assistance for Legal Empowerment* (2008) 4 <<http://www.adb.org/Documents/Reports/Legal-Empowerment/chap02.pdf>> at 10 November 2010.
- 22 M. Stephens, 'The Commission on Legal Empowerment of the Poor: A Missed Opportunity' (2009) 1 (132) *Hague Journal on the Rule of Law*.
- 23 International Council on Human Rights Policy, *Enhancing Access to Human Rights* (2004) 72.
- 24 Chirayath et al, above n 11.
- 25 CLEP, above n 2.
- 26 Ibid 28.
- 27 CLEP, *Making the Law Work for Everyone: Working Group Reports* (2008) 42.
- 28 Ibid 43.
- 29 See generally M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996); S. Adelman, 'Constitutionalism, Pluralism and Democracy in Africa' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 73.
- 30 CLEP, above n 27, 45.
- 31 Stevens, above n 22.
- 32 D. Banik, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' (2009) 1 *Hague Journal on the Rule of Law* 117, 129.
- 33 Connolly, above n 18.
- 34 Wojkowska, above n 2, 20.
- 35 Ibid.
- 36 Connolly, above n 18.
- 37 W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006).
- 38 A. Renteln, *International Human Rights: Universalism versus Relativism* (1990).
- 39 See generally Mamdani, above n 29; P. Veit, *Africa's Valuable Assets - A Reader in Natural Resource Management*, (1998) Veit 1998; Adelman, above n 29.
- 40 F. Von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 47 (1) *Journal of Legal Pluralism and Unofficial Law*.
- 41 Connolly, above n 18.
- 42 Mamdani, above n 29.
- 43 Adelman, above n 29.
- 44 Mamdani, above n 29.
- 45 A prominent example is the Restatement of Customary Law in Africa, led by the School of Oriental and African Studies, which involved research and consultation to achieve a unified written record of prevailing customary norms. See, for example, A. Allott, *Integration of Customary and Modern Legal Systems in Africa* (1964).
- 46 Veit, above n 39; Adelman, above n 29.
- 47 C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Institute of Development Studies Paper commissioned by DFID (2003); Connolly, above n 18.
- 48 Connolly, above n 18.
- 49 Mamdani, above n 29.
- 50 Stephens, above n 22.
- 51 Ibid.
- 52 A. Sen, *Global Justice*, Conference Paper for World Justice Forum, Vienna 2008 (2008).
- 53 Connolly, above n 18.
- 54 Nyamu-Musembi, above n 47.
- 55 See generally E. Cotran, "Some Recent Developments in the Tanganyika Judicial System," *Journal of African Law* 6, no. 1 (1962); Osinbajo, 'Proof of Customary Law in Non-Customary Courts': 265.
- 56 Connolly, above n 18.
- 57 S. Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1972) 7 (7) *Law and Society Review*.
- 58 Bryde, above n 5.
- 59 Connolly, above n 18.
- 60 Nyamu-Musembi, above n 47.
- 61 Mamdani, above n 29.
- 62 Nyamu-Musembi, above n 47.
- 63 Ibid.
- 64 S. Farran, 'Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific' (2006) 52 (77) *Journal of Legal Pluralism and Unofficial Law*.
- 65 Nyamu-Musembi, above n 47.

- 66 CLEP, above n 2.
- 67 Connolly, above n 18.
- 68 R. Schiller, 'The Draft Legislation and Customary Law' (1969) 5 *East African Law Journal*.
- 69 Ibid.
- 70 R. Tanner, 'The Codification of Customary Law in Tanzania' (1966) 2 (1) *East African Law Journal*.
- 71 G. Woodman, 'Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria', in A Allott and G.R. Woodman (eds), *People's Law and State Law: the Bellagio Papers* (1985).
- 72 A. Manji, 'Land Reform in the Shadow of the State: The Implementation of New Land Laws in Sub-Saharan Africa' (2001) 22 (3) *Third World Quarterly*.
- 73 K. Deininger, *Land Policies for Growth and Poverty Reduction* (2003).
- 74 See generally Chirayath et al, above n 11; Wojkowska, above n 2.
- 75 A. Bryman, *Social Science Research Methods* (2001).
- 76 Ibid.
- 77 H. Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24 (171) *University of New South Wales Law Journal*.
- 78 Judicial System Monitoring Programme (JSMP), *Overview of the Courts in East Timor in 2004* (2004).
- 79 K. Taylor-Leach, *The Ecology of Language Planning in Timor-Leste: A Study of Language Policy, Planning and Practices in Identity Construction* (2007).
- 80 T. Hohe and R. Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor*, Report Prepared for the United States Institute of Peace (2003), 2.
- 81 Ibid.
- 82 JSMP, above n 78.
- 83 L. Yoder, *Custom and Conflict: The Uses and Limitations of Traditional Systems in Addressing Rural Land Disputes in East Timor* (2003).
- 84 Hohe and Nixon, above n 80.
- 85 L. Grenfell, 'Legal Pluralism and the Rule of Law in Timor Leste' (2006) 19 (305) *Leiden Journal of International Law*.
- 86 R. Perry, *Engaging with Customary Systems of Law as a Means of Promoting the Rule of Law in Post-Conflict States* (2009).
- 87 Hohe and Nixon, above n 80, 24.
- 88 S. Lowe, Evaluation of the 'Providing Access to Justice—Legal Awareness at the Grassroots Level Project Timor-Leste, Avocats sans Frontieres, Dili, Timor-Leste (2007) 2.
- 89 Ibid 44.
- 90 Ibid 26.
- 91 Ibid.
- 92 *Adat* translates as customary law. Similar critiques of the term customary law have been leveled against the use of *adat*. See D. Mearns, *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International (2002). Undoubtedly, *adat* is a constructed concept, shaped by Dutch colonial manipulation and adapted to contemporary circumstances. However, as it is widely used and accepted across Indonesia, it will be adopted for this section.
- 93 E. Drexler, *Aceh, Indonesia: Securing the Insecure State* (2008).
- 94 *Qanun* are regulations issued by the Acehese provincial parliament. They were formerly known as Regional Regulations, yet under provincial autonomy, *Qanun*, an Acehese term related to canon law, was adopted. While formerly denoting religious authority, *Qanun* as currently used means a Regional Regulation.
- 95 The *mukim* is a distinct Acehese administrative structure that exists between the village and sub-district levels and dates back to the 17th century. It usually combines a number of villages clustered around a central mosque. See D. Fitzpatrick, *Managing Conflict and Sustaining Recovery: Land Administration Reform in Tsunami-Affected Aceh*, Asia Research Institute (2008).
- 96 Memorandum of Understanding between the Acehese Governor and Chief of Police on the implementation of *adat*, on file with the author.
- 97 UNDP, *General Guidelines on Aceh Adat Justice* (2008). This document has not been publicly released; however, it has been made available through the consent of UNDP. The original document is in Indonesian and is on file with the author. Translation into English has been conducted by the author.
- 98 UNDP, above n 97.
- 99 Ibid.
- 100 CLEP, above n 2.
- 101 Chirayath et al, above n 11.
- 102 Nyamu-Musembi, above n 47.



## Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons From Indonesia

Samuel Clark and Matthew Stephens\*

*"To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford."*<sup>1</sup>

### 1. Introduction

In most, if not all, countries in the world, court-based adjudication of legal disputes is considered an expensive and unwanted last resort.<sup>2</sup> Alternative dispute resolution mechanisms are, as many surveys and research attest, more commonly used and invariably more popular.<sup>3</sup> And yet at the same time, many of these "alternative" systems suffer (like courts) from systemic inequities that reaffirm existing power relations to the detriment of the socially excluded — what Amartya Sen describes as the "justice of fish", whereby the big fish eat the little fish with impunity.<sup>4</sup>

The phenomenon of the unpopular and distant state, and the debilitated community institution is particularly common in the developing world, where state capacity to deliver justice is undermined by financial and human resource deficiencies, and communal harmony challenged by socio-economic inequities and rapid social change. Therefore, on the assumption that effective justice systems and means of dispute resolution are crucial to development, equity and poverty reduction, what should be done in such a situation?

States have responded in various ways to the challenges of legal pluralism. These range from complete abolition of informal justice institutions — whether this has been effective at the local level is clearly a different question — to full incorporation, with many shades of partial recognition and incorporation in between.<sup>5</sup>

Abolition was pursued by a number of newly independent states in the post-colonial era.<sup>6</sup> Until recently, international development agencies have also focused almost exclusively on building formal justice institutions under the implicit assumption that customary arrangements will eventually wither away as an inevitable consequence of modernization.<sup>7</sup> Generally, these efforts have failed. Furthermore, and as the excerpt above from the Australian Commonwealth Government indicates, the evolution of justice

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\* Samuel Clark is a DPhil candidate at the Centre for Socio-Legal Studies, University of Oxford. He worked for the Social Development Unit of the World Bank from 2004 to 2009 on post-conflict reintegration, community development, local governance and legal empowerment in Aceh, Indonesia and Timor-Leste, and continues to consult on these issues in the Asia Pacific region. He is currently undertaking field research in Indonesia on legal mobilization and the prosecution of corruption in the post-Suharto era. Matthew Stephens is the Regional Coordinator for the World Bank's Justice for the Poor program, based in the Philippines. They can be contacted at [samuel.clark@law.ox.ac.uk](mailto:samuel.clark@law.ox.ac.uk) and [mjkstephens@gmail.com](mailto:mjkstephens@gmail.com). The views expressed in this chapter are those of the authors rather than the institutions to which they are, or have been, affiliated.

even in the developed world is unequivocally in the direction of community-led processes such as compulsory mediation, restorative and diversionary justice, and alternative sentencing.<sup>8</sup>

This article starts from the presumption that, in the contemporary reality of most developing countries, no one system — state or non-state — can deliver justice. Rather than idealize one system over another, a more realistic strategy is to focus on overcoming the specific injustices of both state and non-state systems.

The article, therefore, broadly advocates for the creation of hybrid institutions through partial incorporation, an approach that attempts to blend the strengths and mitigate the weaknesses of formal and customary systems. This approach carries the challenge of marrying two systems that draw on different normative traditions, as well as the normative and political challenge of identifying comparative strengths and weaknesses.

These challenges, we contend, can be addressed by taking a “grounded approach” to designing programs to strengthen hybrid justice systems. This approach is attuned to local needs and opportunities, and focuses on reducing tangible instances of injustice in incremental steps rather than attempting to achieve an ideal form of justice.<sup>9</sup> Concepts and theory will be defined before drawing on case study research from five provinces and a nationwide quantitative survey from Indonesia to outline a grounded approach to reform. Specifically, five key steps are proposed: (i) understand the historical and contemporary political and policy context of formal and customary justice systems; (ii) analyze the strengths and weaknesses of formal and customary legal systems; (iii) identify entry points for strengthening hybrid justice systems based on an analytical framework of institutional change; (iv) realistically assess the opportunities for engagement on the entry points; and (v) ensure a flexible and long-term commitment to implementation.

The article seeks to provide guidance to practitioners and policy-makers by prescribing a *process* of engagement rather than any specific institutional arrangements or “quick fixes”. To achieve this, it reflects on the establishment of a number of World Bank pilot programs in Indonesia.<sup>10</sup> In the next two sections, the basic steps of a grounded approach to engagement are illustrated by applying it to Indonesia. Section four presents the historical and contemporary context; section five considers the comparative strengths and weaknesses of Indonesia’s hybrid justice system and its constituent institutions; and section six explains the entry points, opportunities and implementation modalities that have been identified through a discussion of three current pilot projects in Indonesia. The final section concludes.

## 2. Key definitions: Justice and hybridity

- 68 The title of this chapter includes a number of terms that need clarification. First, “reducing injustice” requires some discussion of how the chapter conceptualizes justice. Second, the concept of “hybridity” and the term “hybrid justice system” require definition.

### 2.1 Justice

Formal and customary legal systems tend to emphasize different concepts of justice, both in theory and practice. Understanding these different conceptions and how they interact is critical to our analysis. These different concepts are manifested in the underlying models of justice deployed (and thus the objectives they seek to achieve) and the way in which these models are implemented.

Accordingly, models of justice are commonly divided into three main categories: retributive, deterrent and restorative.<sup>11</sup> *Retributive* justice focuses on the moral dimension of justice. It emphasizes the notion that perpetrators of a crime or those who fail to abide by laws or customary norms “deserve” to be punished for their wrongdoing. On the other hand, a *deterrent* view of justice focuses on the instrumental dimension of justice. It emphasizes that punishment for wrongdoing is

necessary to prevent further violations of the law and to signal the boundaries of socially acceptable behavior. Finally, the *restorative* view of justice focuses on the need to rebuild or restore relationships and/or socio-economic status. This form of justice includes scope for compensation as a way of correcting wrongdoing and achieving justice.

It has also been suggested that methods of justice can be divided into two categories: formal and negotiated.<sup>12</sup> The formal method arrives at its decisions — and therefore achieves justice — through the strict application of formal legal statutes and procedures. By contrast, the negotiated method arrives at its decisions through a process of negotiation. This could include a process of communal discussion, where a violation and appropriate punishment is discussed openly and settled jointly, but it can also manifest itself in ostensibly formal settings where a judge facilitates a negotiation between the lawyers of two opposing parties.

It is evident that formal justice systems and customary systems neither exclusively focus on only one model of justice nor a single means for the achievement of justice. Formal justice systems generally use formal means and emphasize retributive or deterrent views of justice in their approach to criminal law, but negotiated means and restorative views of justice are not uncommon in practice. Indeed, many other elements of formal legal systems simultaneously seek to achieve restorative objectives.<sup>13</sup>

Similarly, customary justice systems often use a combination of formal and negotiated methods to achieve all three justice-seeking objectives. Many “informal” justice systems are in fact formal in both procedural and substantive terms. Despite this overlap, many of the debates on the appropriateness of formal versus customary justice systems hinge on assumptions that each system only delivers one model or means of justice, or that some models or means are inappropriate for specific situations or contexts. However, as these examples suggest, it is not possible to maintain the first position, and the second rests on a normative assumption about the appropriate model and means in a given context or situation. This chapter thus takes the position that both state and local customary institutions are capable of delivering justice. Consequently, any attempt to reduce injustice must be based on consideration of local practices and justice-seeking objectives.

## 2.2 Hybridity

The theoretical and descriptive legal literature conceptualizes hybridity in the context of justice systems in three main ways. One approach understands a hybrid justice system as a situation where two legal traditions mix in the same social field. These traditions are sometimes described as “mixed jurisdictions” or “hybrid systems of law”, and are generally used to denote countries or jurisdictions where civil law and common law traditions are both applied.<sup>14</sup> Examples include Quebec, St Lucia, Seychelles, Scotland, Louisiana, the Philippines and Sri Lanka.

A second, somewhat similar account, suggests that a hybrid legal system exists where “two or more legal systems coexist in the same social field.”<sup>15</sup> This explanation draws on the concept of legal pluralism. One important distinction between this account and the first is that the former encapsulates a broader range of legal traditions. The first approach is generally limited to the mixed application of civil and common law traditions, whereas the legal pluralist conceptualization of hybridity allows for other legal traditions, including customary and religious legal traditions. A second key distinction concerns the jurisdictional scope. The first approach implies that both legal traditions apply to all, but that civil law governs some sectors of society, and common law governs others, whereas the legal pluralist account allows for different rules to be applied to different subsets of the population.<sup>16</sup>

A third conceptualization understands hybridity as a characteristic of an individual legal institution rather than the justice sector as whole. In this way, both formal state and customary legal institutions can be considered hybrid if they borrow from other legal institutions or function in a hybrid manner, sometimes applying standard rules in a formal sense and sometimes negotiating outcomes, drawing on non-state legal norms. This has been referred to as “internal hybridity”.<sup>17</sup> This

conceptualization flows from recognition that customary legal institutions have borrowed from other legal institutions for centuries and that, in some places, they resemble their historical antecedents only in a very superficial sense. Indeed, contemporary research from Indonesia and the south Pacific region identifies a trend among customary authorities towards codification of rules and structures so as to “be seen like the state.”<sup>18</sup> It also flows from the empirical analysis of legal systems in practice; analysis that suggest that legal systems rarely only pursue one justice objective (or the same mix of objectives) or method, but rather, adapt their objectives and methods to the local context and specific case circumstances. Similarly, the state borrows from non-state normative traditions in a dynamic process of institutional development and change.

This chapter conceptualizes the justice sector in countries like Indonesia as hybrid in the sense of the second approach (legal pluralism) and characterizes the individual systems that constitute the sector as internally hybrid. The focus of this chapter is therefore on strengthening the plural justice sector through both formal and customary justice systems.

### 3. Five steps of a grounded approach to strengthening hybrid justice systems

This section outlines five key steps for a grounded approach to strengthening hybrid justice systems. The explanation of each step focuses on why it is important (the objectives or ends) and how it can be achieved (the methods or means). The five steps are:

1. Understand the historical and contemporary context.
2. Analyze the comparative strengths and weaknesses of the constituent parts of the hybrid justice system.
3. Identify entry points based on an analytical framework of institutional change.
4. Realistically assess opportunities for engagement on the entry points.
5. Ensure a flexible and long-term commitment to implementation.

Although the steps are presented sequentially, this is not to suggest that it is either feasible or desirable to pursue the grounded approach in this manner; rather, we suggest that all five steps should be considered from the outset of any new engagement with the hybrid justice system of a given country or context.

#### 3.1 Step 1: Understand the historical and contemporary context

The first step in developing a grounded approach to strengthening hybrid justice systems is understanding the historical and contemporary political and policy context, as debated by policy makers, academics and civil society.

- 70 Understanding these debates and policy decisions is important for three main reasons. First, it will provide a sense of the opportunities available for strengthening hybrid justice systems. For example, the Philippines’ compulsory mediation process at the village level, known as the Barangay Justice system, emerged from a different political and historical context than that in Indonesia, where the relationship between state justice institutions and local dispute resolution mechanisms is less institutionalized.<sup>19</sup> Understanding existing institutional structures and the policy imperatives that drove them is crucial to any efforts to strengthen them. Second, it will help to narrow the focus of engagement, a refrain repeated throughout this article. Third, it will help to prevent the “reinvention of the wheel”. International development agencies, and even local non-governmental organizations (NGOs), often lack institutional memory and tend to reinvent the wheel or transplant reforms from other countries. The transplantation of legal concepts is not without merit;<sup>20</sup> but zeal for the new and foreign needs to be matched with an appreciation for the local and the past.

There are two main ways to build an understanding of the local historical and contemporary political and policy context — the “text-based approach” and the “people-based approach”. As the name

suggests, the text-based approach is based on acquiring knowledge through texts, which includes books, journal articles, newspapers, laws, regulations and reports. Since this approach is limited, particularly in contexts that lack a strong writing culture, it is critical to balance it with a “people-based approach”. This involves interviewing academics, politicians, researchers, activists and communities engaged in justice and governance issues or securing background papers or briefing sessions on the historical background and contemporary policy context. This may seem obvious, but in some contexts, particularly in smaller countries where international agencies appear to dominate the institutional landscape, international actors tend to consult only among themselves.<sup>21</sup>

As a final note in this subsection, it is important to be aware of the biases that one’s background can have on the kind of texts and people one seeks out. For example, a lawyer might tend to place emphasis on laws, lawyers and the judiciary; a political scientist on policy, politicians and governance structures; and an anthropologist on the views of village-level actors and institutions. Although focus is necessary, it is important to think beyond one’s background when designing programs to strengthen hybrid justice systems. For example, decentralization and village administrative reforms in Indonesia have had a significant influence on customary legal systems — this would not be apparent if one focused on statutory legal reform or Supreme Court regulations. Similarly, community development programs, which may be launched with no immediate aim of influencing customary justice mechanisms, often introduce norms and procedures that have precisely that effect.<sup>22</sup>

### 3.2 Step 2: Analyze the comparative strengths and weaknesses of the hybrid justice system

The second step of a grounded approach is to analyze the comparative strengths and weaknesses of the hybrid justice system and its constituent institutions *in practice*. This is important for three main reasons. First, institutional arrangements as written on paper are likely to be significantly different from their implementation in practice. Second, and as suggested by the discussion of justice and hybridity in the previous section, it is likely that the hybrid justice system, and its constituent institutions (generally, the formal state justice system and local customary legal systems), deal with different problems with varying levels of success. Such an analysis will, therefore, help to avoid the simplistic platitudes of “formal equals good, customary equals bad” and vice versa. Third, an analysis of strengths and weaknesses will facilitate the identification of priorities for strengthening hybrid justice systems. It is unrealistic to expect that external programs (or even local initiatives) will establish perfect institutions. It is more realistic to address a particular weakness or build on a particular strength rather than wholesale reform. As Amartya Sen has recently suggested, the focus should be on reducing injustice rather than attempting to achieve an ideal form of justice.<sup>23</sup>

There are two broad ways to implement this step. One involves undertaking original field research on the strengths and weaknesses of hybrid justice systems. Another simpler and more efficient method involves tapping available research and findings. In some countries, there is substantial empirical research on the workings and relative strengths and weaknesses of formal and customary legal systems. In others, however, research is weak or excessively formalistic and based on romanticized notions of customary systems. In Indonesia, for example, the World Bank decided that, although there was substantial historical research on *adat* (customary law) and dispute processing at the local level, there was little empirical research on these institutions because the country had undertaken major democratic and administrative reforms in the late 1990s and early 2000s. Consequently new empirical research was launched.

If empirical research on hybrid justice systems is insufficient, it is important that methodological rigor and multi-disciplinary perspectives are brought to bear in research design. Often those charged with developing strategies are lawyers or diplomats with limited empirical research experience. The authors also recommend that any new research be as specific as possible. This will help to ensure that research findings identify specific injustices and concrete, incremental steps that can be taken to reduce them. If research questions are too broad — for instance, *Are hybrid justice systems in Indonesia gender-sensitive or not?* — there is a danger that findings will focus on

unattainable ideal forms of justice rather than overcoming tangible injustices. Research should, therefore, focus on: a particular type of dispute (land, divorce, labor, enforcement of community contracts); a particular type of problem (gender representation, inter-village or inter-ethnic issues, court-community relations, community-investor relations); a particular type of institution (district courts, village institutions) or a particular region or location (a province, post-conflict contexts, areas with forest land or plantations, etcetera).

### **3.3 Step 3: Identify strategic entry points based on an analytical framework**

The primary objective of this step is to identify entry points for strengthening a hybrid justice system so that its constituent institutions deliver an appropriate mix of punitive, deterrent and restorative justice. In this chapter, an “entry point” is interpreted as a strategy for addressing a weakness or reinforcing a strength identified and prioritized in the previous step — it denotes *how* one addresses the problem, not the problem itself.

The identification of entry points requires an analytical framework for thinking strategically about institutional change. One problem with substantial research on and analysis of customary and hybrid legal systems is how they romanticize and present these institutions as “centuries-old”, when in fact, like any institution, many are often adapting to internal demands and changes in the external environment.<sup>24</sup> This is reflected in the Indonesia context, for instance, in the call by many advocacy groups and some local governments for blanket state recognition of customary justice systems, often overlooking systematic biases within these systems against ethnic minorities and women.<sup>25</sup> By contrast, many women’s NGOs seek, at the other extreme, to completely bypass customary justice systems, something that is not always feasible and that overlooks substantial inequities and injustice in the functioning of formal legal systems.<sup>26</sup>

Once the exotic nature of customary justice institutions and the presumed superiority of formal state justice systems is stripped away, it is apparent that they are just as susceptible to standard institutional or sociological analysis as any other institution. They involve the basic building blocks of any social phenomenon: actors or decisions, rules and norms, incentives and preferences, and resources and power relations. Thus, standard analytical frameworks can be legitimately applied to hybrid justice systems to facilitate strategic thinking about how a particular issue or weakness can be addressed.

Helmke and Levitsky propose one such framework in a recent chapter on formal and informal institutions.<sup>27</sup> They identify four main mechanisms of change: (i) institutional design; (ii) institutional effectiveness; (iii) social values and norms; and (iv) changes in the external environment that alter the distribution of power and resources within communities. This framework provides our basis for thinking strategically about entry points for strengthening hybrid justice systems (see Table 1).

**Table 1: Analytical framework for identifying entry points**

Mechanism of change	Pace of change	Examples	Entry point
Change in institutional design	Often relatively rapid	Establishment of the Barangay Justice System in the Philippines; village-level codification of customary legal systems	Policy dialogue, working groups, design workshops, legal drafting
Change in institutional effectiveness	Variable	Provision of training to judges or community leaders	Procedural and skills training, resources, legal aid, organizational incentives
Change in social values and norms	Generally slow	Changes to kinship-based norms of reciprocity; changes to community values on gender relations	Information campaigns, grassroots workshops, education, etc.
Change in power relations and resource distribution	Generally slow	Changes to the economic role of women, and other marginalized groups	Group formation, economic empowerment, access to justice initiatives, etc.

### 3.3.1 Institutional design

The first mechanism of change relates to institutional design. In the context of hybrid justice systems, this mechanism — one that seeks to change formal rules and institutional structures — can apply to both the state legal system and formalized elements of local customary mechanisms. For example, our research in the Indonesian province of West Sumatra identified one village where a local woman successfully campaigned to change the local rules governing customary land to prevent the sale of matrilineal land by male clan heads.<sup>28</sup> We identified a number of local government regulations and court circular letters on the recognition of decisions of non-state justice institutions in the courts. Our research also demonstrated that this mechanism of change can form a part of initiatives to formalize customary legal systems. In the province of West Nusa Tenggara, for instance, a group of villages on the island of Lombok has formalized institutional structures and codified local rules for the delivery of local justice; in some cases, this involved making substantive changes to the design of local institutions.<sup>29</sup>

### 3.3.2 Institutional effectiveness

The second mechanism of change is to improve the effectiveness of the institutional arrangements in protecting the rights of the vulnerable. This mechanism could relate to either state or customary legal systems. It should be noted, however, that efforts to improve one institution are likely to affect the operation of the other, depending on their interaction and relationship. Efforts to improve the accessibility of the police and their capacity to handle domestic violence, for instance, could well induce victims, and possibly also community leaders, to abandon the use of customary legal institutions for this type of problem.

Improving the effectiveness of institutions could involve a number of entry points. An obvious one is the provision of skills training to key justice sector actors, such as judges, prosecutors, the police, community leaders, religious leaders and women's leaders. The content of such training would depend on the specific strengths and weaknesses identified in the previous step. It could include mediation skills for judges and/or community leaders, training on how police should handle domestic violence complaints, or facilitating opportunities for state and non-state justice actors to interact. Another entry point is the provision of resources to ensure that established regulations and guidelines are actually implemented. Such an entry point would obviously only be effective if the previous analysis clearly indicated that the bottleneck was the lack of resources and not other factors such as institutional incentives or informal norms.



### 3.3.3 Social values and norms

The origin and evolution of social values and norms is complex.<sup>30</sup> Yet generally, changes in social values are slow and incremental, and not prone to deliberate external intervention. For example, it might take decades for social norms of punitive justice for rape and sexual abuse to strengthen to the point that they override norms of kinship.<sup>31</sup> In some circumstances, as Helmke and Levitsky have suggested, some social norms can actually change rapidly when a “sufficiently large number of actors become convinced that a new and better alternative exists, and if a mechanism exists through which to coordinate actors’ expectations.”<sup>32</sup> However, overall, the strength and resilience of local norms and beliefs emphasize the need to understand local authority structures at the village level. Thus, entry points for change are likely to be more effective when sponsored by local authorities or leaders.

### 3.3.4 Change in power relations

The fourth mechanism of change focuses on the role that the distribution of power and resources has on the implementation of state and customary legal systems. This mechanism is best illustrated with an example from the Indonesian province of West Sumatra. In Batu Gadang, a village in the province, a women’s group was established to run small business activities, but later evolved to become active in mediating community disputes. After demonstrating success in this endeavor, members of the group managed to secure an allocated seat in the traditional customary law council, which was previously not possible for women. At least part of their success was due to financial independence, which significantly improved their bargaining position on issues of institutional design and decision-making in the village.

This mechanism of change highlights the importance of thinking laterally about entry points for engaging hybrid justice systems. It indicates that activities not directly related to strengthening justice institutions can have a significant impact on their operation and the justice-seeking objectives they achieve. Social mobilization, group formation and economic empowerment can change power dynamics, improving the bargaining position of justice-seekers *vis-à-vis* both the state and customary legal systems and, in turn, carry the potential to drive institutional reform.

## 3.4 Step 4: Realistically assess opportunities for engagement in the entry points

The main objective here is to stand back and double-check that the strategic entry points identified in the previous step are realistic. This is important regardless of whether the entry points are policy-focused (e.g. institutional design changes), or program-focused (e.g. provision of skills training). For example, institutional design changes require significant political buy-in, irrespective of whether they are focused on regulatory reforms at the national level or changes to the way customary-based mechanisms are structured at the village level. Similarly, efforts to improve skills will have little influence if social norms and unequal power relationships compromise their application in practice.

- 74 Ensuring that entry points identified in the previous step are realistic requires detailed and careful identification of local partners who have the understanding and the influence to drive change. If local actors — national or local politicians, religious leaders, civil society organizations or community leaders, etcetera — are not genuinely interested in addressing the weaknesses, then external efforts are likely to prove fruitless. Care needs to be taken, however, when a possible partnership involves the provision of financial resources. Some NGOs or community leaders may be prepared to claim commitment to reform if it means gaining access to resources.

## 3.5 Step 5: Ensure a flexible and long-term commitment to implementation

Occasionally, there are opportunities for quick wins, but these are the exception, not the rule. As indicated in step three, many of the possible entry points involve slow processes of change. Thus, the final step of the “grounded approach” is to manage expectations and ensure that the timing of any initiative is appropriately adapted to the mechanism of change.

For example, if the entry point is “social values and norms”, then a long-term and flexible implementation modality is necessary. One-off workshops at the local level are unlikely to have any significant effect. By contrast, putting resources into a civil society network of women’s groups that would provide support for literacy, education, financial independence and legal awareness over an extended period is more likely to facilitate change.

The previous two sections provided the theoretical outline of a grounded approach to strengthening hybrid justice systems. The next three sections illustrate this approach by summarizing the results of recent research by the World Bank on non-state justice in Indonesia.<sup>33</sup> This includes a description of the historical background and contemporary policy context (step one) and an analysis of the strengths and weaknesses of the hybrid justice system in Indonesia (step two). Finally, to demonstrate how the grounded approach can be translated into practical activities on the ground (steps three, four and five), section six presents a summary of some of the pilot programs that the World Bank is supporting across Indonesia with a broad set of local partners to address weaknesses and build on strengths identified in section five.

## 4. The historical and contemporary context of hybrid justice systems in Indonesia: Colonization, independence and regional autonomy

This section briefly summarizes historical and contemporary approaches to customary legal systems in Indonesia. It highlights how the advent of regional autonomy in the post-Suharto era has generated significant opportunities for strengthening Indonesia’s hybrid justice system at both the national and local level, but that it has also brought out the weaknesses of current arrangements. This paves the way for a broader discussion of the strengths and weaknesses of hybrid justice systems in the following section.

### 4.1 Historical context: Colonization and independence

When Indonesia achieved independence in 1945, it inherited a justice system combining traditional, colonial and Islamic legal influences. The Dutch administration had dealt with the plurality of customary norms and institutions by establishing a hybrid legal system that applied different laws to different racial groups. In simple terms, Europeans were subject to Dutch law, and Indonesians to traditional customary or *adat* law.<sup>34</sup>

In institutional terms, the status of village justice mechanisms also varied, reflecting the tension between, on the one hand, recognition of diversity and, on the other, the desire for legal unity and “modernity”. Until 1874, the Native Courts operated in accordance with traditional customary (*adat*) law and procedure. From 1874-1935, official recognition for village justice was withdrawn, although it continued to operate in practice. In 1935, the colonial government rehabilitated village justice by requiring first instance state courts to take the prior decisions of *Adat* Councils into account.

When the new republic was formed in 1945, national policy promoted a uniform legal system. Institutionally, legal pluralism was viewed as inimical to nationhood and modernity. Nonetheless, the 1945 Constitution and subsequent amendments have provided conditional recognition of traditional customary law.<sup>35</sup> This level of recognition is very limited, however: judges are required by law to “[e]xplore, follow and understand the legal values and sense of justice which exists in society”.<sup>36</sup> While judges are obliged to take into account the outcomes of non-state justice deliberations, in reality they are free to ignore or pay lip service to this requirement, and indeed many do. Thus, despite the legal protections and policy rhetoric, the sum of the above has been that historically, “*Adat* is [a] default legal source, applicable only informally or where regulations are silent.”<sup>37</sup> At least from the state’s perspective, written state law will always trump customary law.

In addition to legal and policy constraints on the recognition of customary norms and institutions, the Indonesian Government imposed a uniform model of village governance, based on Javanese structures, through *Law 5/1979 on Local Government*.<sup>38</sup> This restricted the authority of customary leadership across the country.

## 4.2 Regional autonomy and the Adat revival

The formal position of customary local institutions changed in 1999 when post-Suharto Indonesia instituted a broad process of regional autonomy. *Law No. 22/1999 on Regional Governance* authorized district governments to reconfigure village governance structures — including dispute resolution mechanisms — along inclusive and democratic lines. Reflecting a spirit of autonomy, the law established democratically elected village parliaments and devolved a greater degree of executive authority. On the “judicial” side, article 101(e) gave binding authority to village heads, together with the *Adat* Council, to resolve disputes.<sup>39</sup>

Through local regulations, a limited number of local governments have sought to recognize and raise the profile of local customary actors, institutions and norms. Generally, the provinces and districts that have taken advantage of the national policy shift have sought to revive what H Patrick Glenn has called “the old ways”, promoting local justice institutions dominated by male, indigenous elites.<sup>40</sup> This revival of customary institutions has been particularly evident in locations outside Java, primarily in areas where religious or traditional cultural identity has remained strong, or where ethnic conflict has been experienced since 1999. Some examples of local governance reform in the post-Suharto era are explored below.

### 4.2.1 Maluku Province

In Maluku, a province in Eastern Indonesia, the regional government has regulated a return to traditional village structures. At the provincial level, *Regional Regulation No. 14/2005 on the Return to the Negeri* enhanced the dispute resolution authority of the *raja* (literally “king”), who represents the highest authority and is often both the traditional and the elected leader of the village. At the time the World Bank undertook research in this province (2005-2007), only a handful of districts had issued their own regulations under the provincial umbrella.

In some villages, this amounts to recognition of continuing, well-organized institutions. For example, in Pelau, a village in Central Maluku district, the local *adat* dispute resolution structure is well-defined. It incorporates all key elements of local power into one body: the *raja*; the Islamic priest or *penghulu*, who represents religious authority and manages family disputes; and the heads of village clans, covering the community at large. In other villages, the system is less defined and more informal. In these locations, the regional autonomy regulatory reforms have had little effect and local dispute resolution mechanisms continue to operate in similar ways — families attempt bilateral resolution, moving up to the local hamlet or clan leaders, and then the village head if resolution is not possible. Many of these regulations and village practices make no distinction between legislative, executive and judicial functions, as is common in small-scale communities.<sup>41</sup>

### 4.2.2 West Sumatra

In West Sumatra, a province in Western Indonesia, indigenous *Minangkabau* ethnic identity remained strong despite the imposition of uniform Javanese village structures under *Law 5/1979 on Local Government*. This law created 3,138 *desa* — the Javanese term for village — replacing 543 *nagari* — the territorial, social, political and independent self-governing entity of the Minangkabau that ideally comprised four exogamous matrilineal descent groups. However, a provincial decree followed in 1983, protecting the status of the *nagari* as an *adat* entity.<sup>42</sup> This stipulated that the Nagari Adat Council (*Kerapatan Adat Nagari*, KAN) would continue as the highest authority regarding *adat* and act as a mediator and judge in *adat* cases, particularly regarding *adat* land.<sup>43</sup> According to some informants, the authority of the KAN in relation to the new village administrative structure caused difficulties such that in some locations, the role of the former was gradually confined to ceremonial functions only.

Following the institution of regional autonomy, the provincial and district governments of West Sumatra moved rapidly to restore the full authority of the *nagari*, including strengthened recognition of local customary dispute resolution institutions.<sup>44</sup> The Village Customary Council (*Lembaga Adat Nagari*, LAN), which replaced the KAN but still comprises lineage heads, is stipulated as having official responsibility for village-level dispute resolution, although in practice, the village head also discharges this function. In many locations, the LAN has become increasingly involved in all aspects of village governance such that it has displaced the village parliament or other legislative bodies as designated in district regulations.

#### 4.2.3 Central Kalimantan

In Central Kalimantan, a province on Indonesian Borneo, a number of regulations have been passed to strengthen recognition of the *damang*, a local customary leader traditionally responsible for dispute resolution.<sup>45</sup> This has been mostly a rhetorical exercise, however, which concerns more the reassertion of indigenous Dayak ethnic identity in the aftermath of bloody conflict between Dayaks and transmigrant Madurese over the 1999-2002 period than the strengthening of local justice.<sup>46</sup>

The regulations have not been backed by additional training or support for *damang* to discharge their dispute resolution function, with the result that the level of community respect for the *damang* is mostly a product of individual personal characteristics rather than institutional strength or legitimacy. Indeed, the fieldwork undertaken in Central Kalimantan between 2004 and 2006 indicated that *damang* were active and provided an important dispute resolution service to communities in some places, but were moribund or purely opportunistic in others.

### 4.3 The Indonesian approach: Partial incorporation?

Despite considerable variation across the provinces, the overall trend in Indonesia has been a policy shift towards what Connolly dubs “partial incorporation”, where informal and formal justice systems operate relatively independently, but with local dispute resolution mechanisms receiving recognition, some resources and oversight from the state.<sup>47</sup>

Local governments have led these reforms. In addition, as the regional examples above illustrate, in a number of provinces and districts, a healthy debate has evolved on the appropriate role and form of customary justice institutions. In this debate, few question whether *village-level* justice systems are important, but many query whether the *adat* revival is appropriate for strengthening justice at the community level.<sup>48</sup> Since *Adat* institutions tend to be dominated by male, indigenous ethnic elites, they are often ill-equipped to handle the legal concerns of minority groups and women. Hence, some local actors argue for a new form of local justice that better accommodates the modern realities of ethnic heterogeneity and constitutional protections against discrimination on the basis of gender, race and religion. Furthermore, democratic reforms and the opening up of political space more broadly has led to an increased role for civil society groups in customary dispute resolution and governance institutions through capacity-building, research and advocacy. This has brought a range of different voices and perspectives into policy dialogue on this issue.

This chapter interprets this contemporary policy context as an opportunity, but acknowledges that partial incorporation is not without problems. First, there is significant variation in the effectiveness of these newly recognized local institutions. Second, judges required to take into account local customs and the decisions of these institutions often do not understand them. Finally, there is also the risk of “over-formalization”. In the process of recognizing local institutions, their very advantages — namely, flexibility to match process, remedy and sanction to local realities — could be undermined. Codification of norms also risks locking in one person or group’s interpretation of local norms when these are usually contested. The next section turns to a discussion of the strengths and weaknesses of these current arrangements.

## 5. The practice of local justice in Indonesia: Strengths and weaknesses

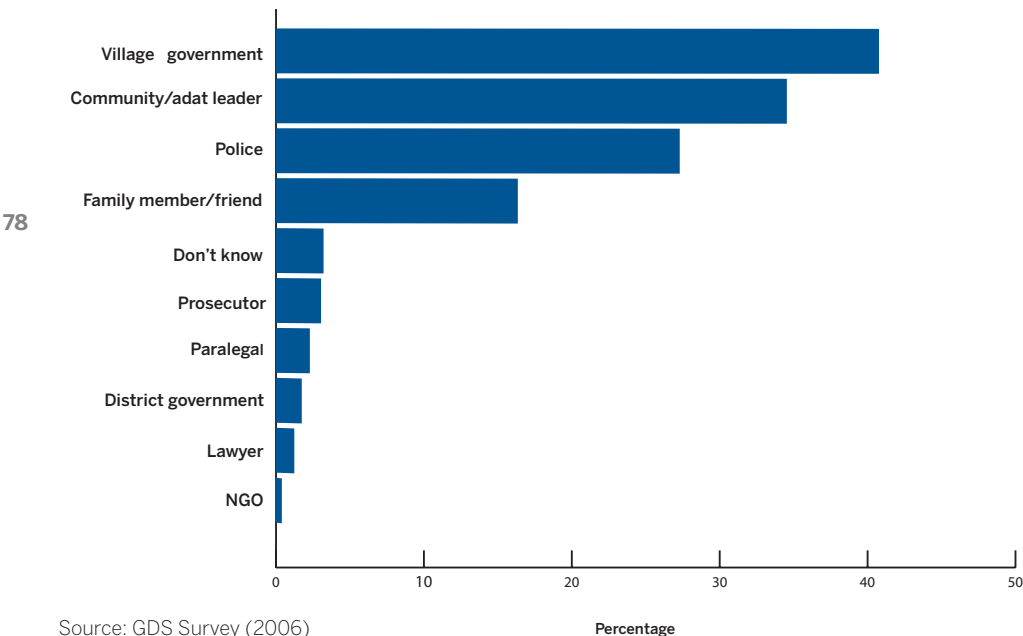
Developing a strategy to strengthen hybrid justice systems requires an understanding of how its constituent institutions deliver dispute resolution services in practice and an understanding of the core strengths and weaknesses of these arrangements. This section presents some of the key findings of World Bank research on local dispute resolution and justice in Indonesia, undertaken between 2003 and 2007.<sup>49</sup> This research employed a mixed methods approach combining qualitative and quantitative techniques to achieve depth and breadth of analysis. In-depth interviews and focus group discussions were undertaken at the provincial, district and village levels in five provinces, generating case studies of over 30 disputes. The research also drew on the nationally representative 2006 *Governance and Decentralization Survey 2* (GDS2), which included a number of questions on dispute resolution and conflict.<sup>50</sup>

### 5.1 An overview of hybridity in practice

Villagers in Indonesia with a grievance have, at least hypothetically, a range of options or “paths to justice” open to them. First, they can attempt to resolve the dispute themselves. Indeed, the majority of disputants attempt bilateral resolution. Second, the disputants can seek the mediatory or adjudicatory assistance of local community leaders. This usually includes hamlet heads, village heads, religious leaders as well as other customary and influential figures. The third option is to report the matter to the police. This is common for serious criminal offences, particularly when violence is involved or likely to occur. Fourth, and finally, the disputants can report the case to the court or prosecutors’ office. This is rare. Generally, a disputant begins with the first option and moves up the hierarchy of authority and influence until a satisfactory outcome is reached.

Overall, the vast majority of disputes are resolved either bilaterally or by village officials or community leaders. Figure 1 shows that in 2006 village officials (mostly hamlet and village heads) and community leaders (mostly religious and traditional customary leaders) are the most active dispute resolution actors, involved in the resolution of over 40 percent and 35 percent of disputes, respectively. The survey also highlights the active role of police in dispute resolution.

**Figure 1: Informal and formal actors in Indonesia in dispute resolution**



It would be incorrect to suggest, however, that the four pathways noted above represent a distinct dichotomy between state and customary institutions. Indeed, the cases researched in Indonesia demonstrate significant interaction between state and customary institutions. Specifically, the research suggests that state and local customary institutions interact in two main ways – direct and indirect. *Direct interaction* occurs when: (i) the formal system becomes directly involved in handling a case that has passed through the informal system through a process of “appeal”; or when (ii) a dispute is simultaneously processed through both formal and informal mechanisms. The research also indicated that even if the formal system does not directly handle a case, it can *indirectly* play an important role in informal dispute processing. This occurs when: (i) formal justice actors act as informal actors (most prominently when police mediate crimes); or more commonly when (ii) informal justice actors or disputants use the formal justice system as a point of reference or source of norms in informal justice proceedings; and, *vice versa*, when (iii) formal justice actors use the customary justice system as a point of reference or source of norms.

This hybrid arrangement, where dispute resolution and justice-seeking are shared between formal state and local customary institutions, has advantages and disadvantages, as discussed below.

## 5.2 Strengths of Hybrid Justice Systems

### 5.2.1 Accessibility and responsiveness

Some of the strengths are clear and simple, such as physical accessibility. Neighborhood heads, village heads, *adat* leaders and religious leaders are based in the village, known to community members and accessible. By contrast, the police and the courts are often located in distant district capitals.

A concomitant strength is speed of action. Lengthy resolution processes can impact on the livelihoods of the poor, particularly where economic rights are at stake. At times when violence is imminent between disputing parties or groups, as in several cases researched in East Java, rapid action is also necessary. In cases that reached resolution, the process was normally quick. A case of manslaughter in Palangkaraya, Central Kalimantan, was resolved in three weeks, and a fight in nearby Kuala Kapuas in two (see also Case Study 1). Most cases in East Java and Maluku were also handled within two to three weeks or less. Cost is another important consideration. For most of the cases studied, there were no case filing or hearing fees.<sup>51</sup>

#### Case Study 1: A fistfight fixed fast<sup>52</sup>

Nuri is a farmer from a rural village in Lampung Province. One day, his son got into a fight with a school classmate. The child’s father stepped in and beat Nuri’s son.

Rather than report the case to the police, Nuri approached Parmin, the hamlet head, and Bejo, a paralegal under a program run by a local legal aid NGO. As Nuri said, they were known as people “who can resolve problems”. Parmin and Bejo called the parties together at Parmin’s house, talked through the problem and were able to resolve it quickly and peacefully through an acknowledgment of fault and an apology. Nuri categorically said that problems taken to the police never turn out well. “If you take a problem to the police,” he said, “they might beat you, lock you up. There’s no control.”

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### 5.2.2 Formal actors act informally to overcome power imbalances

The ability of the state to work with informal actors extends the “shadow of the law” downwards, bringing the authority and power of the state down to the village level. This can assist enforcement by backing social legitimacy with state authority.

As noted above, the police are often involved in dispute resolution. Yet, as clearly shown in Figure 1, other actors in the formal system, such as prosecutors and lawyers, are rarely involved. This demonstrates

that a report to the police does not immediately trigger formal legal action. Indeed, police action often takes the form of mediation or the provision of security at village mediations.<sup>53</sup> The police sometimes actively convince or instruct the disputants (or just the reporting disputant) to report or revert to village leaders rather than pursue their case through formal legal channels. The presence of the police and the inherent threat to escalate a case to the formal system often provides strong motivation to mediate conflicts at the local level. In this way, the involvement of the police effectively casts the “shadow of the law” over informal justice proceedings and outcomes. For example, in Case 2, the police were closely involved in the informal resolution of a street fight in Madura, East Java, by protecting the victim, participating in the negotiations and, finally, guaranteeing enforcement.

### **Case Study 2: Street fight turns ugly**

One afternoon in the village of Blumbungan, the streets were full as a procession of pilgrims returning from the *Haji* passed through the town. At an intersection, a motorbike rider overtook a car waiting at a traffic light. The car then turned right without looking, crashing into the motorbike. Wardi, who had been watching the procession, rushed to help the motorbike rider and shouted at Paidi, who was driving the car, “If you’re going to drive a car, be careful, don’t be so reckless. This is what happens when you speed.” Feeling insulted and humiliated in front of the crowd, Paidi jumped from his car and began to punch Wardi. The fight was short-lived, as some people stepped in to separate the two. Paidi returned home, while Wardi remained at the procession.

But Paidi wasn’t finished yet. Still enraged by the insult, he returned to the scene, this time carrying a kitchen knife and backed by his father. He attacked Wardi, threatening to kill him. Standers-by separated the two again, but Wardi reported the incident to the local police. After collecting evidence from witnesses, the police initially detained Paidi in the local police cell. They then called a local Islamic priest (*kyai*) to attempt peaceful resolution without a formal police report. However, Wardi refused.

A few days later, Paidi reported the matter to his village head. The village head proposed to call a community meeting to resolve the problem. Wardi agreed to attend. Shortly thereafter, the village head called together a neighborhood leader, the village military officer, a member of a local gang and a number of other community leaders, all from Paidi’s village. They brought with them a pre-prepared letter of agreement in which Wardi agreed to drop his police complaint.

Wardi felt intimidated, particularly by the presence of the gang member and military officer. Initially, he refused to cooperate. Finally, after much discussion, Wardi agreed to resolve the issue informally, providing that a letter of agreement was witnessed and signed at the police station. In this way, Wardi managed to secure an informal guarantee of no further reprisal, his security ensured by the police. Nonetheless, the outcome of this case was not fully fair — it was clear that Wardi had been pressured into an outcome that did not satisfy his demands for punitive justice.

### **5.2.3 Ability to restore harmonious relations**

Another important and related factor is the ability of non-state justice to restore harmonious relations. According to a survey undertaken by The Asia Foundation, the majority of respondents who chose informal justice cited the prospect of maintaining communal harmony as their main motivation.<sup>54</sup> Informal justice actors are able to achieve this by virtue of their local authority and flexibility of norms, processes and sanctions. People seek assistance from their village heads, religious and traditional leaders precisely because they possess social legitimacy in the village milieu. They are not neutral and independent actors (as judges are required to be), but rather, they are directly involved in the day-to-day life of the village and are familiar with the social and political background of disputes. Separating dispute resolution from village governance, politics and social relations is something of an artificial exercise that local actors do not engage in.



### 5.2.4 Flexibility to balance justice-seeking objectives

Cooperation between the constituent institutions of the hybrid justice system can facilitate balancing of the objectives of punitive, deterrent and restorative justice. Direct interaction between informal and formal disputes often involves compromise and negotiation between the two systems, which sometimes have different imperatives. A manslaughter case from Kalimantan illustrated how formal and informal systems can successfully cooperate in order to balance these imperatives. In this case, the families of the victim and the perpetrator reconciled and *restored* relations through *adat* processes; the court delivered *retributive* or *deterrent* justice through a prison sentence. A light sentence was imposed, since the judicial panel took into account the *adat* process that the families had undertaken.<sup>55</sup>

### 5.2.5 Providing potential pathways to accountability

The ability of disputants to “appeal” customary justice decisions to the formal system acts as a form of accountability to a system that arguably trumps local values and customs. Just as cases are appealed through the formal system up to the Supreme Court, cases can be “appealed” from the informal to the formal. This can be conceptualized as a “reactive” form of oversight, triggered only when a disputant submits a complaint to the court that has already been handled through informal mechanisms.<sup>56</sup> In Case Study 3, a disputant, dissatisfied with an *adat* sanction that effectively outlawed him from having an opinion on whom his daughter should marry, appealed the *adat* decision to the District Court. In this case, the formal system acted as an oversight mechanism of the *adat* process.

#### Case Study 3: Heavy *adat* fines are “appealed”

Haji Anggeng is a prominent political figure and member of the Regional Parliament in West Lombok. He is from Tanjung sub-district, but lives in the provincial capital of Mataram because of his political activities. In February 2002, his daughter Linda was “kidnapped” by Sahrudin, a young man from a nearby neighborhood.<sup>57</sup>

The following day, Sahrudin’s family asked the hamlet head to officially inform Anggeng of his intention to marry Linda. According to a witness at one of these meetings, Anggeng gave his blessing, subject to the payment of five million Rupiah (approximately US\$500) as “compensation” for the kidnapping. However, two days later, Anggeng visited Linda at Sahrudin’s house to verify her desire to marry. He also queried the capacity of Sahrudin’s family to look after her financially. The next day, Linda left Sahrudin’s house and, upon an investigation by the village, was found at her father’s house in Mataram. This was interpreted as a violation of proper *adat* marriage procedures.

That afternoon, the hamlet head, religious leaders and neighborhood head held a *musyawarah* (community meeting) to consider the matter. At this meeting it was decided that Anggeng had violated *adat*. A heavy fine was handed down, including the payment of two goats, food and a sum of money to be distributed to the poor. Anggeng rejected these fines and took the case to the District Court.

In court, Anggeng objected to the procedures, decision and sanctions of the *adat* institution. The court determined that the fines were invalid, not on the grounds that the *adat* council had acted beyond its jurisdiction to hand down such a severe sanction, but that the sanction was not consistent with local *adat*. On this reasoning, the court would have upheld the sanction if it were in line with local *adat*.

In response, the *adat* council simply increased the sanctions further, including evicting Anggeng from the village for three years and denying his civil rights and role in *adat* functions. However, a

combination of the court decision and Haji Anggeng's powerful position meant that the *adat* sanctions were never enforced and have had little impact on Anggeng's ability to participate in village life. Nonetheless, the *Adat* Council's refusal to acknowledge its subordinate relationship to the court does highlight the difficulties that formal institutions face in ensuring the accountability of traditional systems.

### 5.3 Weaknesses of hybrid justice systems

Social authority may well be the key strength of informal justice, but its unchecked exercise internally and its relative impotence outside the village milieu are also simultaneously its core weaknesses.<sup>58</sup> Along these lines, the research in Indonesia focused on three such weaknesses: the resolution of disputes involving the interests of women; inter-communal groups; and external third parties. The research also identified weaknesses where customary institutions overlooked punitive and deterrent justice-seeking objectives, and conversely where formal state institutions enforced punitive sanctions that violate human rights and constitutional norms.

#### 5.3.1 Failure to protect the rights and interests of women

Arguably, local justice institutions do not protect and serve women's interests well.<sup>59</sup> Rather than balancing interests, they tend to reinforce existing social norms and power relations. Divorced as they are from local authority structures, women's interests are often expendable; there is limited social or political return in protecting them. This is both caused by, and reflected in, women's lack of representation in local dispute resolution mechanisms and a paradigm of the objectification of women's rights. Consequently, many women's legal issues are either ignored or not taken seriously, as illustrated in Case Studies 4, 5 and 6.

#### Case Study 4: Ibu Marnis' land is sold by her brother: Sumpur, West Sumatra

Ibu Marnis and the other women in her family discovered that, in order to pay a debt incurred by his son, their maternal uncle (*mamak*) was planning to sell off lineage land without the required consent of the women. When they objected, the *mamak* threatened them verbally and physically. They appealed to the four lineage elders (*ninik mamak*) to urge their *mamak* not to sell the land.

But the *ninik mamak* supported the *mamak* and the sale went ahead. They were more concerned about the potential embarrassment the *mamak* would feel if his family could not repay a debt than the impact on the women as owners of the land. The women were pressured to sign the agreement and ultimately did so, but only on condition that no further lineage land be alienated. The *mamak* nonetheless continued to sell more lineage land the year after. The *mamak* is now dead but, more than 20 years later, Ibu Marnis is still using her savings to buy back the land he sold off.

#### 5.3.2 Inter-communal conflict

The authority of customary legal systems rarely extends beyond its own sphere of influence, be it territorial (village and neighborhood heads), clan-based (*adat* leaders) or social (religious leaders). Furthermore, trust and social sanction are crucial to the sustainability of mediated agreements. These dual factors — the inability to project social authority and lack of social trust — severely compromise the ability of village actors to resolve inter-communal disputes.

This weakness is at times resolved through cooperation with state authorities such as the police, as noted above. However, some village leaders are reluctant to rely on these actors. Moreover, state authorities themselves are often reluctant to intervene or simply ineffectual. Our research identified a number of unresolved inter-communal disputes, including an extraordinary example from Lombok

in West Nusa Tenggara Province, where two villages had built a three-meter high wall between them to prevent conflict that had claimed tens of lives over the previous decade. The lack of legitimate fora for communication and conciliation across local boundaries can lead to a clash of values and see minor disputes become major violent conflict.

### 5.3.3 Disputes involving the interests of powerful third parties

Indonesia's hybrid justice system and its constituent institutions are rarely able to overcome significant power imbalances at play in disputes pitting villagers against powerful third parties, such as forestry companies, palm oil plantations, factories and other major private sector interests. The research found that these types of disputes are increasingly common. This is particularly the case in rural areas where some newly empowered district governments are encouraging the expansion of extractive industries into traditional customary land.<sup>60</sup> Furthermore, although there are some signs that local communities are learning to self-organize and take on vested interests encroaching on their land rights (often supported by advocacy NGOs), both the former policy of rhetorical recognition and the current regime of partial incorporation do not provide a strong basis for the protection of custom-based rights *vis-à-vis* powerful external parties. Indeed, village leaders are increasingly of the opinion that in such conflicts, state-sanctioned rights and certificates of land ownership are a much stronger tool than customary claims.

### 5.3.4 Customary norms ignore punitive and deterrent justice objectives

Another weakness of hybrid justice systems is that the norms and decisions of customary institutions often ignore punitive and deterrent justice-seeking objectives in favor of restoring relationships among kin and clan. While this characteristic can equally be seen as a strength, the consequences are clearly demonstrated in a case of rape from Maluku (see Case Study 5). In this case, the traditional leaders ignored the rape of a 17-year-old and focused their efforts on restoring relations between the families. The harmony imperative trumped individual rights (see also Case Study 2).

#### Case Study 5: Rape overlooked in Sepa Village

In 2003, 17-year-old P was raped by her brother-in-law in the village of Sepa, Seram Island, Maluku. When she informed her husband, he became angry and beat her. Later, when she told her parents what had happened, relations became heated between the two families. Insults and threats were exchanged. The case was eventually reported by P's husband's family to the village head. He in turn referred it to the village *adat* leader, as the families were from the same clan.

A community deliberation (*musyawarah*) was called by the *adat* leader. It was attended by the families, *adat* functionaries from each village and neighborhood heads. They heard the details of the case, but ignored the rape, focusing instead on the threats passed between the two families. In fact, the rapist was not even called to attend. Ultimately, the *musyawarah* ended with both families being fined for the threats. The rape was overlooked. When asked her views on the case, P angrily responded, "Satisfied? No, I was not satisfied."

Strengthening the oversight role of the courts so as to ensure that punitive and deterrent justice-seeking objectives are not overlooked in a hybrid justice system requires additional efforts to improve their accessibility as well as efforts to change social and moral norms through activities that raise awareness of rights and formal legal processes. But it is neither feasible nor in the public interest for all legal grievances to be handled through the formal legal system. We have seen earlier that in developed nations as well, only a small minority of grievances or justiciable incidents are settled through court adjudication. Also, as discussed above, one of the major functions of the formal justice system is to establish a benchmark of rule-based legal certainty against which informal dispute resolution can occur — the "shadow of the law". However, even if state institutions

are accessible, it is not always apparent that they will assist, as demonstrated below in the case study on domestic violence from Central Kalimantan (Case Study 6).

### 5.3.5 State institutions abuse discretion and overlook cases

In hybrid justice systems, as noted above, state institutions often work together with customary institutions to achieve a balance of different justice-seeking objectives. However, this does not always occur. As noted above, the courts are legally required to take informal processes and local values and customs into account. Clearly, “taking into account” does not mean “legally binding”. This flexibility can be a good thing, as it allows for state institutions to cooperate with local actors and institutions and take into consideration restorative justice objectives. But state institutions can also abuse this discretion. Again, this often occurs when women’s rights are at stake, indicating that state institutions are no panacea when it comes to counteracting the norms enforced by customary institutions.

#### Case Study 6: “It’s just excessive libido”

Sri lived in a simple house with her husband on one of the main roads in the urban sub-district of Pahandut, near the center of Palangkaraya, Central Kalimantan. According to Sri’s sister Eka, when engaging in sexual intercourse, Sri’s husband would be extremely violent, hitting and biting her. Unable to tolerate it any longer, Sri left her husband and told her father what was happening. They reported to problem to the police. After two weeks of inaction, the police suggested that the problem be resolved through the *damang*, the traditional customary leader.

Under local *adat* law, if a wife leaves her husband, the assumption is that she is seeking a divorce. Therefore, when the families met before the *damang*, Sri’s husband requested a divorce. Custom also dictates that on divorce, property and goods must be transferred to the wife, in accordance with a written pre-nuptial agreement. Sri did not want a divorce, just for the violence to stop. However, a divorce agreement was written up; the husband signed and she felt compelled to sign as well. This was partly driven by threats from the husband’s lawyer that she would be fined 100 million Rupiah (approximately US\$11,000) for absconding. Sri, ignorant of the law and unable to afford legal counsel, knew no better. “It’s hard when people are strong, smart and rich,” observed her sister, Eka.

The *damang* did not deal with the domestic violence aspect, feeling this was being handled by the police. The police, however, had already referred the problem to the *damang*. It therefore fell through the cracks. When asked about the case, the *damang*’s Secretary simply laughed and said, “It’s just excessive libido.”

- 84 This section has identified a number of strengths and weaknesses of the hybrid justice system as practiced in Indonesia. Strengths include cost-effectiveness, accessibility and flexibility to overcome power imbalances. It can achieve a mix of punitive, deterrent and restorative justice-seeking objectives. However, it also has weaknesses, some of which are closely related to its strengths. The system operates in a context of local power imbalances, often overlooking the interests of disempowered community groups such as women and ethnic minorities. It is often unable to deal with inter-village disputes and issues involving powerful external interests due to a limited sphere of influence, and it prioritizes restorative justice-seeking objectives (over punitive and deterrent objectives). In addition, formal justice institutions often fail to correct these biases.

In conclusion, the findings identify some of the specific channels of interaction between the constituent components of Indonesia’s hybrid justice system. This suggests that improving the functioning of Indonesia’s hybrid justice system requires action to strengthen both customary and formal justice institutions and to better define the interaction between them. The next section turns to identifying entry points and strategies to build on strengths and address weaknesses.

## 6. Program examples from Indonesia: Entry points, partnerships and time frames

This section covers the final three steps of the “grounded approach” and it summarizes the approach employed by the World Bank in Indonesia to address some of the weaknesses identified in the previous section. Three pilot projects are described: the Strengthening Non-State Justice Systems Program (SNSJS), the Revitalization of Legal Aid (RLA) Program and the Women’s Legal Empowerment (WLE) Program.<sup>61</sup>

The overall objective of the SNSJS pilot project is to develop more equitable and effective community-based dispute resolution processes based on constitutional principles and safeguards. Program activities include case documentation; capacity-building and skills development for local dispute resolution actors on conflict management, human rights and gender; and support for local and national regulatory frameworks that govern local dispute resolution institutions. It will also seek to inform national policy on non-state justice through partnership with a national-level NGO and the Supreme Court. The program will operate in two provinces – West Nusa Tenggara and West Sumatra – from late 2010 until 2011.

The primary objective of the RLA pilot program is to improve the capacity of village-level community legal aid posts to provide the following services: (i) legal aid, particularly with regard to land and labor rights; (ii) mediation; and (iii) community legal education, particularly for women and youth. The program has been implemented by local NGOs in three provinces — Lampung, West Nusa Tenggara and West Java — since 2005.

The WLE program works with women’s groups at the village level and formal justice sector institutions at the province and district level to: (i) increase legal and rights awareness of village women; (ii) strengthen the capacity of formal justice sector institutions to understand and provide community legal education on women’s rights; and (iii) increase legal aid services for women. The program is integrated into the work of the local NGO *Pemberdayaan Perempuan Kepala Keluarga* (PEKKA, or Female-Headed Household Empowerment Program) and is operating in eight provinces.<sup>62</sup>

Each program seeks to build on certain strengths and address different weaknesses in Indonesia’s hybrid justice system. Table 2 summarizes the entry points and change mechanisms that the programs use, in line with the analytical framework described in Section 3.3 above.

**Table 2: Strengths, weaknesses, change mechanisms, entry points and programs**

<b>Strengths &amp; Weaknesses</b>	<b>Change mechanism</b>	<b>Entry points</b>
<b>Strengths</b>		
Accessibility and responsiveness	Institutional effectiveness (customary institutions)	Case documentation skills
Balancing power/ ensuring execution through state-customary cooperation	Institutional effectiveness (state & customary institutions)	Multi-stakeholder fora of formal state institutions (police, judiciary and prosecutors) and customary law actors to share skills and mutual understanding
Ensuring social harmony	Institutional effectiveness (customary institutions)	Mediation skills for customary institutions
Recognizing and balancing justice-seeking objectives	Institutional design (state institutions)	Case documentation of balancing justice objectives Judicial guidelines on recognition of customary justice
Providing pathways to accountability	Institutional effectiveness	Legal awareness campaign Paralegals Legal aid provision
<b>Weaknesses</b>		
Women's rights and interests	Institutional effectiveness (state institutions)	Training of state actors on gender
	Institutional design (customary institutions)	Case documentation
	Social values and beliefs	Mediation training for women leaders Human rights and gender training
	Economic empowerment	Legal awareness training for women and legal information campaigns Microcredit and training
Inter-communal conflict	Institutional design (state and customary institutions)	Regional workshop groups and fora
Powerful third parties	Institutional effectiveness (state institutions)	Legal aid and advocacy services
Weak provision of punitive and deterrent justice-seeking objectives	Institutional effectiveness (state institutions)	Legal aid and advocacy services
	Social values and beliefs	Legal information activities
State abuse of discretion	Institutional design (state institutions)	National and regional regulatory workshops and legal drafting
	Institutional effectiveness (state institutions)	Case monitoring and documentation
	Social values and beliefs	Legal information activities
	Power relations	Legal aid and advocacy services

The first point to make about the programs is that they work with both state and customary justice institutions. This acknowledges the value of promoting engagement between formal and customary justice as part of a hybrid system. The SNSJS program, for example, works directly with customary institutions on codifying and reforming their local rules and procedures, but also with state institutions on handling the decisions of customary processes that are “appealed” to the court.

The second point is that the programs operate at various levels of government, from the national down to the village level. At the national and regional levels, program activities seek to address inconsistencies in how the judiciary monitors the customary legal system, through institutional design and effectiveness mechanisms. Specifically, the SNSJS program will support the establishment and implementation of national guidelines for the judiciary to institutionalize a core

set of principles for the recognition of the decisions of local justice institutions that are consistent with constitutional standards.

At the village-level, the programs use a range of entry points to facilitate change. The SNSJS program aims to facilitate changes in institutional design for local customary legal systems through a process of formalization of institutional structures and selected norms. This includes advocacy efforts to expand the role of women in local justice institutions. The WLE program seeks to improve the effectiveness of existing customary institutions and actors through skills training in mediation, human rights and gender. Additional training is provided to local women leaders. In addition, the SNSJS program will inform the development of social values and beliefs with an information campaign on human rights and gender.

The third point is that the programs are designed to adapt to local conditions at the community level; therefore, they neither attempt to address the same weaknesses nor utilize the same entry points in all locations. For example, the SNJSS program operates in two provinces that have divergent historical and contemporary policy contexts, and very different customary justice systems. West Sumatra, as seen earlier, has well-established traditional customary tribunals, with a standard structure and widely understood norms in the context of a dominant indigenous ethnic culture. In West Nusa Tenggara, the situation is more fluid. Ethnically, the province is more heterogeneous and a broad range of actors, encompassing village heads, traditional customary leaders and Islamic leaders, are active in dispute resolution.

Hence, in West Sumatra, given the extent to which customary systems are already established, the project focuses on grassroots empowerment for women and policy advocacy to include an expanded role for women on local dispute resolution tribunals. In West Nusa Tenggara, where local systems are less formalized, the project is more far reaching. It seeks to support existing efforts to define local justice mechanisms, structures, processes and even norms in a number of villages.

A fourth major point on program strategy is that local partners are central, particularly at the sub-national level. For the SNSJS program, working groups comprising relevant local government agencies, formal justice sector institutions, academics, NGOs and local community leaders were established to guide the initial research and subsequent project design and implementation. These partners know what is realistic and achievable in their location and have the influence to bring about change. They identified entry points and solutions that are realistic and appropriate. The central role of partners in project design and implementation means that the programs are not aiming to design an ideal justice system, but are rather capitalizing on the strengths and addressing weaknesses of local state and customary legal institutions through a process of gradual and incremental change based on local realities.

A final and related point is that in some locations, external intervention may be futile. In Central Kalimantan, for example, the World Bank team was unable to identify suitable partners genuinely interested in strengthening local justice institutions in a manner that would equip them to serve the plurality of community groups seeking justice in a province recovering from bloody ethnic conflict. Thus, the decision was made not to proceed in that location. Similarly, in Maluku Province, there was little demonstrated commitment among key decision-makers in government and civil society to strengthen local justice systems. The decision not to proceed in this location was based squarely on the view that external actors can rarely, if ever, drive local institutional reform. Thus, without local support, the program was not launched.

This section summarized how the World Bank in Indonesia, through a series of legal empowerment programs, is seeking to support more effective and inclusive hybrid justice institutions. Driven by the insights and practical experience of local partners, program designs focus on a range of strengths and weaknesses via a number of entry points, including policy dialogues, training, documentation of cases and the development of local regulations and national guidelines. Prospects for success are



built primarily on the central involvement of key local state and customary institutions in program design and implementation. This input — it is hoped — will ensure that program activities are grounded in local realities and match local priorities.

## 7. Conclusion

This chapter has described a “grounded approach” to the design of programs to strengthen hybrid justice systems that is attuned to local needs and opportunities. Five key steps were proposed: (i) understand the historical and contemporary political and policy context of formal and customary justice systems; (ii) analyze the strengths and weaknesses of formal and customary legal systems; (iii) identify entry points for strengthening hybrid justice systems based on an analytical framework of institutional change; (iv) realistically assess the opportunities for engagement on the entry points; and (v) ensure a flexible and long-term commitment to implementation.

The chapter explicitly refrains from prescribing specific institutional arrangements or one-size-fits-all “quick fixes”. Instead, it seeks to provide pragmatic guidance to practitioners and policy-makers by suggesting a *process* of engagement. The underlying rationale for such an approach is the belief that hybrid justice systems develop incrementally. Therefore, practitioners and international development agencies should set themselves the task of supporting local actors to overcome tangible injustices and weaknesses in existing arrangements in an incremental fashion and in accordance with local timetables and opportunities, rather than attempt to prescribe “one-size-fits all” policies and institutional designs.

Finally, the chapter illustrated how this approach could be pursued based on real examples from Indonesia. The World Bank’s recent research on state and customary justice institutions and subsequent operational programs may well be irrelevant to other contexts. However, we nonetheless expect that the *process* of identifying these strategies may be applicable to other country contexts as a means of supporting better justice systems in a context of legal pluralism.

## footnotes

- 1 Commonwealth of Australia, *Strategic Framework for Access to Justice* (2009) 4.
- 2 Michelson cites research suggesting that about 15 percent of disputes in the United States, England and Wales enter the legal system: E. Michelson, 'Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China' (2007) 72 *American Sociological Review* 461. In Australia, only 6 percent of commercial disputes make it to court: Australian Law Reform Commission, *Review of the Adversarial System of Litigation* (1998). See also H. Genn, *Paths to Justice: What People Do and Think About Going to Law* (1999) (on England and Wales); B. Curran, 'Survey of the Public's Legal Needs' (1978) 64 *American Bar Association Journal* 848 and S. Silbey, P. Ewick and E. Schuster, *Differential Use of Courts by Minority and Non-minority Populations in New Jersey* (1993) (on the US).
- 3 Ibid. See also Asia Foundation, *Citizens' Perceptions of the Indonesian Justice Sector* (2001); World Bank, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* (2008); C. Odinkalu, 'Poor Justice or Justice for the Poor? A View from Africa', Paper presented at World Bank Legal Development Forum, Washington DC (2005); Dale et al, *Trust, Authority and Decision Making: Findings from the Extended Timor-Leste Survey of Living Standards* (2010); and J. Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America' in *The World Bank Legal Review* (2006).
- 4 A Sen *The Idea of Justice* (2009), 20.
- 5 For a typology of recognition of non-state justice, see B. Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38 *Connecticut Law Review* 239.
- 6 Some examples include Australia, Ethiopia and Indonesia.
- 7 See generally T. Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006); S. Golub, *Beyond Rule of Law Orthodoxy: the Legal Empowerment Alternative*, Working Paper No. 14 (2003); Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (2008).
- 8 See Commonwealth of Australia, above n 1.
- 9 The term "grounded" is borrowed from the "grounded theory" approach to research. Although this article does not specifically propose a grounded theory methodology, it borrows a similar aspiration of developing policy based on field research rather than the application of best practice institutional templates. See generally, Barney Glaser and Anselm Strauss, *Discovery of Grounded Theory: Strategies for Qualitative Research* (1967). The focus on incremental steps to reduce tangible injustices rather than the introduction of ideal forms of justice is inspired by Sen, above n 4.
- 10 We recognize that it is methodologically unsound to apply the analytical approach to the case from which it was inductively developed. However, the purpose of this article is not to prove the approach by applying it to the Indonesian case, but rather, illustrate the approach using the Indonesia case simply as a heuristic device. See B. Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics* (2003), 94-5.
- 11 See, for example, S. Blackburn, *The Oxford Dictionary of Philosophy* (2005), 195-6, which uses the terms "retributive", "distributive" and "commutative", respectively.
- 12 P. Clark, 'Hybridity, Holism, and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda' (2007) 39 *George Washington International Law Review*, 772, 765.
- 13 See G. Williams, 'The Aims of the Law of Torts' (1951) *Current Legal Problems*, 137.
- 14 P. Da Cruz, *Comparative Law in a Changing World* (1999), 202.
- 15 S. Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review*, 870.
- 16 RM Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2008), 59.
- 17 Clark, above n 12, 767.
- 18 This seems like an attempt to seize the authority of the state to strengthen legitimacy, but it could also be a strategy to avoid state intrusion by taking a form that the state recognizes, understands and will then leave alone. J. Timmer, 'Being Seen Like the State: Emulations of Legal Culture in Customary Labor and Land Tenure Arrangements in East Kalimantan, Indonesia' (2010) 37 *American Ethnologist* 703.
- 19 On the Barangay Justice System, see M. Stephens, 'Local-level Dispute Resolution in Post-reformasi Indonesia: Lessons from the Philippines' (2003) 5(3) *Australian Journal of Asian Law*, 213; S. Golub, 'Non-state Justice Systems in Bangladesh and the Philippines' (Paper prepared for DFID, January 2003); and G.S. Silliman, 'A Political Analysis of the Philippines' *Katarungang Pambarangay System of Informal Justice through Mediation* (1985) 19(2) *Law and Society Review*, 279.
- 20 Legal transplantation has occurred throughout history and often with positive effects. For example, Roman law has had a sustained and profound influence on civil and common law traditions in Europe, see P. Wormald, *Legal Culture in the Medieval West* (1999). On legal transplantation and diffusion, see A. Watson, *Legal Transplants* (1993); D. Nelken and J. Feest (eds), *Adapting Legal Cultures* (2001); M.D. Adler, 'Can Constitutional Borrowing be Justified?' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 350; and W. Twining, 'Social Science and Diffusion of Law' (2005) 32(2) *Journal of Law and Society*, 203-40.
- 21 This needs to be balanced against the tendency for each international agency to undertake its own assessment to the frustration of local agencies, particularly local government officials.
- 22 The need for thinking laterally about the policy background and contemporary context will become apparent in the discussions on entry points below.
- 23 Sen, above n 4.
- 24 D.L. Van Cott, 'Dispensing Justice at the Margins of Formality' in Gretchen Helmke and Steven Levitsky (eds), *Informal Institutions and Democracy: Lessons from Latin America* (2006) 249, 251. See also, D. Bourchier, 'Positivism and Romanticism in Indonesian Legal Thought' in T. Lindsey (ed), *Indonesia: Law and Society* (2008), 94.
- 25 See, for instance, W.S. Saputro, *Village Mediation Hall: Expansion of Community Access to Law and Justice [Balai Mediasi Desa: Perluasan akses hukum dan keadilan untuk rakyat]* (2007).
- 26 For more on this topic, see World Bank, *Women's Access to Justice: Case Studies of Village Women Seeking Justice in Cianjur, Brebes and Lombok* (2008).
- 27 G. Helmke and S. Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2(4) *Perspectives on Politics* 725.
- 28 World Bank, above n 3.
- 29 Ibid 54.
- 30 J. Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (2007), 368.
- 31 See Case Study 5 below: Rape Overlooked in Sepa Village. The point of this discussion is not to suggest that erosion of social norms is either desirable or an aim of local justice reform programs, but rather, that there is a need to be aware of and respect the strength of local norms in designing such programs.
- 32 Helmke and Levitsky, above n 27, 732.
- 33 World Bank, above n 3.
- 34 See generally T. Lindsey and M. Achmad Santosa, 'The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia' in T. Lindsey (ed) *Indonesia: Law and Society* 2, 4-12.
- 35 The Constitution asserts "The State recognizes and respects individual traditional customary law communities and their traditional rights as long as they survive, and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as regulated by law." (Article 18B(2)); and "Cultural identity and the rights of traditional communities are respected in accordance with the continuing development of civilization over time." (Article 28I(3)).
- 36 Law No. 4/2004 on the Authority of Judges (Indonesia), art 28(1).

- 37 T. Lindsey, 'Inheritance and Guardianship and Women: Islamic Laws in Aceh, a Year After the Tsunami' (2006). Paper commissioned by the International Development Law Organization (IDLO).
- 38 Law No. 5/1979 on Local Government (Indonesia).
- 39 Law No. 32/2004 on Regional Government (Indonesia), which replaced Law No. 22/1999 on Regional Government (Indonesia), removed this jurisdiction, but it was later restored by Government Regulation No. 72/2005 on the Village (Indonesia). Adat councils are generally non-elected local tribunals that represent the different clans within a traditional community. Adat leaders often serve concurrently as elected village heads or appointed members of other village councils. For more on Adat Councils, see World Bank, above n 3, 20.
- 40 H.P. Glenn, *Legal Traditions of the World* (2001), 77.
- 41 M. Shapiro, *Courts: A Comparative and Political Analysis* (1981), 20-2.
- 42 Regional Regulation No. 13/1983 on the Nagari as a Community Adat Legal Entity (West Sumatra).
- 43 Gubernatorial Decision No. 08/1994 on Adat Dispute Resolution Guidelines in the Jurisdiction of the Kerapatan Adat Nagari (West Sumatra).
- 44 Regional Regulation No. 9/2000 concerning Provisions of Nagari Governance (West Sumatra).
- 45 Regional Regulation No. 25/2000 on the Jurisdiction of the Government and the Provincial Government as an Autonomous Region (Central Kalimantan); District Regulation No. 15/2001 on Adat Institutions (East Kotawaringin).
- 46 On the conflict, see International Crisis Group, *Communal Violence in Indonesia: Lessons from Kalimantan*, Asia Report No.19 (2001).
- 47 Connolly, above n 5, 239.
- 48 F. von Benda-Beckmann and K. von Benda-Beckmann, 'Recreating the Nagari: Decentralisation in West Sumatra', Paper presented at the conference of the European Association for Southeast Asian Studies, London, 6-8 September 2001.
- 49 World Bank, above n 3.
- 50 *The Governance and Decentralization Survey 2*, 2006 <[http://www.smeru.or.id/report/research/gds2/gds2\\_eng.pdf](http://www.smeru.or.id/report/research/gds2/gds2_eng.pdf)> at 13 January 2011.
- 51 Adat dispute resolution in Central Kalimantan is an exception. Filing fees in one case studied were 600,000 Rupiah (around US\$65); in another, the Adat Council charged 6 million Rupiah (US\$650).
- 52 This case is drawn from field notes prepared by Alpien, Pieter Evers and Cathy McWilliam from a May 2007 field trip to Lampung Province to evaluate the Justice for the Poor's Revitalization of Legal Aid program.
- 53 In A. Baare, *Policing and Local Level Conflict Management in Resource Constrained Environments* (2004) 9, unpublished memo, police claimed that they mediated as many as 80 percent of the legal complaints they received.
- 54 Asia Foundation, above n 3.
- 55 See World Bank, above n 3, 55.
- 56 On proactive versus reactive mobilization of the law, see D. J. Black, 'The Mobilization of the Law' (1973) 2 *Journal of Legal Studies*, 125.
- 57 In Lombok, there is a tradition known as *merariq* or *memulang*, where the groom symbolically kidnaps his fiancée and brings her to his family as a way of announcing his intentions. Although not always the case, it is presumed that the woman is obliging.
- 58 This has been well documented. For example, Odinkalu notes: "The assertion that powerful men are liable to and do in fact get a better deal out of the application of customary law is obvious." See Odinkalu, above n 3. See also World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (2004); S. Dinnen, *Building Bridges – Law and Justice Reform in Papua New Guinea, State, Society & Governance in Melanesia Working Paper No. 01/3* (2001); World Bank, above n 3; and T. Hohe and R. Nixon 'Reconciling Justice: Traditional Law and State Judiciary in East Timor' (2003). Certainly, much research indicates that the formal system is not very different. See, for instance, the seminal article by M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.
- 59 Lawyers from LBH-APIK (Women's Legal Aid NGO) in Lombok also stated that women are better served by formal justice. See World Bank, above n 26.
- 60 With respect to the expansion of palm oil in particular, see J. McCarthy, 'Changing to Gray: Decentralization and the Emergence of Volatile Socio-Legal Configurations in Central Kalimantan, Indonesia' (2004) 32(7) *World Development*, 1199.
- 61 For more information, see *Justice for the Poor Program in Operational Area*, World Bank <<http://go.worldbank.org/SSJK3PXWZ0>>, at 10 January 2011.
- 62 Women Headed Household Empowerment, PEKKA <<http://www.pekka.or.id>> at 11 January 2011.

## Policy Proposals for Justice Reform in Liberia: Opportunities Under the Current Legal Framework to Expand Access to Justice

Amanda C. Rawls\*

### 1. Introduction

In November 2009, the United States Institute of Peace (USIP) published the results of an extensive field research project, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*.<sup>1</sup> This work was part of a USIP and George Washington University (GWU) project that aims at assisting the Liberian Government and its international partners “to develop evidence-based policy options for expanding the rule of law and consolidating peace over the next decade in Liberia in ways that account for the rule of informal legal systems and grassroots understandings of justice”.<sup>2</sup>

Over the period of ten months, the USIP study involved interviews with over 130 different individuals, with over 35 focus groups in three of Liberia’s 15 counties. It was driven by questions of how average Liberians view their justice options: Where do Liberians go to resolve their disputes? To what extent is customary law practiced today, and how has it changed since before the civil war?<sup>3</sup> To what extent do the various dispute resolution fora produce satisfactory justice in the eyes of Liberians?<sup>4</sup> The study asked these and related questions as a means of constructing an evidence base from which to examine key policy questions facing Liberia regarding the types of justice reform strategies that might improve the Liberian experience of justice, ways that justice reform might bridge the gap between the customary and formal systems, and the longer-term trade-offs relating to the role of customary justice in the formal system.<sup>5</sup>

USIP simultaneously sponsored a Legal Working Group (LWG) of prominent Liberian legal scholars to undertake a comprehensive analysis of the legal framework governing Liberia’s dual legal system, and to explore the resulting possibilities for justice reform in Liberia. The LWG — representing government institutions, the Liberia National Bar Association, the Louis Arthur Grimes School of Law and civil society — met to discuss relevant constitutional questions including the separation of powers, due process and equality. In collaboration with USIP, GWU, the Carter Center and the United Nations Mission in Liberia (UNMIL), the LWG reviewed the above-referenced empirical research and met with traditional leaders in different locations throughout Liberia to gather diverse perspectives and discuss promising avenues for reform of the justice sector.

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In December 2009, the LWG held a final meeting in Monrovia, and presented its findings to the National Traditional Council, representatives of government ministries, civil society and international partners. These findings encompassed the field research undertaken by USIP and GWU, as well as the results of the assessment of Liberia’s dual legal framework undertaken by the LWG. The findings were of three types: baseline findings on the dual justice system, recommended considerations and principles to guide policy making, and key policy questions for justice system reform.

\* Amanda C Rawls is an American attorney and international development professional, who worked as Legal Advisor in the Ministry of Justice, Monrovia, Liberia until September 2010.

The baseline findings confirm the existence of a dual legal system, with a basis in the Liberian Constitution and statutory law. They identify internal inconsistencies, including statutes and regulations that conflict with each other and with the Constitution, concluding that the entire justice system is in need of clarification and revision. The findings on the formal justice system are largely unsurprising; the system is widely believed to be corrupt and plagued by extensive delays, and is not the forum of choice for most Liberians. The customary system is found to raise predictable concerns about gender equality, protection of human rights, due process, and the separation of powers, particularly with respect to the adjudication of more serious crimes. These concerns, however, are raised primarily by representatives of Liberia's formal legal system, and echoed by international non-governmental organization (NGO) workers. They are raised rarely – if at all – by the Liberians consulted in USIP's field research.

The most interesting empirical finding regards the preferences of many Liberians for the type of justice meted out by the customary system: the USIP study found that, even if the formal system were to operate fairly, free from corruption and in a timely manner, the average Liberian would still prefer the customary system. The customary system is perceived as more holistic, taking account of the underlying causes of a dispute and seeking to repair the tear in the social fabric, whereas the formal system is seen as overly adversarial, retributive, and narrow in its focus on the specific case at issue. A resulting concern raised in the study is that, in seeking to promote and extend the formal justice system to all Liberians – motivated by a desire to expand access to justice and build trust in the formal system – the Government risks sparking the opposite effect, causing Liberians to feel that their access to *acceptable* justice is diminishing.<sup>6</sup>

From this empirical base, the LWG/USIP study offers guiding principles for policy-making on justice reform, arguing essentially that reform efforts should focus broadly on how to provide greater access to the kind of justice that Liberians want, rather than narrowly focusing on strengthening the formal system or defining boundaries between the formal and customary systems. The study also recommends that policy-making be driven by realistic assessments of the capacity of the formal legal system – now and in the foreseeable future – and of the Liberian people's justice preferences. The study then recommends that policy-makers consider the implications of justice reform efforts on the country's other strategic priorities: fostering political development, promoting human rights and maintaining peace.

At the conclusion of its findings, the LWG presented two key policy questions and proposed a menu of options for policy-makers to consider in response to each. The policy questions were:

- How can justice be improved at the local level?
- As Liberia considers the future of its justice system and the dual system in particular, how can it move toward a system that inclusively reflects the values of the Liberian people?<sup>7</sup>

**92** Additionally, it offered process recommendations to guide the next steps of policy reform, at which point the Liberian Government would take charge. The process recommendations included continuing a robust social consultation process, culminating in a national conference that it was hoped would determine the way forward for Liberian justice reform.

The findings were adopted at the December 2009 meeting in Monrovia. At the conclusion of this meeting, the empirical research, recommendations and ownership of the proposed national conference and social consultation process were handed over to the Ministry of Justice. This chapter continues where the active phase of LWG involvement ended.

## 2. The Justice Ministry's approach

The process recommendations of the LWG echoed recommendations for successful policy-making in the concluding chapter of the USIP report, both of which were taken to heart by the Liberian

Ministry of Justice. The USIP report recommended a consultative process “explicitly engineered ‘to identify and listen’ to local ideas and solutions rather than telling [local stakeholders] what those are.”<sup>8</sup> This was not just to boost local ownership of the reform process, but grew out of the recognition that rural communities and traditional leaders have the potential to be sources of innovation and drivers of social change.<sup>9</sup>

The Justice Minister launched the consultative process by convening a Steering Committee consisting of the heads of the relevant government ministries and institutions — the Ministry of Internal Affairs, the Ministry of Gender and Development, the Law Reform Commission, the Supreme Court of Liberia and others — who nominated representatives to serve on an Organizing Committee. This Organizing Committee in turn decided to convene four regional consultative meetings of government stakeholders, traditional leaders and civil society to assist them in determining the agenda for a national conference.

The above sequence of events is exceedingly common, not just in Liberia, but also in developing countries across Africa, and most likely across the world. There is a constant tension around local ownership, particularly when an international body believes that it has a good grasp of the problem to be solved, the context in which the problem occurs, the information still to be gathered, and the process that should be followed. It is common for institutions in Liberia to convene a taskforce that creates subcommittees, nominates chairs, and develops workplans, which are validated in multi-stakeholder conferences, only to stagnate because the Government lacks the human and financial resources to devote to implementation.

This resource gap exists not simply because Liberia, as a developing, post-conflict country, has an extremely limited national budget and a small, undereducated cadre of civil servants. It exists because arguably, international partners, including the United Nations, are far more willing to fund training, workshops, consultants and conferences than to fund implementation of long-term activities designed without the assistance of an international consultant. It exists because breaking down an implementation plan into a series of concrete activities to be undertaken — activities sufficiently detailed that the relevant actors know what they are to do first, and have the skills to do it — is arguably far more difficult than drafting a high-level strategy or a multi-year workplan.

## 2.1 The consultative process

At the outset, this process faced all of the challenges described above — the United Nations through UNMIL was willing to fund consultative meetings, and the LWG Findings conveniently provided a background document for “validation” at the regional level. This set-up facilitated a set of activities that all of the actors were comfortably executing.

Four regional consultations were held — one in Monrovia involving primarily government representatives from a wide range of ministries and agencies, and one in each of Bong, Bomi and Grand Gedeh counties. Each of these latter consultations included proportionate representation from the magistrate judges,<sup>10</sup> traditional leaders, women’s group representatives, and civil society organizations in a regional grouping of five counties so that, by the end of the process, representatives from all 15 of Liberia’s counties had had the opportunity to react to the findings of the LWG and to contribute their own thoughts, experiences and opinions.

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### 2.1.1 The value of the consultative process

In addition to generating information on which to base the program for the National Conference, the consultative process, albeit lengthy and resource-intensive, had two positive results. First, it facilitated discussion and debate among actors in the statutory system, the customary system and civil society. Rather than talking to interviewers, the participants were talking to each other. While they may not have identified similar *solutions* to the weaknesses in the justice sector, they identified a number of similar problems, and arguably being part of the same conversation is in itself a building block to future collaboration.

Second, the process of repeatedly bringing participants together created feedback loops in which participants could see how their contributions were affecting outcomes. Some of the regional consultation participants had been involved in the USIP and LWG research, and those who were new to the topic had an opportunity to express their experiences, thoughts and frustrations with the current state of justice in Liberia, prior to attending the National Conference. The Findings of the LWG were disseminated to participants not as the conclusion of a process in which they played little or no part, but as a phase in a much larger process that they now had the opportunity to influence.

Similarly, participation in the Monrovia-based government consultation provided an opportunity for high-level engagement by the government ministries and agencies who would later participate in the National Conference, but who were not the co-hosting Ministries of Justice and Internal Affairs, nor the Supreme Court. Because traditional leaders and civil society organizations were *not* present and the media were invited only for the opening statements, government representatives could be open in sharing their views and disagreeing with each other.

### 2.1.2 Common themes across consultations

There were a number of similarities among the four regional consultations, which greatly helped to refine the scope of the national conversation and to identify likely areas for policy recommendations. Participants in all of the consultations identified corruption in the formal legal system as a primary obstacle to justice, focusing on the lack of transparency of the fees charged to litigants, as much as on the ability of wealthier or more powerful parties to influence the judge. Participants universally sought greater jurisdiction for the courts of first instance, whether the magisterial courts of the formal system or the chiefs' courts, and expressed the desire for a formal role of traditional leaders in the formal system. Participants overwhelmingly acknowledged without argument that objectively harmful forms of trial by ordeal were against Liberian law and should be banned. They were far more divided on the question of non-harmful ordeal methods of collecting evidence and proving guilt or innocence.

When the National Conference was convened in April, most of the traditional and civil society participants from the counties outside of Montserrado and a number of the high-level government attendees had previously participated in regional consultations. This iterative process meant that it was possible, at the National Conference, for facilitators to present to participants the concerns that they had already raised, and then to ask them to focus on concrete proposals for how they could be better addressed. It is typically easier to cite problems than to envision solutions; since participants were now coming together for the second or third time, it was essential to move away from the list of grievances to concentrate on concrete recommendations.

## 2.2 Government priorities

- 94 The considerations of social scientists and rule of law practitioners studying the Liberian dual justice system informed the questions posed to participants in the regional consultations, and thus inevitably shaped the responses. However, these priorities potentially differ from those of the Government, which is ultimately responsible for initiating legal reform and ensuring access to justice. Academics and outside observers often have more freedom to consider ideal alternative justice systems for Liberia, to recommend interim reforms that respond to the demands of the public but compromise on international commitments, or to simply caution that justice reform requires generations rather than years to have demonstrable success.<sup>11</sup>

The Government, on the other hand, needs reforms that are acceptable to both the local population and the international donor community and achievable from their actual starting point, with some level of immediate impact. Thus, ultimately, policy decisions may not reflect what individual government actors believe would be the best outcome for Liberia on the narrow question at issue (the jurisdiction of traditional chiefs' courts, for example), but may instead reflect a complex balancing process.



The Government of Liberia is balancing at least three factors in designing a policy to address the plural legal system, each of which will be discussed in greater detail below:

- A preference for building trust in the formal legal system and using law and policy to change beliefs and behaviors. This is fueled partly by an awareness of the significance of international opinion, manifested in the human rights discourse;<sup>12</sup>
- An urgent need to establish and maintain a government monopoly on the use of force, which would be evidenced by a decrease in mob violence and an effective response to violent crime. This creates pressure for policy options that provide fast results; and
- Acceptance of the need to balance the power of government branches, ministries, agencies and individuals with a stake in the structure of the justice system. This *realpolitik* serves as an often unspoken constraint on any policy options that might shift power from one part of the government to another.

### 2.2.1 Preference for the formal legal system

Ownership is one of the bedrock principles of international development. This is apparent not only in multilateral agreements like the Paris Declaration on Aid Effectiveness,<sup>13</sup> but also in the rhetoric that bilateral donors, NGOs and the United Nations use in public discussions of their programs.<sup>14</sup> This is not just an ethical position taken by the donor community — it is a reflection of the belief that locally designed and “owned” initiatives are more likely to respond to the needs and preferences of the community and thus more likely to be effective in meeting their goals.

The field research findings discussed in the introduction are not unique to Liberia — a number of developing and post-conflict states experience a similar preference of their population for customary justice options over the formal system.<sup>15</sup> Given this expressed preference, access to justice and rule of law initiatives risk failing the ownership test when they appear to impose value systems together with legal reforms.<sup>16</sup> More than other sectors that receive substantial international development assistance, such as public health, economic growth and infrastructure development, the justice sector is closely tied to a society’s conscience. The operation of the justice system and the alternatives that individuals seek reflect interpretations and beliefs about power, politics, gender relations, family structures, religion, the role of the state and countless other aspects of society.

At the same time, it would be incorrect to assume that the local preference is exclusively for customary justice. In Liberia, there is a divide in the population between those who feel that the formal system has been imposed from abroad (based on the United States justice system), and those who identify strongly with this system. This divide closely mirrors the distinction between those Liberians who trace their ancestry to the freed slaves who founded the Republic of Liberia after returning from the United States and brought the formal legal system with them, and those who descended from Liberia’s indigenous inhabitants. But the divide is intensified by the fact that most of the nation’s elite legal practitioners, including government leaders as well as those who were not descended from the returned freed slaves, were educated in the United States and thus steeped in its legal culture. Hence, there is a situation in which those Liberians who shape legal policy have a profound sense of ownership over the formal legal system.

This ownership translates into a strong sense of respect for the constraints created by the Liberian Constitution and the opinions of the Liberian Supreme Court regarding the role of traditional leaders and the customary law in the justice system. It also translates into a genuine interest in rationalizing the inconsistencies found in the Liberian legal framework, rather than creating a new framework to respond to an immediate need. Law is perceived by those in power not only to structure social interactions, but also to have the potential to shape beliefs and behavior. It is a perceived inevitability that formal law will triumph over customary justice, particularly the ‘supernatural’ elements of the latter; crimes of witchcraft and evidence collection by ‘supernatural coercion’ are expected to cease as a more objective and rigorous formal system spreads.<sup>17</sup>

A second pressure encouraging governing powers to emphasize the formal system emanates from the significant influence that the priorities and finances of international and multilateral organizations hold over Liberian policy-making. The United Nations, the United States of America and the large variety of NGOs that are currently investing in rule of law programming routinely express concern over the protection of human rights and the strengthening of the State security and law enforcement apparatus — the national police, prosecution and the prison system. In 2010, externally funded and coordinated projects were responsible for: a prosecution unit and court devoted to sexual and gender-based violent crimes; a training program to train new magistrate judges for national deployment; a national public defender program to establish a probation system and to supplement salaries of prosecutors; and countless other interventions designed to strengthen the formal legal system. This focus reflects a donor response to strategic priorities articulated by the Liberian Government, as well as the justice paradigm most familiar to international supporters.

Outside researchers caution that this elevation of the formal system is based on an idealized version of what that system could be, not a realistic perception of what it is.<sup>18</sup> Irrespective of the truth of this observation, the belief in the ultimate primacy of the formal system — even if an ideal to be attained in the future — creates a firm constraint on the justice options that the Government will wholeheartedly pursue.

### 2.2.2 Urgent need for change without inciting violence

Although Liberia is at peace, there is a palpable feeling of unrest in the justice sector. USIP reports that the perception of many Liberians is that crimes associated with “witchcraft” are on the rise, a contention supported by frequent stories of trial by ordeal, and “traditional detectives” or “herbalists” gathering evidence in cases of ritualistic killing.<sup>19</sup> In Monrovia as well as elsewhere in the country, incidents of mob violence ending in death are common.<sup>20</sup>

While it may be true that justice reform is a project of decades, not years,<sup>21</sup> that more empirical research is needed to refine approaches, and that we cannot rush the process without jeopardizing the quality of the result, it is equally true that some visible changes must be made immediately if the Government is to increase its control, as well as public acceptance of its control, over this situation. The Ministry is further pressed to demonstrate this control while at the same time not denigrating traditional culture.

The Justice Minister therefore seeks to strike a balance between acknowledging both the justice preferences of the Liberian people, and the weaknesses of the formal system in practice, while stressing the boundaries on potential reform. At the opening ceremony of the National Conference on Enhancing Access to Justice, the Minister set out this pragmatic approach, stating that:

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laws are rooted in the values and beliefs of a people and therefore the enactment of any legislation must take into account socio-cultural realities; we cannot continue to ignore the desire of our people to have customs and traditions recognized by the formal justice system, but we must do so being mindful that it is imperative to apply rules and principles that are fair and just, and show respect for human dignity.<sup>22</sup>

### 2.2.3 Balancing power within the Government

Power and control inevitably play a part in any official Liberian Government position on justice reform. The hierarchy of traditional chiefs falls under the Ministry of Internal Affairs, while the training and supervision of prosecutors and police officers falls under the Ministry of Justice. Traditional chiefs, as part of the Ministry of Internal Affairs, fall under the executive branch of the Government, while the magistrate judges fall under the Judiciary. These divisions, though mundane, are significant when discussion of justice reform turns to two often proposed options. These options include: the abolition of the Hinterland Regulations<sup>23</sup>, which grant original jurisdiction to traditional chiefs over petty criminal matters in the absence of a magistrate judge

(strongly resisted by the Ministry of Internal Affairs, which would lose one basis of its claim to legitimacy in its exercise of judicial powers, and rejected by the Judiciary, which sees no room for flexibility in the separation of powers); or permitting traditional chiefs to detain suspects (challenged by the Ministry of Justice, which wishes to maintain a firm monopoly on exercise of police powers).

The Law Reform Commission, established in June 2009 by Executive Order,<sup>24</sup> provides one way to avoid the worst of these power struggles. The Commission mandate includes the directive to “[s]upervise the law reform process of the country and serve as the coordinating arm of the Government for various law reforms desired or being undertaking by various ministries, agencies, political sub-divisions, authorities, public corporations and other institutions of the Government.”<sup>25</sup> Its independence from the Justice Ministry gives it some freedom to make decisions that take into account a balance of power with the Ministry of Internal Affairs and the Judiciary, although the Chair of the Law Reform Commission of Liberia (LRC), Philip Banks, is a former Justice Minister. Much of the success of justice reform in Liberia may depend on the ability of the Law Reform Commission to play this mediator role wisely. As of mid-September 2010, the future of the Law Reform Commission was uncertain to some extent; the Liberian Legislature had not yet passed the Act that would have created the LRC as an institution under law, citing the high cost of operations, and the Executive Order provisionally authorizing the LRC technically expired on 10 June 2010. If the Legislature adjourns before the Act is passed (it was scheduled to adjourn for a six-month recess at the end of August), it is likely that the LRC will be reauthorized by a renewal of the Executive Order during the legislative recess. But without legislative approval, however, its funding and therefore its operations are in danger of being sharply curtailed.<sup>26</sup>

### 2.3 Public opinion: The National Conference on Enhancing Access to Justice

The three-day National Conference on “Enhancing Access to Justice: A review of Our Customary and Statutory Systems” was co-hosted by the Ministry of Justice, Ministry of Internal Affairs, and the Supreme Court in Gbarnga, Bong County, 15-17 April 2010. The Conference brought together over 100 traditional leaders, civil society representatives, and government officials from all 15 counties of Liberia, with the aim of drafting a set of recommendations to present to Liberia’s LRC and other stakeholders. The recommendations will cover how both the formal and customary systems and their interaction could be strengthened. President Ellen Johnson Sirleaf presided over the opening of the Conference, indicating to the participants that there are some elements of the traditional system that must be preserved, respected and used respectfully, decrying corruption in the formal system, citing Liberia’s international legal obligations, and asking participants to seek an answer to the question of whether the Rule of Law can be made applicable to traditional systems?<sup>27</sup>

The extended consultative process discussed above led to possibly the greatest success of the National Conference: several of the traditional leaders participating commented that, for the first time, they felt like they were being listened to. The importance of this result for peacebuilding in Liberia cannot be overstated. This outcome was a result not of the organization of the Conference itself, but of the process beginning with the USIP research and the LWG activities as early as 2007, and the iterative approach of the regional consultations, which demonstrated to the traditional leaders *how* their opinions, rationale and positions were being heard in one forum and taken into account as the next step of the process was implemented.

The other overwhelming success of the Conference was that participants did not simply present a list of grievances, but engaged in brainstorming possible concrete policy solutions.

This was possible both because they felt that their complaints had been heard (and that the Conference agenda was designed around these complaints), and because the Plenary was divided into smaller subgroups for one full day of the program, each with a different, narrowly tailored question to discuss. Facilitators, armed with documentation of the complaints previously raised,

worked diligently to keep the participants in each group focused on solutions rather than problems. The groups concentrated on the following questions:

1. How can both the customary and statutory justice systems better reflect Liberian values of justice? This included discussion of both how the formal system could incorporate more elements of restorative justice, and how the customary system could better protect constitutional rights.
2. How can we change the way the two justice systems interact to better address issues of customary beliefs and practices that the formal system finds problematic? This included substantial discussion of how *trial by ordeal* should be addressed.
3. How could the Government reform both the formal and the customary justice system to increase access to justice? This included discussion on who the Government should work with to enhance access to justice nationwide, how the formal justice system could be made more accessible in rural areas, and how the judiciary law could be changed to increase access to justice.
4. How can the statutory legal system be made fairer? This included significant discussion on how the Government can best combat corruption.

The impact of dividing the participants into four subgroups and focusing the discussion was seen on the final day of the conference, when participants in the Plenary session were invited to comment on the work of all four groups. The plenary discussion turned almost exclusively to the most controversial, sensational topics — trial by ordeal and women's rights. These topics, which spark considerable passion from Liberians on all sides of the discussion, do not lend themselves to constructive discourse. By dividing the participants on day two and assigning each group a distinct topic to focus on, facilitators were able to direct conversation back to the specific questions assigned to their group, assuring participants that these other issues were being dealt with in other groups. At the same time, the group discussing trial by ordeal was able to move past emotional reactions and to identify potential common ground for compromise.

### 2.3.1 Immediate outcomes of the conference

At the end of the three days, participants had produced a number of unsurprising outcomes: a set of guiding principles that emphasize mutual respect, input-heavy recommendations to invest in strengthening infrastructure and human capacity of both systems, requests for higher salaries for all justice actors to combat corruption, and recommendations that the formal system lower its fees.

At the same time, participants produced insightful recommendations for law reform, administrative reform and further research. Their recommendations also included ideas for new initiatives within the current legal framework that are simple and straightforward, and yet have tremendous potential to respond to both the justice needs of the Liberian people, and the competing priorities of the government officials — particularly the Justice Minister — who would need to support implementation.

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The long list of conference recommendations were approved by consent; representatives of the government hosts, international supporters and civil society participants offered congratulatory farewell remarks; and participants departed for their home counties, leaving the conference organizers with the significant question: now what?

It is easy to underestimate the difficulty of converting a strategic goal, public consensus, or high-level vision into an implementable action plan. Many of the conference recommendations were neither possible within the framework of current Liberian law, nor feasible within current resource constraints. Others were premised on political decisions that Liberia has not yet made, regarding whether the country will formalize a role for customary justice within the legal system. As is the case after any such broad consultative process, there was a significant danger that a conference report would simply be drafted and shelved, or that the Government would feel pressured to make hasty decisions with significant long-term repercussions.

### 2.3.2 The post-conference process

Following the National Conference, the Justice Minister convened a Post-Conference Review Committee, to be led by the Chair of the Law Reform Commission, former Justice Minister Philip Banks. The Committee's mandate was to review the conference recommendations, categorize them according to the type of change that each would require, analyze their feasibility under current Liberian law and within current resource constraints, and draft a timeline for implementation.

As the Post-Conference Review Committee began their work, a number of concerns arose. Membership in the Committee grew with the addition of Liberian legal professionals who had not previously participated in either the consultative process or the Conference. On the one hand, these attorneys provided needed expertise in the formal legal system and its constraints; on the other, although the committee included representation from the Ministry of Internal Affairs through the National Traditional Council, the addition of each new attorney shifted the balance of voices toward the formal system. Each new participant brought his or her own ideas on how Liberia's different justice systems should interact, and added them to the list of recommendations under discussion.

Despite these challenges, the Committee finalized a conference report and prepared a comprehensive analysis of the Conference recommendations. As the Committee's work progressed, initial impassioned calls for broad legal reform or wholesale rejection of aspects of the customary legal system were tempered, perhaps by an increased understanding of the logistical complexities and political challenges inherent in fundamental overhaul of a nation's legal system. When the Committee presented its analysis to the Justice Minister in early August 2010, the list of administrative reforms, public education needs, and areas for additional research far outweighed recommendations for legal reform.

### 2.3.3 Moving toward implementation

The list of recommended actions prepared by the Post-Conference Review Committee covers over 60 initiatives, falling under the responsibility of some 12 different ministerial and non-governmental agencies and actors. The thorniest political questions — such as determining whether customary courts should be created by law as a part of the formal system — are expected to be preceded by considerable additional field research. Fundamental legal reform is expected to be undertaken by the LRC, in collaboration with the relevant government ministries, under its mandate of identifying obsolete, inconsistent and contradictory laws, as well as rationalizing the relationship between statutory and customary law (once the policy decisions have been made). This process should be expected to take a very long time.

As the law reform process moves gradually forward, policy change within the existing legal structure can help to bridge the gap between the justice that Liberian people seek and the justice options that the system currently provides. But with so many different proposed initiatives on the table, it is a significant challenge for the Government and its international partners to determine which actions to take first. Three of the most promising avenues for policy change, drawn from the recommendations of the participants at the National Conference on Enhancing Access to Justice, are discussed below.

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## 3. Policy proposals

"A justice system is only as good as its capacity to respond to the demands made on it".<sup>28</sup>

The following initiatives have been selected for discussion because they require no legislative action for implementation and they highlight the fundamental unresolved issues raised by Magistrate Judges, traditional leaders, civil society representatives and women's groups in the course of the National Conference. Each initiative has the potential to notably increase access to justice and its perception across the country, because it creates the possibility of honoring both the Liberian

preference for the customary justice system, and the chiefs' concerns over losing power, while not violating the statutory laws that constrain justice options. These initiatives are the following:

1. Carving out a formal role in the formal justice system to task traditional chiefs with facilitating customary resolutions of criminal matters to be submitted to prosecution as recommendations for case disposition.
2. Drafting policy on alternative forms of oath-taking in criminal prosecutions that permit adherence to traditional belief systems while not violating constitutional protections for criminal suspects.
3. Writing down customary law, both as idealized and as applied in practice, in each of Liberia's ethnic groups, so that it can be evaluated for application in relevant cases in the formal courts.

### **3.1 Customary dispositions of criminal cases**

Under the proposed initiative traditional chiefs will be able to continue to hear minor criminal matters in the form of pre-trial conferences, the results of which can be offered to the prosecution as viable case dispositions. The following discussion examines if such an initiative: is responsive to the justice desires of the Liberian people; follows from the solutions proposed at the National Conference; can be defined within the bounds of current Liberian law (and therefore can be implemented without legal reform); falls within government priorities; and is logistically feasible.

There was broad consensus at the Conference that traditional leaders should have concurrent jurisdiction over minor criminal matters and civil complaints. The definition of "minor" was never specified; it is widely accepted that chiefs do not have jurisdiction over crimes in which blood is spilled, armed robbery, or rape cases in which physical violence is used, the victim is a child, or the perpetrator is a stranger. However, theft, destruction of property, criminal negligence, "less severe rape", and other non-violent crimes are generally considered within the competence of traditional chiefs, who would essentially conduct alternative dispute resolution as though they were handling civil matters. In their reasoning, conference participants echoed the findings of the USIP and LWG studies, saying that the customary justice system is faster and cheaper, and provides a resolution – generally with guilt admitted and restitution paid – that leaves both parties satisfied.<sup>29</sup>

When discussants were asked to consider ways of inserting these restorative elements into the formal system, they protested that this solution would be unsatisfactory because the formal adjudicator would be unable to craft a compromise or mediated solution that would satisfy both sides without knowledge of the parties, their relationships and an understanding of the social context in which the litigants operate.

Although granting customary courts the power to hear these matters would solve this issue, respond to an expressed preference for justice, and contribute to reducing the backlog in the court system, there is a significant legal obstacle to taking this path — the doctrine of the separation of powers.

#### **3.1.1 The separation of powers<sup>30</sup>**

While the regional consultations were taking place, the Ministry of Justice commissioned research on the formal legal constraints on customary justice. Based on a review of the Liberian Constitution, Supreme Court opinions, the Hinterland Regulations and other relevant legislation, the Ministry prepared an outline of the current constraints, identifying potential focus areas for statutory law reform and constitutional reform, as well as a Supreme Court precedent that would have to be overturned to render lawful the jurisdiction of customary courts over criminal matters.

The commissioned study found that the relationship between the customary and statutory systems is defined by the constitutional edicts concerning separation of powers, the statutory role of traditional chiefs in implementing the Hinterland Regulations, and Supreme Court decisions defining the limits on customary dispute resolution.<sup>31</sup> These three frameworks are not internally consistent, resulting in a status quo in which nearly any act of the customary courts that is acceptable within one framework is in violation of another.

Article 3 of the Constitution mandates the separation of powers. It grants the power to take judicial action exclusively to the judiciary, and states that “no person holding office in one of these branches shall hold office in or exercise any of the powers assigned to either of the other two branches except as otherwise provided in this Constitution”.<sup>32</sup>

While the Constitution seems unambiguously clear on this issue, Liberian statutory law is not. The Executive Law grants power to the Ministry of Internal Affairs to manage a system of traditional courts, stating that the Minister of Internal Affairs is to “manage tribal affairs and all matters arising out of tribal relationships, draft rules, regulations and procedures for tribal government and courts including fees allowable in such courts, and, administer the system of tribal courts”.<sup>33</sup> This modern delegation of authority has its origins in the Act Creating the Interior Department (now the Ministry of Internal Affairs) in 1869, 35 years before the native Liberians were granted citizenship.

The 1869 Act apparently granted the executive power to hold judicial hearings and make judicial decisions involving native Liberians — a power that was confirmed by the legislature in 1905, following the extension of Liberian citizenship to native Liberians and the expansion of government control beyond the original boundaries of 40 miles from Monrovia, with passage of an “Act Providing for the Government of Districts within the Republic, Inhabited by Aborigines”. This Act apparently established a native court system from which decisions were appealable to a statutory Quarterly Court, an organ of the Judiciary.<sup>34</sup>

The Supreme Court upheld this judicial power of the Executive in 1907, with the caveat that the Executive could not infringe on the Constitution in exercising this power.<sup>35</sup> Counselor Jallah Barbu, a commissioner for the Law Reform Commission, notes that this decision is inherently contradictory, essentially granting the Executive an exception from the separation of powers clause of the Constitution only when the subject matter is purely “native” Liberian.<sup>36</sup>

The Liberian Supreme Court has maintained this contradiction in its decisions on the jurisdiction of customary courts. In cases arising from the practice of trial by ordeal in the customary courts, the Supreme Court issued rulings curtailing their use of specific practices, without questioning their jurisdiction over the subject matter of the case, thus effectively acknowledging the existence, legitimacy and jurisdiction of customary courts.<sup>37</sup> However, at the same time, the Court has repeatedly held that customary courts have no legal grounds to hear cases over which the Judiciary has jurisdiction. Since under the Constitution the judiciary has jurisdiction over *all* legal disputes, the customary courts are left with jurisdiction only over matters that have no cause of action – for example, insult or violation of a local regulation such as a non-member of a secret society viewing society activities.<sup>38</sup>

Over the years, in a few individual cases, the judiciary has attempted to carve out specific jurisdiction for chiefs, for example, by conceding that they could act in both a judiciary and an executive capacity, provided they did not act in both capacities at the same time.<sup>39</sup> However, for the most part, Supreme Court decisions have chipped away at the power of the customary courts. They have found that the executive branch (which includes all customary court judges) is not entitled to have the power to impose an enforceable punishment, such as a prison term or a fine.<sup>40</sup> They have found that jurisdiction of customary courts cannot be created by the consent of the parties.<sup>41</sup> Further, they have held that, despite clear local government law to the contrary, proceedings held before a customary court and reviewed by the county superintendent are void (rather than appealable to the judiciary).<sup>42</sup> In this last case, however, the Court offered a potential resolution when it determined that customary courts were to be understood as administrative tribunals, provided for under Article 65 of the Constitution.

Article 65 states that:

The Judicial Power of the Republic shall be vested in a Supreme Court and such subordinate courts as the legislature may from time to time establish. The *courts shall apply both statutory and customary laws* in accordance with the standards



enacted by the Legislature. Judgments of the Supreme Court shall be final and binding and shall not be subject to appeal or review by any other branch of government. *Nothing in this Article shall prohibit administrative consideration of the justiciable matter prior to review by a court of competent jurisdiction.*<sup>43</sup>

By providing for the application of both customary law and the statutory system, and by allowing administrative consideration prior to court adjudication, Article 65 creates two distinct, parallel means of integrating statutory and customary justice independent of the statutory role of customary courts. However, it raises two questions: what are the bounds on “administrative consideration” and what is customary law?

The second of these questions is addressed below, in section 2.3 on documenting customary law. The first question impacts directly on the judicial role that could be carved out for traditional chiefs under the current statutory legal framework. The Supreme Court addressed the scope for action of traditional chiefs under Article 65, holding that hearings conducted before Executive Branch officials are subject to judicial review, and should be treated as hearings before administrative tribunals.<sup>44</sup> This was later supported in the Court’s decision that clan and paramount chief courts can undertake administrative considerations of the facts of a case without violating Article 3, provided that parties retain access to the formal courts.<sup>45</sup>

### **3.1.2 Customary dispute resolution as an administrative consideration in criminal matters**

Liberia is in the process of finalizing a policy on plea negotiations for implementation in Circuit Courts.<sup>46</sup> While recognizing that plea negotiations are susceptible to corruption and misuse, the Justice Ministry is seeking to implement the plea negotiation legislation that has been on the books since at least 1973,<sup>47</sup> and to train the county attorneys (prosecutors operating in the Circuit Courts, which hear more serious criminal matters) to begin developing plea agreements. It is hoped that these agreements will combat the problem of prolonged pre-trial detention by enabling courts to process a larger volume of cases more quickly. It is also hoped that it will serve to reduce the overall prison population, by reducing the amount of time the average arrestee spends incarcerated — both pre- and post-conviction.

Plea negotiations will not be used, at least initially, in the courts of first instance, the magisterial courts, which handle a far larger volume of cases. This creates an opportunity for traditional chiefs to conduct administrative review to help clear the case backlog, while potentially providing a more satisfying justice option to litigants. This suggestion came from participants at the National Conference, both as a recommendation that litigants in criminal cases attend pre-trial conferences (also expressed as a recommendation for mediation and arbitration as alternatives to court), and as a recommendation that all disputes be taken to the chiefs first.

- 102** Permitting administrative review of criminal matters by traditional chiefs and using its outcome to structure plea agreements differs from ongoing projects to expand Alternative Dispute Resolution (ADR), because it considers customary resolution of disputes as a stage of the formal legal process, rather than an alternative to it. Because customary adjudication generally involves both a guilty plea and an agreement on restitution in addition to reconciliation of the parties,<sup>48</sup> it would function similarly to a plea negotiation, although without the requirements on evidence and standards of proof that a formal plea negotiation would entail. This process has been described by Counselor Felicia Coleman, now Chief Prosecutor for the Sexual and Gender-based Crimes Unit of the Ministry of Justice, as follows:

Social and family pressures of any and every kind are brought to bear on the disputing parties to shift ground, to accept, to compromise, and to settle the dispute. The common element of these various models of traditional dispute settlement in Liberia is the emphasis on peaceful settlement, compromise, and agreement where communal interests outweigh individual rights and interest.... The community acts as

a monitoring and arbitrating presence providing an arena for private feeling to be vented in a public manner and acting as a safety measure and a sanctioning device to the confronting parties.<sup>49</sup>

Because a customary pre-trial conference would be considered administrative review under Article 65, the courts could accept or reject any resulting agreement — for instance, rejecting the agreement if there is a concern that confession was coerced or that power imbalances unfairly influenced the agreement. This would necessitate written documentation of the administrative finding, which could be provided to the prosecution as a recommendation that prosecution be waived provided that the alleged perpetrator complies with the customary resolution.

An addendum to this initiative would be the use of the same traditional chiefs to post bail for suspects who agree to customary dispositions of their cases, pending judicial review. This approach was recently piloted by the Ministry of Justice and the Liberian Judiciary, following unrest in Lofa County. Nine suspects accused of inciting violence were released on the word of traditional leadership in Lofa, who agreed to ensure that the suspects returned for their court appearances.<sup>50</sup> This agreement was reached in order to prevent the detention of the suspects from serving as a flash point for further unrest, and if successful, it will serve as a model for future agreements using traditional leadership in the formal legal structure.

### 3.1.3 Challenges to overcome

Three significant concerns arise:

- the danger of coercion when confessions are obtained by a traditional chief, even acting as an administrative tribunal;
- the logistical challenges of conducting pre-trial conferences with participation of victims, witnesses and other community members for detainees in Liberia's prisons and jails; and
- the compensation of the traditional chiefs, for their contribution to the criminal justice system.

In the first point, it will pose a challenge to the formal system — and specifically to the Ministry of Justice — to promote a system in which fundamental rights including protection from self-incrimination and coercion are violated. The customary system often uses “supernatural” methods of evidence collection to obtain confessions, which would not be permissible in the formal system. This problem could possibly be dealt with through an expansion of the definition of permissible oath-taking in Liberian law, which will be discussed below. Another approach would be to work with the traditional chiefs to draw up guidelines for administrative consideration, explaining that the formal courts will be obligated to reject negotiated pleas in cases where these guidelines are violated.

In the second point, transportation logistics are one of the most difficult hurdles to overcome in the disposing of criminal cases. In response to this challenge, a Sitting Program was established inside the Monrovia Central Prison to bring Magistrate Judges in once a week to dispose of detainee cases and avoid the difficulties of transporting the detainees to the court. A similar program for traditional chiefs would not be practical, as customary dispute resolution requires the presence of the accuser and possibly other members of the community. This suggests that the appropriate time for pre-trial conference would be after arrest but prior to commitment of the suspect to a prison facility, when a magistrate judge can grant release under supervision of the traditional authority. Prosecution can then request a hearing following the negotiated settlement by the traditional chief.

On the third point, the issue of payment, traditional chiefs are currently paid by the Ministry of Internal Affairs; a fund and budget line would need to be established either through this Ministry or by the Ministry of Justice in order to provide a stipend for mediation or pre-trial conferences. It is essential that parties themselves not be asked to pay and that the incentives be structured to reward agreements that are upheld on review in the formal system.

## 3.2 Expanding our understanding of oath-taking

The most animated discussion at the National Conference was on the controversial subject of the practice of trial by ordeal, generally referred to in Liberia as *sassywood*. It is common, in Liberia's customary justice, for suspects or defendants to be asked — or to request — to perform an act or submit to a test to prove their innocence or establish their guilt. A great deal has been written on the practice of trial by ordeal; a catalogue of the most common types can be found in the USIP study.<sup>51</sup> The following description will therefore be brief.

Trial by ordeal is fundamentally based on supernatural beliefs and takes a variety of forms along a spectrum from objectively harmless to deadly. In the mildest versions, suspects might be asked to do an everyday act, such as picking up a light object from the ground. If they are guilty of the charge against them, it is believed that they will find this task impossible. In another similarly harmless although more invasive form, suspects might be asked to eat or drink food or water that is objectively harmless — often that they have prepared themselves. If they are guilty, or dishonest, it is believed that the substance will make them ill within a specified period of time. In more serious and dangerous forms of trial by ordeal, suspects are made to perform a dangerous act such as to place their hands in hot oil, place a hot metal object against their skin or drink tea made from a poisonous tree bark (the eponymous *sassywood*). It is believed that, if innocent, they will be protected from the ill effects of the act; if guilty, they will suffer the expected harm.

One of the four small group discussions on the second day of the National Conference was devoted to the question of how to strengthen customary justice and improve the traditional chiefs' ability to curb unlawful practices such as trial by ordeal on their own, rather than having the formal system impose regulation on them. Participants insisted that some forms of trial by ordeal should be retained, provided they were undertaken voluntarily and did not cause physical harm to the person to whom they were administered. The final official conference recommendations included the request that the Government distinguish between "good *sassywood*" and "bad *sassywood*," prohibiting only the latter.

### 3.2.1 A brief history of trial by ordeal under Liberian law

In 1916, the Supreme Court of Liberia outlawed trial by ordeal that results in death, and declared that, in such cases, those who administer the ordeal can be tried for murder.<sup>52</sup> In 1940, the Supreme Court upheld this decision and declared all forms of trial by ordeal to be unconstitutional and in violation of Liberia's organic law. Specifically, the Court found that the practice violated Article 21(h) of the Constitution, granting the right not to be compelled to give evidence against oneself.<sup>53</sup> This decision was upheld in 2005.<sup>54</sup> Seeking to explain the judiciary position on trial by ordeal at the National Conference, Justice Minister Tah stated:

The rationale for the position of the Court stemmed from the fact that the accused in a trial by ordeal is denied many fundamental legal rights guaranteed a criminal defendant during trial, such as the right to legal representation, the right to due process of law, the right to protection against self-incrimination or coerced confession, the right to a jury trial, the right to an appeal, the right to protection against cruel and unusual punishment, and so forth.<sup>55</sup>

Both jurisprudence and the Justice Minister's position are contradicted by the Hinterland Regulations (2001), which permit non-dangerous trial by ordeal.<sup>56</sup>

Irrespective of the law, many forms of trial by ordeal continue to be practised throughout the country. The explanation commonly given is that there is no other equally reliable method of determining guilt or innocence, particularly in cases of witchcraft.<sup>57</sup> Attempts to regulate or curtail trial by ordeal can backfire; the perception of many Liberians is that, as a result of the ban on trial by ordeal, witchcraft is on the rise.<sup>58</sup> Public frustration with the ban is high, and reliance on "traditional detectives" using supernatural methods of evidence collection is strong.<sup>59</sup> It is not difficult to understand the root of this frustration — imagine the reaction in the United States or France if a rule were imposed banning the use of DNA evidence or fingerprints, simply because the legal establishment did not believe in such methods of evidence collection.

The policy proposal here is to take up the recommendation from the Conference that “good sassywood” be distinguished from “bad sassywood,” and then to take it a step further, distinguishing between good sassywood that selects the guilty from a pool of suspects using supernatural means, from good sassywood that commits an individual to tell the truth, i.e. to identify any of the methods commonly grouped together as trial by ordeal that are in fact no more than an alternative form of oath-taking. Such practices could then be defined under a different term, and their use permitted in at least customary pre-trial conferences, if not also in statutory court proceedings.

The most common form of ordeal referenced by participants to epitomize “good sassywood” was *kafu*. In the USIP study, *kafu* is defined as food prepared and shared among all parties to a complaint and acts as a group oath to tell the truth. Conference participants suggested that even water can serve as *kafu*, and that within some period of time after its use, it will sicken a person who drank it and then did not tell the truth. Participants asserted that this type of oath was no different from swearing on a Bible or Koran in statutory courts.

### 3.2.2 Constitutional concerns

This policy proposal depends on an assessment of whether *kafu* — or any other traditional oath-taking — is in violation of the constitutional protections referenced by the Justice Minister at the National Conference. The analysis here uses *kafu* as an illustration — a similar analysis could be conducted on any proposed form of customary oath-taking. The constitutional concerns here would be:

- **Right to legal representation, jury trial and appeal:** Because *kafu* does not alter the process of justice itself — from pre-trial conferences and plea negotiations through trial and appeal — it would not impinge on a suspect’s *right* to representation, trial or appeal.
- **Right to protection against self-incrimination:** Because *kafu* is taken prior to testifying, the *kafu* itself need not impinge on this right. It is rather the questions that are posed after ingesting the *kafu* that could impinge on this right. However, the same protections that are in place to guard against infringement on this right after a suspect has been sworn to honesty on a Bible or Koran could be similarly employed.
- **Right to protection against coerced confession:** Because *kafu* is objectively harmless, is ingested by multiple parties to a complaint and not only by suspects, and its anticipated supernatural side effects would occur far in the future, there is no reason it would be perceived to be more coercive than swearing on a holy book. The symbolism is similar — those who do not tell the truth will suffer supernatural repercussions.
- **Right to protection against cruel and unusual punishment:** Since it is a voluntary oath and only an objectively harmless substance is ingested, *kafu* would not constitute punishment.

The policy recommendation is to apply this type of analysis to other forms of ordeal currently used to establish the honesty of a suspect or witness, and offer it as an alternative to defendants and witnesses who prefer a traditional type of oath to swearing on a holy book. Introducing this option to the formal system also has the potential to increase the public’s faith in the system, simply because they understand and believe in its procedures.

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## 3.3 Documenting customary law

The two policy proposals discussed so far relate to traditional processes of dispute resolution that could be applied in the context of Liberia’s statutory law. This final proposal relates instead to using the statutory court processes, applying Liberia’s customary law.

As described above, Article 65 of the Liberian Constitution states that the formal court system shall apply both statutory and customary law. However, participants universally noted that Liberia’s 16 tribes each have different customary laws, that judges, particularly at the circuit and Supreme Court levels, are not knowledgeable about customary law, and that customary law has never been documented and thus cannot be reliably referenced by a statutory court.

### 3.3.1 Documentation vs. codification

The proposed policy initiative to *document* customary law should not be confused with a push to *codify* it. There are strong arguments against codification of customary law: that one strength of a customary system is its flexibility — its ability to shift based on the circumstances of a case; that customary law is living, changing as the circumstances change; and that codification would stagnate it in time. Pragmatically, it is argued that customary law as described will vary sharply from customary law as practiced, and that because of the effort required to reliably capture it, any codification project is doomed to misrepresentation.<sup>60</sup>

In Liberia, these concerns are complicated by the fact that the customary or tribal courts that were established by the Liberian Government just after independence were provided with formal, statutory law that they were to administer: the Hinterland Regulations. The premise of the Hinterland Regulations was that there would be one legal system governing the indigenous inhabitants of Liberia and another system governing the settler population in Monrovia. It is the existence of these parallel statutory systems that leads one to describe Liberia as having a “dual legal system” — a system in which two different sets of codified laws are applied simultaneously to different segments of the population. Each system had its own government-appointed adjudicators, its own appeals process and its own constitutional authority.

In addition to this dual legal system, Liberia has a plural justice system. For example, a traditional *zoe* — a leader in the female sodality of the Sande — might be called on to settle a dispute relating to violation of rules of the Sande. This matter would be purely customary — the rules governing this society are part of neither the Hinterland Regulations, nor the Liberia Code of Laws. However, when a Paramount Chief in Nimba County is called upon to settle a land dispute between two citizens of his district, this might be called a “customary” matter, though it falls under the statutory jurisdiction of the Hinterland Regulations and is being decided by a government employee of the Ministry of Internal Affairs (the Paramount Chief), who has a statutory mandate to adjudicate customary law matters arising in his district in a tribal court.<sup>61</sup>

The policy recommendation to document the customary law would encompass both of the above situations — the purely customary dispute resolution and the chief’s court operating with arguable statutory authority — and would include the dispute resolution process, the actors involved, the evidence collected, the resolution, its enforcement, and any other relevant details of the law as intended and as applied.

### 3.3.2 Statutory law for the traditional people: The Hinterland Regulations

The status of the Hinterland Regulations is currently in doubt. A recent report on land disputes from the Norwegian Refugee Council explains:

The original Law of the Hinterlands was enacted in 1905 and was amended in 1914 and 1949. The content of the 2001 version issued by the Ministry of Internal Affairs is apparently mostly unchanged (with some few alterations) from the 1949 version, despite the fact that most of the law had been apparently repealed in 1956 by the passing of section 600 of the Aborigines Law. The Aborigines Law was repealed in turn through its exclusion from the 1973 revision of the Liberian Code of Laws. In addition, the Law of the Hinterlands has since been republished, but it remains uncertain whether it is ‘law’.<sup>62</sup>

The Regulations were distributed to the chiefs, who were tasked with enforcing and interpreting them as local laws. Some Liberian legal scholars have looked back on this time as one of greater integration of the formal and customary systems, pointing out that:

There are good examples of the integration of informal into formal justice systems in many parts of Liberia, where the courts of traditional chiefs are integrated into the authority and power structure of government. For example, a traditional court like the Paramount or Clan Chief’s Court exercises considerable statutory jurisdiction over criminal matters, extending to powers of imprisonment not to exceed three months.<sup>63</sup>

However, the Hinterland Regulations were also inherently divisive, based as they were on defining a large segment of the population as *uncivilized* and therefore inferior.

The continued validity of the Hinterland Regulations is problematic because this second legal system places judicial power in the hands of the executive branch – in which the final appeal is to the president, not the court – in violation of the separation of powers clause in Article 3 of the Constitution, discussed above. It is also problematic because the Regulations themselves define native inhabitants as second-class citizens, in violation of Article 11(c) of the Constitution, which provides for equal protection under the law for all citizens of Liberia.<sup>64</sup> This persistence frustrates the formal justice sector, as evidenced by the Justice Minister's comment at the National Conference that, despite "several Supreme Court decisions and the enactment of many acts of legislature rendering most of the provisions of the Hinterland Regulations illegal or obsolete, they continue to exist."<sup>65</sup>

Despite these problems, traditional chiefs argued vociferously in the regional consultations leading up to the National Conference that they wanted the Hinterland Regulations back. This argument might be best understood as a claim for the legitimacy that the chiefs had under the Hinterland Regulation system, in which they were empowered to settle local disputes, and to rule according to law.

The validity — or lack thereof — of the Hinterland Regulations may therefore be something of a distraction; the key question is not whether there is a separate statutory legal system for the rural areas or traditional peoples of Liberia, but rather whether the traditional chiefs have the power to adjudicate the day-to-day disputes that arise in any community. The question of the validity of customary law is therefore better focused on the yet uncoded customary justice through which day-to-day disputes are resolved.

### 3.3.3 Analyzing customary law

Apart from the Hinterland Regulations, and setting aside the academic debates over codification, there remains a worthwhile exercise in simply documenting customary norms. This law can then be compared to the formal code, to reveal where the two are consistent, and where they are not – a preliminary activity to any future integration, harmonization, or codification.

The policy recommendation therefore is to *write down* customary dispute resolution guidelines, rationales and practices, and to then analyze their similarities and differences to existing statutes, and their compliance with constitutional constraints. No distinction would be drawn regarding the origin of the law or custom being applied; if a traditional chief is applying a provision of the Hinterland Regulations, or of the Penal Code, which has become the accepted legal framework governing a particular pattern of events, then this provision will be recorded as an example of the living customary law.

Because of the nature of customary law, such a documentation project would be a massive undertaking, requiring not simply speaking with the chiefs who preside over customary courts, but observing proceedings, discussing with participants when and how dispute resolution practices differ from the customary norms as described, what circumstances might lead to a different outcome, etc. It would be not unlike the task of drafting a restatement of the law of a common law jurisdiction, in the absence of a written case record.

Dependent on the outcome of the documentation exercise, a future policy recommendation might be to amend statutory law to incorporate certain customary guidelines on sentencing, measuring the severity of a crime, or granting leniency. An alternative recommendation might be to certify experts on customary law in different ethnic groups and geographical regions, who could be called upon to provide interpretation and expertise in formal cases where customary law is material. In the absence of any concrete documentation on the content of customary law, it is impossible to know whether such proposals would be appropriate and in line with Liberia's legal constraints and the

government's policy priorities.<sup>66</sup> Nevertheless, this uncertainty should not prevent researchers, Liberian legal scholars, and customary justice actors from taking the first step.

#### 4. Maintaining momentum: Next steps for justice reform

Following the successful National Conference, the time is ripe for Liberia to pursue creative justice reform strategies that expand the official role of the traditional chiefs in contributing to dispute resolution, in a manner that provides the justice that the Liberian people want, within the bounds established by the Liberian Constitution. But when resources are scarce and law reform is perceived to be urgent, how does the Government make the leap of faith required to embark on an untested new policy initiative in the justice sector? If the political will is established, how does the Government move from policy to action?

The policy proposals presented here are to: (i) create a formal role for administrative review of criminal matters by chiefs' courts, using the outcome of that review to structure plea agreements; (ii) expand the definition of legally permissible oath-taking to incorporate non-harmful customary ceremonial oaths; and (iii) document the norms and procedures of customary law. The proposals could stand a good chance of successful roll-out in Liberia, for three reasons. First, they are distilled directly from an extended national, iterative consultative process, which was itself founded on extensive field research. Second, they can be implemented within the existing legal framework, and thus do not require extensive public debate or legislative approval for initial implementation, but rather can be initiated rapidly. Finally, the proposals complement each other, and each lends itself to piloting in a single region or district of Liberia prior to national roll-out.

However, it is not these specific initiatives so much as the rationale that underlies them that the Liberian Government and its partners should consider as they move from gathering information on enhancing access to justice to taking actions designed to respond directly to the concerns raised by the Liberian people. At their core, the above proposals highlight two conceptual balancing acts and address an underlying information gap, all essential to providing more acceptable justice for the Liberian people.

The first balancing act concerns justice outcomes. It revolves around the question of how to respond to the desire of most Liberians to have their disputes — including petty criminal matters — handled by traditional leaders who dispense justice that more closely reflects their values. This desire must be balanced against the conviction of Liberian legal professionals and government leaders that “rule of law” in Liberia demands fidelity to the Constitutional principle of the separation of powers. The first proposal gives an example of this.

- 108** The second balancing act focuses on the legal process and the lack of trust expressed by many Liberians in a system that rejects the methods they believe in for gathering evidence and determining guilt. The demand for recognized forms of supernatural pressure for honesty must be balanced against the Liberian Constitutional values of due process. The second proposal reflects this.

Finally, the knowledge gap in the formal legal system as regards the procedures, rules, and norms of the customary system creates an obstacle to incorporating elements of customary justice into the formal system. The third proposal offers one way of narrowing this gap.

As Liberia's post-war peace proves increasingly stable, international support for rule of law and access to justice initiatives is growing, with the United Nations, bilateral donors, and numerous NGOs launching campaigns in the sector. At this crucial juncture, the follow-up to the National Conference on Enhancing Access to Justice provides a perfect platform for the Liberian Government to assert and maintain control of the justice reform agenda in the country. By applying the above rationale — if not taking up the discussed policy proposals themselves — the Government will be



able to direct the course of national justice reform so that it may stand a good chance of responding to the fundamental concerns of the Liberian people, respecting the basic tenets of the Liberian Constitution and generating the information necessary to make well-informed policy decisions in the future.

## footnotes

- 1 D. Isser, S. Lubkemann and S. N'Tow, 'Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options' (2009) United States Institute of Peace <<http://www.usip.org/resources/looking-justice-liberian-experiences-and-perceptions-local-justice-options>> at 7 January 2011.
- 2 Ibid 13. There is ongoing debate over use of the terms "formal", "informal", "customary" and "traditional" in reference to legal systems and access to justice globally. This concern stems primarily from a fear that "formal" implies something of greater value. For purposes of this article, no such judgment is intended; "formal" will be used to delineate the legal system based on the Liberian Constitution, statutes and common law founded on the United States legal system and falling under the Ministry of Justice, while "informal" and "customary" will be used interchangeably to indicate the justice provided by the hierarchy of chiefs under the Ministry of Internal Affairs. Liberia's pluralist justice system includes additional actors providing informal justice, such as elders, leaders of sodalities, and persons of wealth and influence; they will not be addressed in depth here.
- 3 Liberians generally refer to the "14-year civil war," meaning the period from 1989-2003.
- 4 Ibid 21.
- 5 Ibid.
- 6 Ibid 73-77.
- 7 Findings of the LWG presented in Monrovia, Liberia, 9-10 December 2009.
- 8 Isser et al, above n 1, 92.
- 9 Ibid.
- 10 Liberia's judiciary has three levels. Magisterial courts are the courts of first instance throughout the country. Magistrate judges are required by law to hold a law degree, but of the approximately 350 serving magistrates, only 12 have any formal legal training. Magisterial jurisdiction over criminal matters is extremely limited, with most cases requiring referral to a circuit court. Above the magisterial courts are 20 circuit courts – a dedicated civil law court and five dedicated criminal courts in Montserrado County, each handling different types of crimes, and one general circuit court in each of the remaining 14 counties. There are five additional specialized courts located in Montserrado County, handling probate, debt, labor disputes, traffic violations and juvenile issues. The judiciary is headed by a Supreme Court of five justices, with jurisdiction over constitutional issues and appellate jurisdiction over all cases.
- 11 See, for example, D. Isser, *Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries*, Discussion Paper for the Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference, 17-18 November 2009.
- 12 The phrase "human rights" seems to have taken on a negative connotation for the majority of Liberians, who associate the term with outsiders interfering in child rearing, gender relations, and punishment of offenders. It is extremely common for participants in community meetings on justice issues to assert, for example, that "child rights" are the cause of disrespect, juvenile delinquency and social unrest. When government officials promote human rights, it is therefore very unlikely that the Liberian public is their intended audience.
- 13 The Paris Declaration on Aid Effectiveness (2005) attempts to guide the relationship between countries that are aid donors and countries that are aid recipients by identifying five key "partnership commitments". The first is ownership; the outcome of the Paris Declaration is that all donor assistance must be in support of developing country strategic plans. See, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (2005/2008) <<http://www.oecd.org/dataoecd/11/41/34428351.pdf>>.
- 14 See, for example, the United Nations Development Programme's (UNDP) justification for their rule of law work in Liberia at <<http://www.lr.undp.org/rol.htm>> at 7 January 2011; USAID Liberia's matrix demonstrating how programs align with Liberia's Poverty Reduction Strategy (PRS) at <<http://liberia.usaid.gov/node/189>>; and The Carter Center's description of their Rule of Law portfolio in Liberia as a response to the PRS at <[http://www.cartercenter.org/peace/conflict\\_resolution/liberia-homepage.html](http://www.cartercenter.org/peace/conflict_resolution/liberia-homepage.html)>.
- 15 See for example *Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* (Conference Packet for a Conference hosted by United States Institute of Peace, George Washington University, World Bank, Washington DC, 17-18 November 2009)(providing case studies from Sierra Leone, Afghanistan, Sudan, Liberia and others).
- 16 See for example D. Pimentel, 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan' (summary for USIP, GWU and World Bank Conference Agenda, Washington DC, 17-18 November 2009) (cautioning that Rule of Law initiatives consisting of "attempts to import foreign (usually Western) legal concepts and structures" will fail because of their neo-colonial overtones); M. Mutua (ed), *Human Rights NGOs in East Africa: Political and Normative Tensions*, University of Pennsylvania Press (2009) (exploring the legitimacy of international human rights organizations in East Africa); B. Ibhawoh, *Stronger than the Maxim Gun: Law, Human Rights, and British Colonial Hegemony in Nigeria* (2002).
- 17 Comments by representatives from Ministries of Justice, Gender and Development, and the Law Reform Commission at the Regional Consultation for the National Conference on Enhancing Access to Justice, Monrovia, February 2010.
- 18 Isser et al, above n 1.
- 19 See, for example, A.A. Dulleh, '300 'Witches' Confess to Witch Doctor', New Democrat, (Monrovia) 5 April 2010 <<http://allafrica.com/stories/201004051153.html>> at 7 January 2011; Anon, "'Ritualistic Killings' Pose Difficulties for Maryland', The Analyst, (Monrovia) 6 April 2010 <<http://allafrica.com/stories/201004070937.html>> at 7 January 2011.
- 20 See, for example, B.J. Boima, 'Insults Result to One Burned Alive, One Shot in the Head' New Democrat, (Monrovia) 1 April 2010 <<http://allafrica.com/stories/201003011645.html>> at 7 January 2011; S. Golafale, 'Mob Justice – A Reality in Today's Liberia' Ceasefire Liberia, 23 April 2010 <<http://ceasefireliberia.com/2010/04/mob-justice-a-reality-in-todays-liberia/>> at 7 January 2010.
- 21 Isser, above n 11.
- 22 C.P. Tah, (speech delivered at the opening of the National Conference on Enhancing Access to Justice, Gbarnga, Liberia, 15 April 2010).
- 23 The Hinterland Regulations were developed in 1905 as a secondary formal legal structure governing the indigenous population of Liberia, and their existence is often the basis for the assertion that Liberia has a dual legal system. They were to be administered by the hierarchy of chiefs

- falling under the Ministry of Internal Affairs, and did not apply to Liberians of American descent. While the Hinterland Regulations were applied by arguably traditional leaders (the national hierarchy of chiefs is itself a construct of the formal system and not an accurate reflection of traditional leadership structures) and applied to indigenous people, they do not constitute "customary" justice as the term is typically used. Section 2.3 contains a more detailed discussion of their origins and current status.
- 24 See Executive Order Number 20, Establishing a Law Reform Commission, Monrovia, 11 June 2009 <[http://www.emansion.gov.lr/doc/EXECUTIVE\\_ORDER\\_20\\_-\\_ESTABLISHMENT\\_OF\\_LAW\\_REFORM\\_COMMISSION.pdf](http://www.emansion.gov.lr/doc/EXECUTIVE_ORDER_20_-_ESTABLISHMENT_OF_LAW_REFORM_COMMISSION.pdf)> at 5 January 2011.
- 25 Ibid 2.
- 26 Observers theorize that refusal to pass the *LRC Act* was not a reflection on the *LRC Act* itself, but rather political retaliation against presidential pressure related to the controversial Threshold Bill to redraw legislative districts; this suggests that the *LRC Act* will ultimately succeed.
- 27 H.E. Ellen Johnson Sirleaf (Remarks to the National Conference on Enhancing Access to Justice, Gbarnga, Liberia, 15 April 2010).
- 28 F. Coleman, Association of Female Lawyers of Liberia (AFELL) (writing on traditional justice mechanisms), 'Post-Conflict Peacebuilding in Liberia – Much Remains to Be Done', Center for International Peace Operations, (report of the Third ZID/KAIPCT Seminar, Accra, Ghana, 1-3 November 2007, 56).
- 29 Ibid 55 (stating that "while the more formalized Western models often allow for only one form of justice — retributive, restorative or reparative — these traditional institutions seek to combine several of these and other elements in keeping with the values of their communities").
- 30 Liberia currently operates under the 1986 Constitution, loosely patterned on the United States Constitution. It can be and has been argued that the Constitution lacks legitimacy for a large majority of the population, as it was drafted with the goal of solidifying the power of the settler minority, often at the expense of the indigenous majority. Additionally, the Constitution — drafted as it was during a period of rule by the leader of a military coup — sought to entrench the executive power rather than genuinely seeking to balance the powers of the three branches. Nonetheless, the 1986 Constitution is the law of the land in Liberia. It protects fundamental human rights, and includes some notable constraints on the role of customary justice.
- 31 J. Dube, 'Summary of Supreme Court of Liberia Opinions on Customary Law Matters' (submitted to the Ministry of Justice and presented to participants at the National Conference on Enhancing Access to Justice, April 2010).
- 32 *Constitution of Liberia 1986* art 3.
- 33 *Executive Law, Ministry of Internal Affairs: Duties of the Minister*, 3 LCLR 12, s 25.2 (1972).
- 34 See J.A. Barbu, 'An Analysis of the Formal Legal Framework Governing Customary Law in the Republic of Liberia' (submitted to the United States Institute of Peace (USIP) as part of its project, *From Current Practices of Justice to Rule of Law: Policy Options for Liberia's First Post-Conflict Decade*, 2009, 11) (noting that the Act is unavailable, but referenced in the 1916 case of *Jedah v Boyah*, 2LLR 265).
- 35 *Gray v Beverly* (1907) 1 LLR 500 (The Court notes: "The Act created an Interior Department and provided for the appointment of a Secretary of Interior as its head, upon whom was conferred very broad duties and authority in relation to matters affecting the aborigines of the country", but the actual text of the 1869 Act is currently unavailable); see also, Barbu, above n 34, 7.
- 36 Barbu, above n 34, 27.
- 37 Ibid 12 (citing *Jedah v Horace* (1916) 1 LLR 265; *Karpeh, Manning, and Odei v Verdier* (1963) 15 LLR 285).
- 38 *Jedah v Horace* (1916) 1 LLR 265; *Karmo v Morris* (1919) V2 LLR 317; *Posum v Pardee* (1935) 4 LLR 299; *Ayad v Dennis* (1974) 23 LLR 165; *Jitco v Sesay* (1990) 36 LLR 695; *In Re Broderick* (2000) 40 LLR 263. Case summaries taken from Dube, above n 31 (unless otherwise stated).
- 39 *Odel v Verdier* (1963) 15 LLR 285. This solution to the separation of powers problem does not have support from the current Justice Minister.
- 40 *Ayad v Dennis* (1974) 23 LLR 165.
- 41 *Nah v Judge Topor* (1998) 39 LLR 144.
- 42 *Posum v Pardee* (1935) 4 LLR 299.
- 43 *Constitution of Liberia 1986*, Art. 65 (*Emphasis added*).
- 44 *Koryon v Korvayan* (1982) 30 LLR 246.
- 45 *Insurance Company of North America v Bhatti and Sons Inc.* (1988) 35 LLR 191.
- 46 Permitting plea negotiations would create prosecutorial discretion in criminal courts, such that a prosecutor could offer to charge a defendant with a less serious crime in exchange for that defendant agreeing to plead guilty to the lesser charge. This would speed up the processing of criminal matters by reducing the number of trials, and could reduce crowding in the prisons by reducing the volume of pre-trial detainees as well as decreasing average sentences. Negotiations can result in a defendant agreeing to perform community service or compensate the victim of his or her crime in lieu of imprisonment. Plea negotiations are only being considered in circuit courts because most criminal charges leading to imprisonment in Liberia are above the trial jurisdiction of a magistrate judge.
- 47 *Criminal Procedure Code*, 1 LCLR §2:16.5
- 48 See Coleman, above n 28, 60 (stating "Traditions and customs count compensation as a precondition for their reconciliation ceremonies. This is echoed in claims that "forgiveness comes after the payment of damages", and calls for 'reconciliation through disbursement').
- 49 Ibid 59.
- 50 See 'Four Dead in Religious Clashes in Liberia: Official', AFP, 27 February 2010, <<http://www.google.com/hostednews/afp/article/ALeqM5jwcBPvPiQdkWURQ3VJqaZohaGmrq>> at 5 January 2011; 'Justice Ja'neh Ordered Me to Release Lofa Rioters', New Democrat, (Monrovia) 18 May 2010, <<http://allafrica.com/stories/201005180862.html>> at 5 January 2011.
- 51 Isser et al, above n 1, 60-61 (This study provides an excellent catalogue of rural Liberian views on different forms of trial by ordeal.)
- 52 *Jedah v Horace* (1916) 2 LLR 63.
- 53 *Tenteah v Republic of Liberia* (1940) 7 LLR 63.
- 54 Tah, above n 22.
- 55 Ibid.
- 56 *Hinterland Regulations Revised 2001* art 73 (stating "Ordeals, however, of a minor nature and which do not endanger the life of the individual, shall be allowed and is hereby authorized." This Article then provides for the Certification of Ordeal Doctors by the Ministry of Internal Affairs, and to lay out the procedures for re-trial if requested by a party deemed guilty by the initial ordeal).
- 57 Comments by participants in Regional Consultative Meetings in Bomi and Bong Counties, February and March 2010; see also Coleman, above n 28, 60.
- 58 See Isser et al, above n 1, 60-65.
- 59 See, for example, 'Free Legal Services for Yancy, Morias, Others', The Daily Observer (Monrovia), 2 April 2010, <<http://www.liberianobserver.com/node/5555>> at 5 January 2011 (citing the Minister of Justice explaining that "in Liberia's criminal justice system, evidence produced by a 'witch doctor' could not be accepted for prosecution of any suspects in criminal matters such as murder").
- 60 The term "ascertainment" is often used to describe the attempt to uncover the customary laws or norms applying to a particular case. The term is problematic because of its colonial usage (see A.N. Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) *The Modern Law Review*, 244) - since it does not precisely apply to the proposal here, it will not be used.
- 61 See also Barbu, above n 34, 4 (writing on the legal context of customary and formal justice in Liberia, explaining that discussion of the Hinterland Regulations is "not a study

of the traditional indigenous African Justice systems, but rather a study of the customary legal system created by regulations and statutes”).

<sup>62</sup> A Corriveau-Bourque, ‘Confusions and Palava: The Logic of Land Encroachment in Lofa County, Liberia’, *NRC Reports 2010* (internal citations omitted) <[http://www.nrc.no/arch/img.aspx?file\\_id=9481898](http://www.nrc.no/arch/img.aspx?file_id=9481898)> at 5

January 2011 (internal citations omitted); see also P Banks, ‘The Role of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies’, (a project of the United States Institute of Peace [USIP] and the Fletcher School of Law & Diplomacy, Tufts University, 2007) 26.

<sup>63</sup> Coleman, above n 28, 58.

<sup>64</sup> *Constitution of Liberia 1986*, art 11(c).

<sup>65</sup> Tah, above n 22.

<sup>66</sup> *Executive Law, Ministry of Internal Affairs: Duties of the Minister*, 3 LCLR Title 12, s 25.2(n) (1972). (This activity is part of the formal responsibility of the Minister of Internal Affairs, who is charged with “overseeing the collection and publication of the laws and customs of the Liberian tribes”).



Senai W. Andemariam\*

## Introduction

The Eritrean communities have an age-long tradition of local dispute resolution in accordance with their respective customary laws, most of which are codified and date back to the 15th century. This tradition is considered part of the day-to-day life of the community and is a reflection of the desire to maintain peace among all of its members.

On 22 September 2003, the Government of Eritrea enacted Proclamation 132/2003<sup>1</sup> to establish community courts<sup>2</sup> and thereby accomplish two objectives.<sup>3</sup> The first objective is to enable greater participation of the community in the judicial process and make the judicial process accessible to the larger community, the poor in particular. This objective is achieved by allowing the community to elect the judges of the community courts, at least one of whom must be a woman, and by establishing hundreds of community courts. The second objective is to integrate customary dispute resolution mechanisms in the national legal system and thus alleviate the burden of higher courts. To achieve this two-tier objective, community court judges are allowed to reconcile disputants based on customary laws and practices. If the parties fail to reach a compromise, the community court judges then pass judgments based on national laws. Any disputant who does not agree with the judgment can appeal to higher courts. Settlement at the community courts of those disputes that would have been previously brought to the higher courts has alleviated the burden of such courts.

A report from the Community Courts Chief Coordination Office of the Ministry of Justice shows that from January 2004 to mid-2009, about two-thirds of cases brought to the community courts were settled by agreement (compromise) between the disputants. The steady success of community courts in ensuring peaceful settlement of disputes has inspired the wish to expand jurisdiction of community courts and attracted increasing assistance to strengthen them. Growing interest in customary laws has also revived national studies on them, which encouraged the incorporation of key principles of customary laws into Eritrea's basic laws.

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This chapter will review the contribution and impact of community courts in creating access to justice, empowering the poor to participate in the judicial process, and in efficiently integrating customary dispute settlement in the national legal system. Accordingly, it will illustrate how the two objectives of the establishment of community courts are being progressively achieved.

\* Lecturer of Law, Law School, College of Arts and Social Sciences, Eritrea. A Fulbright Scholar and a former judge at the Ministry of Justice, State of Eritrea, Mr Andemariam is also a member of the International Law Association, the American Society of International Law, the Society of International Economic Law and IQsensato. In 2007, he was selected as a national consultant for evaluating the impact of community courts in Eritrea for the 2004-2006 period. He has also worked on studies and projects on strengthening community courts, in drafting legislation for expanding jurisdiction of community courts and in the integration of customary law principles in basic Eritrean laws, particularly the sentencing regime of the Draft Penal Code of Eritrea.

## 1. Evolution of the establishment of community courts

The history of the establishment of community courts may be viewed from two perspectives. First, the present-day community courts are intended to be a partial reflection of the long history of the various communities of the Eritrean society in settling legal disputes based on customary laws. Accordingly, the nature of the customary laws within the Eritrean communities and their interaction with successive governments through the customary laws will be described.

Second, the history of efforts in various times to consolidate and use the basic notions of the Eritrean customary dispute resolution norms at the national levels will be described. Reference will be made to previous attempts to weaken or destroy the use of customary laws in dispute resolution in Eritrea.

### 1.1 The nature of Eritrean customary laws

Communities have always developed rules and procedures for settling disputes that arise among their members. As the socio-economic conditions of these communities grow and evolve — and hence the disputes become more complicated — it becomes more imperative that such rules and procedures adapt accordingly. Also, values and norms of these dynamic means of dispute settlement are part of the daily life of the community, and therefore they can be transmitted from one generation to the next. When the various communities living in a given country have developed indigenous settlement mechanisms that guarantee peaceful co-existence among its citizens, national laws should be developed in line with the inherent values of the society in question.

Eritreans are one of the people in sub-Saharan Africa — if not the only ones — to have had codified or written<sup>4</sup> customary laws.<sup>5</sup> The preambles of most of these customary laws claim that the laws were enacted as far back as the 15th century. For example:

- The preamble to the 1910 amendment to the Customary Law of *Loggo Chwa* (the name of a district in the Eritrean highlands) claims that the first version of the law was enacted in 1492 AD during the reign of Emperor Eskindir of Ethiopia; the second version in 1658 during the reign of Emperor Fasil of Ethiopia; the third version during the early days of the Italian occupation of Eritrea (1900); and the final version during the British Military Administration of Eritrea in 1943.
- Similarly, in a September 1991 interview, Reverend Haile Hadera, an Orthodox Christian priest, one of the elders involved in amending the customary law of *Adkeme-Mlga'e* (coined after the two alleged forefathers of the district in the Eritrean highlands within which this customary law applies), claimed that the *Adkeme-Mlga'e* law was over 800 years old (audio cassette copy of interview available). Another source suggests that the law of *Adkeme Mlga'e* evolved during the reign of Emperor B'edemariam (1467-1477) and it was modified in 1873 during the reign of Emperor Yohannes IV of Ethiopia. In 1940, the law underwent its final amendment: in 1944, Part I was published in the *Rassegna di Studi Etiopici* by Carlo Conti Rossini, and in 1953 Part II was published in the same journal. Both parts of Tigrigna version were published in single edition in 1944.
- Moreover, according to a tradition, the customary law of *Adgna-Tegeleba* (a name indicating the two villages of *Adgna* and *Tegeleba* in the Eritrean highlands, where this customary law applies), was first codified with the name *The Order of M'em Mhaza* (*M'em Mhaza* indicating a region in the southern highlands) during the reign of the Tigrayan ruler Ras Welde-Slassie (1750-1770). It was later amended in 1873, again in 1904, and finally published in its present form in 1946. This code combines the various previous codes known as *Mai Adghi*, *Serao*, *Enda Deko*, *Enda Fegrai* (Tigrigna families in the southern highlands), in addition to *The Order of M'em Mhaza*.<sup>6</sup>

It can be concluded that these customary laws cover almost all the notions embodied in conventional modern laws — substantive (civil, commercial and criminal) and procedural.

Notably, when customary law was recorded or amended, all the villages where it was applied were proportionally represented in the assembly of elders, who would deliberate on the law-

making/amendment process.<sup>7</sup> These elders would sit in a quiet, isolated place and debate the law in pious solemnity for weeks and often for months or years<sup>8</sup> before they would return to their community and make all the contents of the law publicly known. The public was notified of any amendments to the law and thus their awareness was raised on individual rights and duties, and the legal procedures needed to implement them.

The striking similarities among Eritrean customary laws tend to show that there has been constant interaction between and among the various communities of Eritrean society.<sup>9</sup>

Until the introduction of the Ethiopian Codes in the late 1950s and early 1960s, Eritrean communities used to settle their disputes on the basis of customary law. All litigation hearings were open to the public (hence judges were accountable) and were conducted in front of a village judge. The litigations followed procedures that reflected fairness, secured representation of women and guaranteed the presence of the parties and the swift execution of judgments. Litigants enjoyed the freedom of questioning the partiality of the judges and witnesses who testified under solemn oath. The village paid the so-called 'blood money' if one of its members had killed a person from outside the village, and inter-village marriages were conducted as a means of settling murder disputes.<sup>10</sup>

## 1.2 View of customary law at the national level

The following is a brief history of how the various governments that ruled the country applied Eritrean customary laws at the national level.

Carlo Conti Rossini, an Italian scholar, notes that the Italians, who ruled Eritrea from 1890 until 1941, encountered diverse oral and written customary laws governing a law-abiding people. Hence, the Italians allowed the Eritrean society to be governed by its own customary laws except in matters concerning municipal administration and those concerning Italians living in Eritrea.<sup>11</sup>

The British, who administered Eritrea from 1941 to 1951, continued the Italian tradition and allowed legislators to amend their respective customary laws when necessary. These forefathers inked their amendments with the further expectation that their descendants would continue to broaden and amend these laws as needed.<sup>12</sup>

In late 1940s, the United Nations resolved that Eritrea would be federated with Ethiopia, and in 1952, the Federal Government of Eritrea was established. However, in November 1962, with the unilateral dissolution of the Federation and the Ethiopian annexation of Eritrea, the Emperor of Ethiopia, Haile Selassie I wanted to impose his new codes (introduced in the late 1950s and early 1960s) on the Eritrean society. Since Eritrean society had its own dynamic and comprehensive customary laws embedded in the cultural fabric of its various communities, he had to abolish pre-existing laws.

To this end, art 3347(1) of the *Civil Code of Ethiopia 1960* provided: "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

However, customary laws are an integral part and a reflection of the tradition, lifestyle, belief system and civilization of the community where they are applied. Arguably, one cannot, by the stroke of a pen or by adding a paragraph in a new code, repeal these laws. Similarly, it can also be argued that new laws will only be adhered to in society when its people understand the concepts of the new law and find a way to harmonize the old with the new. This explains why Emperor Haile Selassie I failed when he tried to introduce new codes into Eritrean legal tradition. Despite this imposition, Eritrean society continued to follow the deep-rooted customary laws in resolving disputes.

The Dergue regime, which overthrew the Imperial Government of Ethiopia in September 1974 and ruled Ethiopia (inclusive of Eritrea) until May 1991, followed in the footsteps of the previous imperial



government. In May 1991, the Eritrean People's Liberation Front (EPLF)<sup>13</sup> liberated Eritrea. Eritrea gained its formal independence from Ethiopia in May 1993, following a referendum held in April 1993. Independence entitled the Eritrean people to assume full and free control of their destiny and thus the liberty to use their customary laws and search for means of harmonizing them with other national laws.

The EPLF had earlier started the consolidation and use of customary laws in dispute resolution. In the late 1970s, the EPLF initiated the establishment of communal assemblies of elders in liberated and semi-liberated areas to undertake amicable dispute resolution functions. Following Eritrea's liberation in 1991, the Transitional Government of Eritrea resolved to institutionalize traditional dispute settlement mechanisms and institutions by establishing village courts that were to function mostly in rural areas and to serve as the lowest benches of the judiciary for civil and criminal cases.

The law that established village courts was Proclamation Number 25/1992, which amended Proclamation Numbers 1/1991, 5/1991 and Legal Notice 3/1991. The following matters were placed under the jurisdiction of village courts for trial of first instance:

- In civil cases, disputes involving moveable properties for an amount not exceeding ERN2,501 (currently US\$1 = ERN15) and disputes involving immovable properties for an amount not exceeding ERN5,001; and
- In criminal cases, disputes involving simple bodily injury (art 539(1) of the *Transitional Penal Code of Eritrea 1957* ['TPCE']), simple damage to property of another caused by herds or flocks (art 649(2) of the TPCE), disturbance of possession without use of force (art 650(1) of the TPCE), petty insult or violence (art 794 of the TPCE), simple insult or defamation (art 798 of the TPCE) and petty theft (arts 806-807 of the TPCE).

Village courts did not manage to produce the desired effect of enhancing access to state justice and reducing cases at higher levels of state courts. The institution of village courts was not formally abolished until the establishment of community courts. However, in practice, village courts faded out and their jurisdiction was later merged into the expanded jurisdiction of sub-regional courts. With the introduction of regional administrations in Eritrea through Proclamation 86/1996 (the Proclamation for the Establishment of Regional Administrations), the structure of the courts had to be aligned to the new administrative structure of the country. Thus, sub-regional courts were created as the lowest level of courts in Eritrea. Appeals from sub-regional courts led to regional courts, from regional courts to the high courts, and from the high courts to the Court (Bench) of Final Appeal. With the enactment of the Proclamation to Establish Community Courts, sub-regional courts were dissolved, and appeals from community courts are now made to the regional courts.

- 116** The main reason for the limited success of village courts was that they were established to function as any other court. Although the intent was to enable them to help settle cases amicably, they were not given any clear mandate to do so. Village courts were established by Proclamation 25/1992 as the lowest echelon of the formal court structures. For each court, the Government appointed a village elder to serve as judge. A number of these new judges were either illiterate and/or lacked basic legal training, and the decisions of these single-judge village courts were neither traditional (i.e. dispute resolutions based on local customs and customary laws) nor formal (i.e. judgments based on national laws).

When the Government realized that the village courts were ineffective and that new community-based legal institutions needed a clearer mandate to apply customary laws and practices, it resorted to establishing "mediation elders" (*shmagle erqi*) in all communities with the aim of bringing disputants to settle their cases out of courts. These were neither formalized dispute resolution institutions established by law nor panels of previous customary community judges. Simply, they were panels of village elders selected by the community for their knowledge of customary dispute

resolution who would try to mediate when disputes arose in their respective communities. Although constituted at the Government's initiative, these institutions were not integrated in the state legal system because they were not allowed to adjudicate and pass binding judgments when the parties failed to settle their dispute amicably. In addition, parties could not appeal to state courts when dissatisfied with the local settlement.

Responding to the strengths and weaknesses of village courts and *shmagle ergi*, the Government decided to establish a mechanism that would combine the character of both institutions. Like the village courts, it would issue binding judgments if parties failed to settle their disputes amicably. Like the *shmagle ergi*, the new mechanism would be allowed to make use of customary laws and practices familiar to the disputants to try to settle the dispute amicably. Community courts were created in 2003 to accomplish this dual task as well as to provide the communities with an opportunity to participate in the judicial process.

### 1.3 The development of community courts

The present community court system was created as a logical step to bring the state legal system closer to the people while integrating and formalizing traditional dispute resolution into its lowest tier. Before the introduction of community courts, due to the unequal distribution of formal courts throughout the nation, the rural people had to travel long distances and spend a great deal of money and time to make use of the state legal system. Some people in the southern Red Sea region, for example, had to travel over 300km to the nearest state courts located in the port cities of Massawa and Asseb. This long distance, together with time and money involved, heavily restricted poor people's access to state justice. The complex procedures and the frequent misunderstandings caused by the differences in language and cultural background between the disputants and the judges, compounded these problems and made it difficult to reach an amicable settlement between the disputants.

## 2. Brief description of Proclamation 132/2003

Issued on 22 September 2003, Proclamation 132/2003 entered into force on 1 November 2003. In 13 Articles, the Proclamation covers a range of issues including: the establishment and distribution of community courts; the qualification, election and term of office of community court judges; work procedures; civil and criminal jurisdiction of community courts; courtroom procedures and fees, budget, salary and other benefits of community court judges; and cooperation with, monitoring of, removal and/or disciplinary measures against community court judges. The following is a brief description of the Proclamation.

### 2.1 Distribution of community courts and election of judges

The Proclamation (art 3) requires the establishment throughout Eritrea of community courts at any convenient level such as a village or group of villages, districts or cities. Each community court is constituted by three judges elected by the people. Article 3 (1) and (2) of Proclamation 132/2003 distinguish the three member of the court as "one judge and two *nebaro*", with the judge sitting as the presiding member. In Eritrean customary law, particularly in the highlands, the *nebaro* (singular *nebaray*, meaning "one who sits") consist of an even number of elders called to constitute a majority when their votes are counted together with that of the judge. These elders, owing to their deep knowledge of customs and of the community, assist the judge at all steps during the proceedings, particularly in factual matters. The name *nebaro* seems to have been used in the Proclamation to follow traditional terminology. In the practice of community courts however, the three members of the community court bench are all named "judges", even though Proclamation 132/2003 outlines some differences in the powers of a judge and a *nebaray*. For example, art 3(9) of Proclamation 132/2003 states that a community court cannot take the testimony of witnesses in the absence of the judge; whereas, in the absence of one *nebaray*, the judge and the other *nebaray* can take the testimony. Article 3(9) however, adds that judgments cannot be pronounced in the absence of any one of the three members of the court.

Judges of community courts are elected for two years and are eligible for re-elections. As required by art 4, to be elected to the community courts, a person must:

- be at least 25 years of age;
- be free from chronic mental problems;
- have fulfilled all national duties required from him/her;<sup>14</sup> and
- not have been previously convicted of theft, embezzlement, corruption or perjury.

With respect to administration, the Ministry of Justice was given the responsibility to manage and oversee the election of community court judges, their budget and their overall functioning.<sup>15</sup>

## 2.2 Jurisdiction

In essence, the jurisdiction of community courts must fit within the purpose of their mandate. A fundamental principle in determining the jurisdiction of community courts is that only cases that are related to disputes arising from the “daily lives of communities” and ones that are “not complicated” should fall within the jurisdiction of such courts.

Accordingly, in civil cases, the jurisdiction of community courts extends to disputes involving:

- movable properties for an amount not exceeding ERN50,000;
- immovable properties for an amount not exceeding ERN100,000;
- land-related rights provided for in Proclamation 58/1994, the Land Proclamation, namely:
  - the right to fence the land;
  - the right to mark borders of land;
  - the right to require the cutting off of branches and roots at the point where they invade property of a neighbor; and
  - protecting an allotted plot of land.<sup>16</sup>

In criminal matters, community courts have original jurisdiction over the following offences:

- intimidation;
- minor damage to property caused by herds or flocks;
- disturbing the possession of another (but not where the disturbance has involved violence, threats or the assistance of a large number of persons, or has been committed by persons carrying arms or dangerous weapons, in which case the matter shall be taken to the regional courts);
- petty assault and minor acts of violence; and
- slight offences against honor.<sup>17</sup>

- 118** Since the establishment of community courts dissolved sub-regional courts, art 2(c) of Proclamation 133/2003, which amended the jurisdictions of Eritrean courts following the establishment of community courts, provides that all criminal matters that had previously been under the jurisdiction of sub-regional courts were to fall under the jurisdiction of regional courts.

In the first three or four years after the establishment of community courts, there was a tendency in Eritrea not to consider community courts as part of the court hierarchy in the country, which was reflected in the use of the term “regular” courts to identify courts other than community courts. This notion probably came from the misguided belief that community courts were established to settle disputes by mediation or conciliation of the parties. It should be noted however that:

- Since the establishment of community courts, there have been four levels of courts in Eritrea: community courts, regional courts, high courts and the Court (Bench) of Final Appeal. By law, therefore, community courts are the lowest level of the courts in Eritrea, as were previously the village courts, the district courts and the sub-regional courts;

- Although art 3(10) of Proclamation 132/2003 provides that community court judges must give parties adequate opportunity to settle their dispute by conciliation or negotiation, this article also authorizes them to issue a judgment if the parties fail to reach an amicable settlement;
- Judgments of community courts are appealable to regional courts by the losing party (arts 5 (6) and 8(5) of Proclamation 132/2003);<sup>18</sup> and
- The police, security officers and other government institutions are obliged, as with the other courts, to assist community courts in their functions (art 13 of Proclamation 132/2003).

These and related provisions of Proclamation 132/2003 show that community courts are part of the state legal system. Due to the increase in the number of disputes being settled out of court by community courts and the growing expertise of community court judges in national laws as a result of lessons learned from judgments of regional courts to which community court judgments are appealed, there is increased trust in the capacity of community courts. This can be evidenced from the current plans to expand their jurisdiction.

### 2.3 Procedure of community courts

Most of the basic procedures in civil and criminal matters applicable in other courts, as contained in the *Transitional Civil Procedure Code of Eritrea 1965* ('TCPCE') and *Transitional Criminal Procedure Code of Eritrea 1961* ('TCRPCE') respectively,<sup>19</sup> have been maintained for use in the community courts, although in a much simpler form. The main reason to introduce substance of the TCPCE and TCRPCE procedures into the community courts is to enable the regional and other higher courts to review properly all of the cases appealed from the community courts. These procedures include, in civil cases:

- dismissing a case when the plaintiff does not appear on the appointed date of trial;
- reopening trial if the plaintiff submits sufficient evidence for his or her absence on the appointed date of trial;
- proceeding with trial in absentia if the defendant fails to appear on the appointed date of trial;
- starting a new trial if the defendant submits sufficient evidence for his or her absence on the appointed date of trial;
- hearing witnesses either called by the parties or by the court's own motion; and
- fixing court fees and deciding if court fees can be waived in special circumstances.<sup>20</sup>

In criminal matters, the basic adversarial nature of the Eritrean trial proceedings has been maintained for community court hearings. If convicted, the accused is punishable with a maximum of ERN300. If the convicted person does not pay the fine, the court can substitute the fine with an imprisonment not exceeding 15 days.<sup>21</sup>

Although not specifically provided for in Proclamation 132/2003, in practice the parties in civil and criminal cases tried by community courts are not represented by lawyers. The principal justification given for the avoidance of lawyers in community courts is that there is a need to maintain a balance in the parties' knowledge and power of argument. Another justification is the need to protect the low level of legal knowledge of the community court judges by allowing them to lead the parties to closure of the cases by conciliation, because in the majority of the disputes brought to them, they consider their office as de facto conciliator of the parties.

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## 3. A review of the work of community courts in Eritrea

### 3.1 A community court in action

A community court can be found in or near the district administration in any big city in Eritrea, or even in a popular spot, or under the shade of the largest tree in a very remote village. There would be three judges, often well over 45 years of age, dressed in original attire, at least one of whom

would be a woman. These places are routinely visited by residents of the jurisdiction of the court, and passers-by may stop for a few minutes to see what is going on since they may know the arguing parties, who may be their relatives or neighbors. They may also know the three judges and probably even attended the meeting in which they were voted into office. It is not considered a breach of courtroom decorum for the passer-by to greet the judges and the arguing parties. If interested in the case, passers-by can wait and see if they can be of help in settling the dispute. Occasionally, the judges press the parties to resolve the dispute amicably. Passers-by can be asked to voluntarily intervene in the conciliation together with some other volunteer mediators. The judges can also be, and usually are, part of the mediating (conciliating) team. The settlement process does not consist in hard-and-fast mediation or conciliation. Community court judges and other persons who participate in the dispute settlement process may take on the role of mediators, conciliators or negotiators, as fits the circumstances. It must be noted that, in this article, the terms “conciliation”, “mediation”, “compromise”, “peaceful settlement” are used interchangeably, without reference to their conceptual difference, generally to refer to the means by which the parties to a dispute peacefully settle their matters outside of the court’s formal process.

The judges may ask the disputants to select — or the judges may appoint — elders and/or relatives of the disputants to settle the case peacefully out of court. Whether it is the judges of the community court or other individuals requested to mediate or conciliate the disputants, the judges, given that they live close to the parties, are available at any moment for discussion. The complainant may finally be persuaded to receive some form of compensation from the defending party, which would be acceptable to the customary law and tradition prevailing in that district or village. These include covering costs of medication of an injured plaintiff, compensation in the form of money, cattle, cereals, a determined size of traditionally woven cloth, honey, butter, salt, stew spices or other commodities, and a public apology to the victim and his or her family, often in front of village elders, religious leaders or the mediators/conciliators. Of the cases brought to community court judges in January 2004 to mid-2009, over 57 percent were settled in this manner.

If the parties fail to settle their dispute amicably, the community court judges, given their adjudicative powers under Proclamation 132/2003, will proceed with the trial process and issue a judgment based on the relevant provisions of substantive laws such as the *Transitional Civil Code of Eritrea 1991* (TCCE), the *Transitional Penal Code of Eritrea 1957* (TPCE) or the Land Proclamation. After a formal judgment has been pronounced, a party aggrieved with such judgment can make an appeal to the appropriate regional court.

### **3.2 Level of restoration of customary laws for use in community courts**

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The Eritrean Government has taken an ambiguous position towards the restoration of customary law. On the one hand, by Proclamation Number 2 of 1991, the Government has not repealed Article 3347 of the *Civil Code of Ethiopia 1960*, which provides that customary laws are not to be used as substantive laws in resolving disputes.<sup>22</sup> On the other hand, with the creation of community courts, customary laws are tolerated for reaching compromises between litigants, although not explicitly allowed by Proclamation 132/2003. It may be concluded that the Government of Eritrea has not officially revived the use of customary laws in resolving legal disputes brought to any court, but seemingly, the government does not oppose the use of customary laws in the amicable resolution of disputes undertaken by the community courts.

### **3.3 Standards for evaluating community courts**

Over the past six-and-a-half years, community courts have played a positive role in Eritrea as shown by statistical reports, the government’s decision to further expand their jurisdiction and the increase in interest of the international community to support them. It emerged that they have served as an essential tool in furthering peaceful, out-of-court dispute settlements, in preserving customary dispute resolution mechanisms and in easing the burden of higher courts. The

institutional set-up and functions of community courts in Eritrea are evaluated below, according to the following four standards:

- enhancement of popular participation;
- guarantee of the representation of women and protection of their rights;
- tackling of barriers to justice; and
- achievement of out-of-court settlements.

### 3.3.1 Popular participation in the establishment of community courts

A key method employed in the establishment of community courts to enhance the participation of Eritrean communities in the judicial process is the direct election of community court judges by the people.<sup>23</sup>

Under Article 53 of the *Eritrean Constitution 1997*, a Judicial Service Commission will be established by law to advise the President of Eritrea on the appointment of judges, supervise their working conditions and give its opinion on these matters. The President shall appoint judges who hold offices after confirmation of their appointment by the National Assembly. The Judicial Service Commission has not yet been established, however. To date, the prevailing legislation on the appointment of judges (Proclamation 1/1991 to Establish Transitional Institutions for the Administration of Justice in Eritrea), provides that judges of the various levels of courts shall, depending on the level of the court, be appointed by the Government of Eritrea (interpreted to mean the President of Eritrea) or by the President of the High Court (now President of the Court [Bench] of Final Appeal). The process of electing community court judges into office by the people may therefore undergo a constitutional test under the Constitution's general principles for the appointment of judges.

Nevertheless, election is one of the most effective instruments in controlling the accountability of officials in the various branches of the government. While the wisdom of appointing judges into office may be questioned if viewed from the perspective of countries where judges are appointed by the executive and confirmed by the legislative body,<sup>24</sup> the advantages of a direct election of judges to enhance popular involvement and a sense of local ownership in the state legal system are self-evident.

There are no specific rules in Proclamation 132/2003 applicable to the election of community court members. Although the lack of uniform election rules has its disadvantages,<sup>25</sup> this was intended to allow each community to resort to its customary process of electing community leaders and judges. The Eritrean communities have always observed their respective norms and rituals for electing customary law judges, called *chQa Addi* or *dagna Addi*,<sup>26</sup> and Proclamation 132/2003 merely requires that judges of the community courts be elected by the respective community. Such practice has brought proximity between the people and the judicial process.

The participation of the people at the beginning of the establishment of the community courts by the election process is also ensured throughout the term of office of the judges, since the latter involve members of the community in the numerous mediation/conciliation processes that dominate the functions of community courts.

### 3.3.2 The representation of women in the community courts

A notable achievement of the establishment of community courts from a gender perspective is the representation of women on the bench. Although not specifically required by Proclamation 132/2003, in practice it is expected that at least one of the judges of the community courts be a woman. In a country where women were not elected as village judges, this is a groundbreaking step in securing women's interests. Tables 1 and 2 show the male-female distribution of community court judges in the 2003 and 2008 elections.<sup>27</sup>

**Table 1. Male-female distribution of community court judges during the first election (2003)**

Region	Total number of judges	Gender		Percentage of women judges
		Men	Woman	
Center	165	118	47	28.5
South	639	452	187	29.3
Anseba	327	274	53	16.2
Gash Barka	531	465	66	12.4
Northern Red Sea	294	260	34	11.6
Southern Red Sea	90	67	23	25.6
<b>Total</b>	<b>2,046</b>	<b>1,636</b>	<b>410</b>	<b>20.0</b>

As a result of the policy of women's participation in community courts, from 2003 to 2008, the number of women community court judges increased by 8.4 percent.

**Table 2. Male-female distribution of community court judges during the second election (2008)**

Region	Total number of judges	Gender		Percentage of women judges
		Men	Woman	
Center	108	72	36	33.3
South	350	227	123	35.1
Anseba	135	115	20	14.8
Gash Barka	282	186	96	34.0
Northern Red Sea	171	150	21	12.3
Southern Red Sea	15	10	5	33.3
<b>Total</b>	<b>1,061</b>	<b>760</b>	<b>301</b>	<b>28.4</b>

The presence of women in community courts is of paramount importance both to women litigants and to women living in various communities. First, it strengthens the Government's policy to ensure access to all offices and occupations on a gender-equal basis. Second, arguably the presence of a woman in a community court gives a woman litigant an advantage because the woman judge may be more understanding to women-specific issues, such as child maintenance, than her male colleagues. Finally, the presence of a woman judge in the community court may encourage women litigants to bring their cases before the court, especially in a society where women have been traditionally barred from accessing justice directly.

### 3.3.3 Tackling barriers to justice

The Commission on Legal Empowerment of the Poor asserted that "at least [four] billion people [in the world] are excluded from the rule of law."<sup>28</sup> Carothers states that the current "rule-of-law orthodoxy" that focuses on nationally applicable formal laws and procedures, usually not understood by the wider public, could not effectively create efficient access to justice for the people, especially the poor.<sup>29</sup> Golub writes that this top-down approach needs to be replaced by what he and other scholars dub the "bottom-up approach" to create better access to justice and empower the poor.<sup>30</sup> Access to justice and legal empowerment<sup>31</sup> of the poor have become the core standards for measuring the newly emerging bottom-up approaches to legal services, especially after the common barriers to justice have started to be identified.<sup>32</sup> These barriers are geographical distance, financial obstacles, language, cultural norms, delays, and the complexity of laws and procedures.<sup>33</sup> The establishment and functioning of community courts will be discussed below in light of their contribution to tackling the above-mentioned barriers to justice.

#### *Distance*

The dearth of legal professionals both in and outside the judiciary has become a serious impediment to the Ministry of Justice's desire to expand its outreach by extending its services to remote towns



and villages in Eritrea. Today, there are only 36 regional courts in Eritrea. Previously there was only one High Court, in the capital Asmara; however, after years of efforts, the Ministry of Justice established four new High Courts – one in Anseba Region, two in Debub Region and one in Gash Barka Region.<sup>34</sup> Prior to the establishment of community courts, litigants had to travel long distances, often for two or three days, to reach the nearest sub-regional or regional court.<sup>35</sup>

During the first round of elections, 683 community courts were opened, covering the entire nation.<sup>36</sup> The first three to four years of community court practice have shown that, in some regions, the number of community courts was excessive or some communities continued to resort to more indigenous forms of dispute settlement, such as in the case of the Afar tribe of the southern Red Sea region. Hence, the number of community courts has been drastically reduced to 368 as of 15 April 2010, still a sizable number compared with that of regional and high courts in Eritrea. This has allowed rural people to have easier access to state justice by approaching the community courts near them for the settlement of “daily life” disputes.

### ***Financial barriers***

Linked to the issue of distance is the financial difficulty that the poor face in bringing their cases to court, specifically the costs of travel to the courts and lodging. There would be substantial savings in litigation-related expenses for the poor if they were allowed to litigate in courts near their homes, without having to pay for an attorney and by making simple applications.<sup>37</sup> Statistics show the success of community courts in amicable dispute settlement and this has in turn greatly reduced the expenses that the litigants would otherwise incur if they were to make appeals to regional courts and high courts.

### ***Language***

Language is the third barrier in securing access to justice. Eritrea is a nation of nearly five million people divided into nine major ethnic groups,<sup>38</sup> each speaking its own language.<sup>39</sup> Although the judicial service is crucial to the daily lives of a given nation's people, appointing a judge to serve in a community who is unfamiliar with its traditions, language or way of life is a difficult barrier to his or her efficiency. Judges and prosecutors appointed to work in regional and high courts in Eritrea very often meet parties who have a different tradition and language.<sup>40</sup>

Since community court judges are elected from the community in which they live and work, and whose language they speak, this indubitably reduces the estrangement often felt between courts and litigants in Eritrea. The proximity between community court judges and litigants is one of the factors contributing to the high number of quick and peaceful dispute settlements in these courts.

### ***Complexity of laws and procedures***

Community courts were required to follow the most basic procedures contained in the TCPCE and TCRPCE.<sup>41</sup> The wholesale application of the procedures contained in these codes to the community court litigations would have created proceedings not easily understood by the common citizen. As noted throughout this chapter, the emphasis of community court procedures is to immediately resort to out-of-court settlement. The fear of losing a case due to lack of knowledge of the substantive and procedural laws is greatly reduced in community courts, which encourage such settlements as part of their way of operating.

### ***Cultural norms***

Barriers to justice based on cultural norms include the tradition common to some societies where taking a case to the court or seeking remedies from courts is considered dishonorable, an embarrassment to community elders, or a sign that the community is unable to handle its problems.<sup>42</sup> In remote Eritrean villages, there is still the tendency — arising from the belief that community courts are like the other courts in all aspects — to resolve disputes, including murder cases, by the village elders. However, people have increasingly been encouraged to approach community courts because in the majority of cases people who are knowledgeable of customary

laws are elected into the community courts, hence the high probability that cases that go to the community courts will be settled under customary practices.

### 3.3.4 Achieving out-of-court settlements

As previously noted, community courts place great emphasis on out-of-court dispute settlements. Table 3 shows that from January 2004 to mid-2009, a total of 117,586 cases were brought to the community courts, out of which approximately 57 percent were settled by a compromise between the parties and 31 percent decided by judgment of the community courts, with 11 percent pending.

**Table 3. Preliminary report of all cases (civil and criminal) brought to community courts from 2004 to mid-2009.**

Year	Total no. of cases	Decided (%)	Settled without trial total (%)	Pending by the end of the year (%) <sup>43</sup>
2004-2006	60 333	20,246 (33.5)	37,326 (61.9)	2,761 (4.6)
2007	23 845	6,787 (28.46)	12,316 (51.65)	4,742 (19.89)
2008	22 673	7,078 (31.22)	11,972 (52.80)	3,623 (15.98)
Mid-2009	10 735	2,611 (24.32)	5,845 (54.45)	2,279 (21.23)
<b>Total</b>	<b>117 586</b>	<b>36,722 (31.22)</b>	<b>67,459 (57.36)</b>	<b>13,405 (11.40)</b>

Sources: E A Elobaid and S W Andemariam, Evaluation Report: UNDP Eritrea, Capacity Building in the Justice Sector, 41; Community Courts Chief Coordination Office of the Ministry of Justice.

A key element in the high percentage of cases being resolved out of court by community courts is that the community court judges, being part of the community of the litigants, know the parties well and are well known to them. There is a higher probability that relatives and community elders are involved and also that the litigants live in the same village or district. Hence, there are more chances of personal interaction.

An interesting question arising from the high number of disputes settled out of court by community courts is whether the plaintiffs or complainants, especially women, are being excessively pressured not to pursue their claims for judgments under national laws. Or in the extreme of cases, could some community courts be putting too much emphasis on out-of-court settlement due to the fear of a reversal of their judgments by the higher courts which are more knowledgeable of national laws? A useful approach to respond to these and related questions would be that community court judges be further trained in courtroom procedure,<sup>44</sup> including voluntary reactions of litigants to out-of-court settlements. A comprehensive statistical report on the quality of such settlements could then be conducted.

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Non-community courts also frequently push for a compromise between the litigants and thus a withdrawal of the dispute.<sup>45</sup> Community court judges however, are expected to serve the litigants and they see themselves as facilitators of a compromise between the litigants. The first action that community courts take is to guide the parties towards a compromise. In a system like the Eritrean community courts however, the mediators (the community court judges in this case) can also refer to national law to pass executable judgments, which may convince both parties to resort to compromise. Thus, the community court system arguably strengthens the state legal system by allowing speedy case resolution through mediation and by simultaneously extending the jurisdiction of national law, which applies when parties fail to mediate.

## 4. Further strengthening of community courts

Seven years of experience of community courts show that the community court system tends to ensure access of the wider population to basic judicial service and peaceful settlement of disputes. An April 2007 evaluation of the community courts recommended further support to

and strengthening of the community courts.<sup>46</sup> The plan to strengthen community courts required financial assistance. The United Nations Development Programme (UNDP) had assisted the community court plan as part of its Capacity Building in the Justice Sector project. On 2 September 2009, the European Commission and the Government of Eritrea signed a Country Strategy Paper and National Indicative Programme for 2009-2013, whereby the former agreed to provide the latter with a financial assistance of €122 million.<sup>47</sup> Part of the amount, €9.7 million, will be earmarked for strengthening the community courts. The following is an analysis of some of the activities in progress to strengthen community courts and other steps that need to be taken to achieve this.

#### 4.1 Expanding jurisdiction of community courts

During a national meeting of the Ministry of Justice and its stakeholders in May 2007, a review of the 2004-2006 activities of the community courts was presented and discussed. Among the various recommendations was that, given the achievements of the community courts, the jurisdiction of community courts should be expanded to include more cases. If community court judges can be further trained on national laws, there is a general agreement that adding more cases to their jurisdiction can serve the greater goals of access to justice and peaceful settlement of disputes.

An overall plan has been in progress at the Ministry of Justice to review the jurisdiction of the three levels of courts with original jurisdiction — community courts, regional courts and high courts. A pyramidal structuring of jurisdiction whereby the majority of cases would begin at the lower level courts and the few, complex cases would be brought to higher level courts can relieve congestion of cases in the higher courts, allowing judges more time to study cases and carry out research in order to deliver refined judgments. The standard that must apply for adding more cases to the original jurisdiction of community courts is to select cases related to the day-to-day lives of communities and those that are socially relevant.

Draft legislation on the adjustment of jurisdiction of Eritrean courts is now completed. If the legislation passes, the community courts' jurisdiction will be expanded to comprise a number of civil causes including: family disputes, abuse of ownership leading to nuisance, right of way, publication of succession rights, repair of a wall or a building, lost objects or stray animals, abuse of ownership, and the use of rainwater and its flow to lands on low levels. Criminal disputes including defamation and insult, failure to provide financial support to family members, infringement of the right to privacy, damage to property caused by herds or flocks, and disturbance of possession of private or public property will be under the original jurisdiction of community courts.

The current legislative proposal to add more cases to the primary jurisdiction of community courts should be implemented under the condition that community court judges receive more training in national law. It is also important that judges of the community courts be literate.

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#### 4.2 Term of office and literacy

A number of reviews of the activities of community courts have indicated that the two-year term of office of community courts can thwart the progress of the courts if the judges have to sit for election every two years.<sup>48</sup> This problem is further highlighted by the concern that the huge expenses involved in training community court judges can be futile if the trained judges work for two years and fail to be re-elected. However, the Ministry of Justice responds that the failure to be re-elected can be an asset because regular installation of new judges leads to more people with legal training in the localities, which can be an essential tool in disseminating knowledge of the law to families and neighbors in the community. The draft legislation proposes to balance these two legitimate arguments by extending the term of office of community court judges to four years.

Officers at the Community Courts Chief Coordination Office of the Ministry of Justice state that in a few community courts, none of the judges are literate and must receive assistance by students

in the communities for writing functions. The Ministry of Justice has started to place graduates of a one-year, college-level law training as assistants to community courts. The trainees will assist the community court judges not only in writing court decisions and keeping court files, but also in helping the judges understand relevant national laws that need to be referred to in delivering judgments. Moreover, the draft legislation on the adjustment of jurisdiction of courts provides that at least one of the three judges in each community court must be able to read and write.

#### **4.3 Clarity in the use of customary laws**

The extent to which customary law can be used in deciding on a given issue must also be clearly spelled out in the future. A notable uncertainty in the operations of community courts is the status of the customary laws of Eritrea. Currently, the use of customary law as a source of law for delivering judgments is prohibited by the national laws, specifically art 3347(1) of the TCCE. Proclamation 132/2003 does not contain an explicit provision allowing community courts to refer to local traditions or customary laws for any purposes. However, perhaps owing to their background, in a short time, judges of community courts have developed the tradition of referring to customary laws in reaching a compromise between disputants. To this end, any subsequent legislation on community courts needs to be specific on how, if, when and to what extent community courts can refer to local traditions or customary laws in deciding on a case.

#### **4.4 Issues for further research**

The increased rate of out-of-court dispute settlements, close to 60 percent, may also be a cause of concern. Documents at the Community Courts Chief Coordination Office of the Ministry of Justice do not reveal if the wronged parties, especially women, under the pretext of peace-making with the wrongdoer and respect to the community, were put under pressure not to proceed with court action. The proposal to add more cases to the primary jurisdiction of community courts can lead to more cases being settled without resort to national laws, something that could lead to inadequate redress for the wronged party. Research should therefore be conducted on this issue.

Moreover, a more complete review of the achievements of community courts needs to be supported by advanced statistical data. At present, for example, there is no data regarding the percentage of cases appealed to regional courts against the judgments of community courts and how many of the appealed cases were upheld, modified or reversed. The assessments of the higher courts on the soundness of the judgments of community courts need to be collected in order to further integrate both court systems. Furthermore, perspectives of community court users, especially in the rural areas, need to be studied.

### **5. Conclusions**

**126** Community courts, as opposed to the previous post-independence institutions of village courts and *shmagle erqi*, have recorded positive achievements in ensuring the administration of justice at the village and district levels. The democratic means of establishing each community court through election has brought the Eritrean communities closer to the judicial service and allowed them to monitor the courts' transparency. Electing women in each community court is another asset of the community courts because it contributes to national efforts to ensure greater emancipation of women and their involvement in the judicial process.

The mixed nature of community courts, i.e. their application of national laws in delivering judgments while simultaneously referring to local customs and indigenous laws in settling disputes out of court, enables them to act as a conduit between customary and national laws. Therefore, they may be used as effective tools for preserving the nation's rich pool of customary laws as its heritage and for disseminating knowledge of national laws to the local arena. The high level of participation of community members in peaceful dispute settlements led by the community courts in their vicinity brings societies, rich and poor alike, closer to the judicial service.

Community courts have also played their role in the legal empowerment of the poor. The concept of legal empowerment of the poor includes *inter alia*, encouraging them to resort to informal justice systems by involving religious authorities, local authorities and other local procedures.<sup>49</sup> In this sense, community courts have involved a variety of intermediaries and conciliators in their efforts towards out-of-court dispute settlement.

## footnotes

- <sup>1</sup> The Proclamation was issued in Tigrigna, the predominant literary language in Eritrea, and Arabic. The way languages are used for issuing legislations in Eritrea varies. The tradition involves a mix of legislations issued in Tigrigna only, in English only, in Tigrigna and Arabic, or in Tigrigna, Arabic and English. No legislation has thus far been issued in Arabic only. There is no official language in Eritrea, although Tigrigna and Arabic dominate official texts and government legislations. The Eritrean Constitution of 1997 states that all Eritrean languages are equal. For purposes of this article, all citations of the Tigrigna-issued Proclamations 132/2003 and 133/2003 are the author's own translations.
- <sup>2</sup> Literally translated, the title of the Proclamation would be "A Proclamation Issued to Establish Community Courts". Some documents of the Ministry of Justice, for example, those from the Office of Coordination of Community Courts, cite the Proclamation as the "Community Court Establishment Proclamation". For purpose of easiness, the author will refer to the legislation as "A Proclamation to Establish Community Courts" or "Proclamation 132/2003".
- <sup>3</sup> The Proclamation does not contain a statement of objectives or a preamble. The author continuously referred to these two objectives during his community court-related experiences (mentioned in above n 1), including his initial work in preparing the current draft legislation to revise the jurisdiction of Eritrean courts.
- <sup>4</sup> M.B. Hagos, *Hgtat endaba bmentsr zemenawi hggi ntsotawi me'arnet* (Laws of the Forefathers in View of Modern Law for Gender Equality) (2009) 284-285. Hagos provides a list of 27 customary laws of Eritrea, 23 written and four non-documented, applied throughout the country.
- <sup>5</sup> The name commonly used to refer to customary laws in the various Eritrean communities, *Hggi endaba*, is translated to mean "laws (rules) of the forefathers".
- <sup>6</sup> Z. Estifanos, W Abraham and G Ghebre-Meskel (compilers), *Codes and Bylaws of Eritrean Regions and Counties* (1990) 207, 463. All citations from this compilation are translations of the Tigrigna version in which the compilation was prepared.
- <sup>7</sup> This is evidenced by long lists with names and villages of the legislators involved, presented at the beginning or end of the respective customary laws. See, for instance, *ibid* 14-18; 113-114; 217-219, 346-347 and 399-400.
- <sup>8</sup> For example, the final 1943 version of the customary law of *Loggo Chwa* took two years to amend. See Estifanos, Abraham and Ghebre-Meskel, above n 6, 219.
- <sup>9</sup> Hagos, above n 4, 21-279. Hagos describes in detail the similarities and differences in the rules applicable to various legal concepts (personality, betrothal and marriage, divorce, property, paternity and maternity, maintenance, successions, contracts, various types of crimes and compensation) as contained in 27 customary laws of Eritrea while simultaneously referring to corresponding provisions in national laws, particularly the Transitional Codes. For example, the introduction of the 1943 amendment to the customary law of *Loggo Chwa* contains an acknowledgment and gratitude to *The Honorable Azmatch* [title] *Tesfay Beraki*, originally from *Loggo Chwa*, who "despite being an official sent to *Meraguz* [a district where the customary law of *Adkeme-Mlga'e* prevails], assisted his heartiest friend, *The Honorable Blatta* [title] *Kahsay Malu* [one of the legislators of the customary law of *Loggo Chwa*], by giving his advice in writing and thus enabled the customary law of *Loggo Chwa* to rise high". Estifanos, Abraham and Ghebre-Meskel, above n 6, 219.
- <sup>10</sup> Estifanos, Abraham and Ghebre-Meskel, above n 6, 15-465. These conclusions can be drawn from the various procedural and substantive laws of Eritrean customary laws compiled for reference and study purposes.
- <sup>11</sup> C.C. Rossini, *Principles of the Customary Law of Eritrea* (1916) 34-210.
- <sup>12</sup> Referenced in Estifanos, Abraham and Ghebre-Meskel, above n 6, 112. The Preamble to the 1944 amendment to the customary law of *Adkeme-Mlga'e*, for example, contains this paragraph: Now that the Most High God has allowed us to write and publish whatever is available [on the law of *Adkeme-Mlga'e*], we call upon our descendants coming after us to hone, update and expand this law over the foundation we have laid. It is easier to amend an existing law than to create a new one. First came the Old Testament and then were written the Gospels in perfect light; and so do we all bless our descendants who will come after us to renew and purify these laws in strict conformation to the manner of our laws.
- <sup>13</sup> The Eritrean People's Liberation Front (EPLF), the revolutionary front that liberated Eritrea in 1991, established the Provisional Government of Eritrea. In February 1994, the EPLF renamed itself the People's Front for Democracy and Justice (PFDJ) as part of its transformation into Eritrea's ruling political party.
- <sup>14</sup> This is a vague expression. In practice, however, it is interpreted to mean that the candidate for a community court position must have completed, or be exempted from, the compulsory national service.
- <sup>15</sup> Proclamation to Establish Community Courts, art 9.
- <sup>16</sup> Proclamation 58/1994, the Land Proclamation, as also later reflected in the *Constitution of Eritrea 1997*, declared the principle that all land in Eritrea belongs to the State and that a person may only have usufructuary rights on land allotted to him or her by the Government of Eritrea. The legislation also states that the Government of Eritrea will allocate land for industrial and agricultural purposes. A person to whom a plot of land has been allotted has the right to fence and mark the borders of such land, to require the cutting of branches and roots from an adjoining land and to protect such land.
- <sup>17</sup> These are contained in arts 552, 649(2), 650(1), 794 and 798 of the TPCE respectively. All of these offences, except intimidation (art 552) were previously under the jurisdiction of the village courts. See s 1.2.
- <sup>18</sup> If the regional court confirms the judgment of the community court, then the case is closed. If the regional court reverses the judgment of the community court, then the party that had won at the community court level can make an appeal to the High Court. The decision of the High Court is final for all parties.
- <sup>19</sup> In September 1991, the then Provisional Government of Eritrea issued Eritrean Gazette Volume 1, which contained eight transitional proclamations. Except for Proclamation 1/1991 (the Proclamation to Establish Transitional Institutions for the Administration of Justice in Eritrea), these Proclamations (Transitional Civil, Penal, Civil Procedure, Criminal Procedure,

Commercial, Maritime Codes of Eritrea and the Transitional Labour Law of Eritrea) were issued by including essential amendments to the same laws previously in force by the Ethiopian Government. With the exception the Transitional Labour Law of Eritrea, which was replaced by Labour Proclamation No. 118/2001, they have been in force up until today. Drafting of the new Civil, Penal, Civil Procedure, Criminal Procedure, Commercial and Maritime Codes of Eritrea as well as a new Evidence Code of Eritrea (drafted by the author of this chapter) has been completed and their official enactment is expected.

**20** Proclamation to Establish Community Courts, arts 5(2)-(7) and 6.

**21** Ibid art 8(5).

**22** The *Ethiopian Civil Code 1960* was amended by Proclamation Number 2 of 1991.

**23** An interesting critique of the wisdom of appointing judges and the ensuing disadvantages can be found in K. Malleson and P.H. Russell (eds), *Appointing Judges in An Age of Judicial Power: Critical Perspectives From Around the World* (2006).

**24** Recall, however, that in some countries with the most advanced and powerful judiciaries, certain judges are elected by the people. With respect to the election of U.S. state judges:

*Unlike federal judges, who are appointed by the president with the Senate's approval, state judges come to the bench in a variety of ways. Some judges are appointed by state governors and, after a period of time, stand for elections. Other judges are elected from the beginning. Sometimes these elections are contested and partisan; often they are not. In recent years states have tried to improve the quality of state and local judges by creating panels of qualified lawyers from which state governors choose the judges they appoint.*  
– Microsoft Corporation, *United States Government*, Encarta 2009.

**25** A notable disadvantage is that the election process may select judges that do not fairly represent the communities that have elected them. Although, unlike the legislative body, community court judges are not expected to be elected to represent fairly the various communities in which they serve, the legitimacy and acceptability of these judges is undeniably bolstered if the communities that have elected them feel that the three judges represent fairly the composition of the community. Even in systems where judges are appointed by the executive and confirmed by the legislature, the appointment of judges is carefully undertaken to reflect the political, social, economic, racial and religious composition of the respective countries. See the following for an analysis of the U.S. experience in appointment of U.S. Supreme Court judges: A. Liptak, 'Stevens, the Only

Protestant on the Supreme Court', *The New York Times*, (New York) 10 April 2010 <<http://www.nytimes.com/2010/04/11/w/ee/kinreview/11liptak.html>> at 7 January 2011. Another disadvantage is that there are no uniformly explicit rules regulating the lodging of electorate complaints against the fairness of the election process. However, resorting to an election process traditionally familiar to each Eritrean community has greatly ameliorated any such grievances.

**26** Literally translated, the Tigrigna phrases *chQa Addi* or *dagna Addi* mean, respectively, "mud of a village" or "judge of a village". The origin of the phrase *chQa Addi* is interesting because the office of the judge is equated to mud, a substance that is treaded equally by everyone, weak or strong. By this expression, the community wants the village judge to think that he has been appointed to treat everybody in the community without distinction. In fact, when the village elders plead a person to be their village judge, they tell him (village judges have always been men) that they want him to be like the *goduf* (dumping ground) of the village. This is a figurative expression used to ask the judge to be patient to patiently hear and settle the wrongs of the community as one would dump all his wastes to a dumping ground.

**27** Although by law the election of community court judges had to be conducted every two years, logistic and other challenges led the Ministry of Justice to suspend the second election, due in 2005, until 2008, when the second round of elections were conducted.

**28** Commission on Legal Empowerment of the Poor and UNDP, *Making the Law Work for Everyone*, Report Volume 1 (2008) 3; See also M. De Langen and M. Barendrecht, 'Legal Empowerment of the Poor: Innovating Access to Justice' in G Rizvi and J. de Jong (eds), *The State of Access: Success and Failure of Democracies to Create Equal Opportunities* (2009), 262 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1355446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1355446)> at 7 January 2011.

**29** Ibid 260. Carothers challenges the three types of reforms intended to create access and empower the poor: "Revising laws or whole codes to weed out antiquated provisions [...] ... the strengthening of law-related institutions, usually to make them more competent, efficient, and accountable [...] and] reforms aimed at the deeper goal of increasing government's compliance with law. A key step is achieving genuine judicial independence."

**30** B. van Rooij, 'Bringing Justice to the Poor: Bottom-up Legal Development Cooperation' (2009), 8, SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1368185](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368185)> at 7 January 2011.

**31** The World Bank uses the term "justice for

the poor" and has developed a program to this end. The World Bank explains the program as:

*an attempt by the World Bank to grapple with some of the theoretical and practical challenges of promoting justice sector reform in a number of countries in Africa and East Asia. Justice for the Poor reflects an understanding of the need for demand oriented, community driven approach to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized as women, youth and ethnic minorities.* Ibid 7-8.

**32** The Eritrean Ministry of Justice holds that one of the goals of the community courts is to enhance access to justice by the poor and their participation in legal proceedings. E.A. Elobaid and S.W. Andemariam, *Evaluation Report: UNDP Eritrea, Capacity Building in the Justice Sector Project No. 00035786* (2007) 13-14 <<http://erc.undp.org/evaluationadmin/reports/viewreport.html?sessionId=3E3C7E107171C88DC7ABB29DCE5B8DF6?docid=1314>> at 7 January 2011.

**33** Langen and Barendrecht, above n 28, 254-256.

**34** The High Court in Asmara has two benches presiding over civil matters, one over commercial matters and one over criminal matters, both of which sit as courts of first instance and as appellate courts for cases appealed from regional courts in the central region of Eritrea. Moreover, there is a panel of five judges in the Asmara High Court building constituting the Court (Bench) of Final Appeal, which is the highest court of the land.

**35** The author of this article is witness to this situation. When serving as judge at the courts in the cities of Massawa and Ghinda'e in 2001, there were litigants who would come from the cities of Gele'alo and Af'abet after travelling for two to three days, some on camels.

**36** Ibid 13.

**37** It should be noted, however, that the court fees payable for opening a civil case continue to apply to files opened before the community courts, another indication that community courts are part of the formal judicial structure. Court fees are governed by the Legal Notice No. 177 of 1952, otherwise known as Court (Fees) Rules of 1952, which were issued as part of the various Rules of Court enacted to further implement Proclamation No. 2 of 1942, the Administration of Justice Proclamation. In 1991, the Provisional Government of Eritrea proclaimed that the Court (Fees) Rules of 1952 should continue to be in force.

**38** These are Tigrigna, Tigre, Saho, Afar, Blin, Kunama, Nara, Hdarb and Rashaida.

**39** These are Tigrigna, Tigre, Saho, Afar, Blin, Kunama, Nara, Bdawijet and Arabic for the Tigrigna, Tigre, Saho, Afar, Blin, Kunama, Nara, Hdarb and Rashaida ethnic groups,

respectively. For a more detailed profile of the country, see <<https://www.cia.gov/library/publications/the-world-factbook/geos/er.html>> at 7 January 2011.

<sup>40</sup> In his practice as a judge in a predominantly Tigre-speaking region, the author of this article, coming from a Tigigna background, encountered language problems in communicating with Tigre-speaking litigants. The use of interpreters often made the proceedings tiring and complex.

<sup>41</sup> Instead of stating the obvious that community courts must follow the TCPCE and TCRPCE, Proclamation 132/2003, Issued to Establish Community Courts included the most fundamental elements of these procedural codes in the text of the legislation allowing each community court judge to easily preside over the cases brought to his or her bench.

<sup>42</sup> Langen and Barendrecht, above n 28, 255.

<sup>43</sup> Hence, to give a clear picture of the statistics, cases that have not been decided by the end of 2007, for example, might be added to the cases decided or settled out of court in 2008, or possibly transferred to 2009 if not decided in 2008. However, in all tables indicating the number of cases brought to community courts, the total number

indicated as heard in a given year includes the ones transferred from the previous year. For example, the reported total of 22,673 cases brought to community courts in 2008 include the 4,742 cases identified as pending by the end of 2007. However, statistics do not show how many of these cases were decided by the end of 2008. Therefore, it is not clear if some of them were still pending by the end of 2008 and therefore to be indicated as transferred to 2009.

<sup>44</sup> In his joint evaluation of the 2004-2006 functions of community courts, the author of this article visited a number of community courts and had access to their court records. Compared with records kept by the other courts, community court records lack depth, arguably owing to the judges' inadequate training in national laws and court procedures. Further, it is difficult to obtain complete information of the entire process solely from their records.

<sup>45</sup> Article 275(1) of the TCPCE states that "A compromise agreement may at any time be made by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them."

<sup>46</sup> Elobaid and Andemariam, above n 32, 30.

<sup>47</sup> *Eritrea-European Community: Country*

*Strategy Paper and National Indicative Programme for the Period 2009-2013* (2009) Social Science Research Network <<http://www.deleri.ec.europa.eu/whatsne/CSP-NIP-2009-2013.PDF>> at 7 January 2011; *PE/2009/8686 C (2009) 9149: Commission Decision of 25 November 2009 on the Annual Action Programme 2009 in favour of Eritrea to be financed from the 10<sup>th</sup> European Development Fund* (2009) Europe Aid <[http://www.ec.europa.eu/europeaid/documents/aap/2009/aap\\_2009\\_eri\\_en.pdf](http://www.ec.europa.eu/europeaid/documents/aap/2009/aap_2009_eri_en.pdf)> at 7 January 2011; *New EU support programmes to foster poverty alleviation in Eritrea* (2009) Europe Aid <[http://www.ec.europa.eu/europeaid/documents/aap/2009/pr\\_aap\\_2009\\_eri.pdf](http://www.ec.europa.eu/europeaid/documents/aap/2009/pr_aap_2009_eri.pdf)> at 7 January 2011.

<sup>48</sup> These reviews include comments given by judges and public prosecutors during the presentation in April 2010 of the draft legislation to amend Proclamation 132/2003. Expansion of the term of office of community court judges from two to four years is also a precondition for the EU assistance program mentioned at the beginning of this article.

<sup>49</sup> Langen and Barendrecht, above n 28, 264.





## Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia

Janine Ubink\*

### Introduction

For the majority of poor people living in developing countries, customary law provides the most accessible justice system. Their disputes are dealt with in a plethora of local dispute settlement institutions from family elders to the more formalized chief's courts. Ever since the colonial period, governments have been forced to recognize the pervasive nature of customary justice systems and their importance for the people. This has led to policy questions regarding recognition of customary law and institutions, possibilities to supervise the application of substantive and procedural customary norms, and attempts to modernize or prohibit certain customary practices. More recently, agents in the field of legal development cooperation have increasingly begun to realize the pervasiveness of customary justice systems and their importance to the poor. Combined with new insights regarding the limited impact of reforms in the state justice sector on the majority of the poor, this has led to a marked increase in access to justice and legal empowerment programs that aim to build on the positive elements of customary justice systems for their benefit.

A common problem that both governments and legal development agencies encounter is the unwritten nature of customary law. Due to its oral nature, customary law is flexible and thus offers a high level of discretion to dispute settlers. This character trait of customary law is hailed for its ability to respond to rapidly changing social conditions and to take into account the specific circumstances of a case and reach a settlement acceptable to all parties. Notwithstanding these positive aspects, high levels of flexibility may also result in uncertainty and create a susceptibility to elite capture. Since the colonial period, a number of governments – often supported by national or international researchers – have attempted to put parts of customary law into writing with a dual aim: to end the uncertainty and discretion caused by its flexibility; and also, equally important, to come to grips with the content and nature of customary law for their own understanding. Such moves have drawn severe criticism from development theorists stressing the dangers of codification.<sup>1</sup>

This chapter starts with a discussion of the different historical mechanisms that have been developed for recording customary law: codifications, restatements and case law systems. It will analyze and compare their goals and rationales, their methodological requirements, and their possible advantages and shortcomings. Furthermore, the chapter will provide insight into the real effects on the functioning of customary law in countries or areas where such mechanisms have been introduced. It will show that each of these mechanisms has its own dynamics and opportunities, as well as serious drawbacks. The most important weaknesses of the recording attempts are the loss of adaptive capacity as well as the resulting gap between the recorded version and the living customary law.

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\* Janine Ubink is a Senior Lecturer at the Van Vollenhoven Institute, Leiden Law School, the Netherlands. Her areas of specialization include customary law, traditional leadership, land tenure, legal anthropology and legal empowerment. She can be reached at [j.ubink@law.leidenuniv.nl](mailto:j.ubink@law.leidenuniv.nl).

Recently, an innovative approach to recording customary law can be witnessed in certain areas through self-recording by customary groups or their traditional leaders, which has, for instance, been taken in Namibia.<sup>2</sup> To generate new knowledge on the advantages and obstacles of self-recording substantive customary law, this chapter will explore the remarkable activities undertaken from the beginning of the 1990s by the Owambo Traditional Authorities in northern Namibia to arrive at a self-statement<sup>3</sup> of the most important substantive and procedural customary norms, while simultaneously adapting some norms to conform to Namibia's Constitution. How and why did this process take place? Who were the change agents? And which norms ended up on paper? The chapter then presents the impact of this process in one of the Owambo Traditional Authorities, the Uukwambi Traditional Authority. It studies to what extent the new laws are actively propagated, are known by traditional leaders and common villagers, and are seen as customary law. Furthermore, it analyzes how and to what extent the recording of the most important customary norms has had an impact on the functioning of the customary legal system in the Uukwambi Traditional Authority: Have the new norms effectuated behavioral change, and are they enforced by traditional authorities?

Through research data collected in 2009 and 2010 – more than 15 years after the initiation of the process – it becomes clear that the self-statement of customary law prompted certain positive changes in Uukwambi's customary justice system. First, it had a profound impact on the functioning of customary law. Although the self-statement was not comprehensive and only covered the main rules of customary law, it did increase the certainty of the justice system by reducing the level of discretion of traditional courts, especially with regard to sentencing. This aspect was regarded positively by common villagers as well as by traditional leaders. Second, the research data show that the adaptations made were well known and highly effective. The new norm prohibiting “land grabbing” or “widow dispossession”<sup>4</sup> was well-known and implemented. The latter is especially striking when compared with statutory interventions in other African countries to outlaw land grabbing, which have been only marginally successful.

The arguments presented in this chapter draw on field research conducted in the Uukwambi Traditional Authority between September 2009 and February 2010. Data were collected principally through qualitative data collection methods, comprising semi-structured interviews – with women, women leaders, traditional leaders, farmers, governmental authorities, academics, staff of non-governmental organizations (NGOs) – focus group discussions with women and NGO staff, and participant observation of traditional court meetings. In addition, structured interviews on the basis of a survey were conducted in 216 rural households to explore issues associated with legal awareness, perceptions of customary proceedings and the role of traditional leaders in dispute settlement.

## 132 1. Historical attempts to record substantive customary law

Over the years, several mechanisms have been developed that allow for a recording of customary law, with the aim of enhancing clarity and certainty, and reducing the scope of discretion for judges, dispute settlers and administrators. This also reduces the susceptibility to elite co-optation. These mechanisms include codifications, restatements and the gradual recording of customary law through the development of case law. They show various methods and differ in comprehensiveness of their recording efforts. This section will discuss each of these methods' merits and drawbacks, in terms of process and methodology as well as impact on customary justice systems and its users. To this end, it will discuss both theoretical literature and, where available, case studies of the development and use of the recordings in specific countries and areas.

### 1.1 Codification

A code is a most comprehensive and exhaustive binding statement of the applicable law on a particular topic for a particular jurisdiction. Some claim that codification is “the most obvious

solution to the problems of ascertainment ... of customary laws";<sup>5</sup> as it "substitutes order, precision, authority and uniformity for what had previously been confusion, imprecision, doubtful authority and diversity".<sup>6</sup>

The main objective of codification is to stem uncertainty,<sup>7</sup> which has two sources. First, customary laws, being unwritten, depend for their survival and preservation on human memory, which is often unreliable. When adding to this unreliability, the deliberate distortions of the laws by interested litigants or by traditional elites, the result is uncertainty.<sup>8</sup> Second, the uncertainty of customary law is created by the discretion of judges in cases where customary law is contested and in their use of the repugnancy doctrine<sup>9</sup> and other general tests of validity.<sup>10</sup> The uncertainty within customary law is exacerbated by power, wealth and other asymmetries between the parties.

Other aims of codification include unification, simplification and modernization.<sup>11</sup> Although the process suggests nothing more than the reduction of the whole *corpus juris* to the form of enacted law, considerable reforms may be affected as part of this process.<sup>12</sup> When customary rules are discriminatory or biased, for instance, against women, immigrants or youth, codifying them can consolidate or bring a level of authority that is deemed undesirable, which makes a natural evolution towards equality less likely. Thus, in the codification of customary law, modification "would obviously be required where the question arose of reconciling conflicting rules of customary law, of attempting to amalgamate customary and civil law or of abolishing what might be felt to be undesirable or outdated rules".<sup>13</sup> In effect, the process of codification would suggest an evolution from the original customary law to a new system, which, while founded in tradition, is adapted to the needs of a modern state.<sup>14</sup> Bearing this in mind, the development of a codification involves painstaking research, sifting and recording. It involves legal drafting and definite and positive overruling of contrary customary laws.<sup>15</sup>

Many colonial administrators were preoccupied with the codification of native customs, in the hope that it would permit a better understanding of native societies and a better means of controlling them.<sup>16</sup> This was not true for every country, as Shadle shows for Kenya, where colonial administrators themselves resisted codification of customary law because they saw it as a threat to administrative power. They believed that:

[a] crystallized, unalterable customary law would allow them little room to adjust the law in order to control local African courts and, by extension, African societies. In the same way, a non-codified customary law meant that only those who 'knew the African', that is, district officers, could preside over intra-African legal matters. African courts and African life could thus be kept isolated from the overly-technical and arcane judiciary, thought to be illogical to the African minds and thus encourage flouting of the law.<sup>17</sup>

Codifications have met with various objections. The first criticism points to the large variation among the different customary laws within the same country and that it would be almost impossible to record them all and highly difficult to harmonize and codify them into a single customary law that all communities would have to follow. This process would entail the exclusion of many observed customary laws. As a result, the codification is faced with grave problems of credibility and acceptability, and might be completely ignored by many people as not reflecting their rules of customary law.<sup>18</sup> In fact, this is exactly what occurred with Tanzania's experiment with codification of customary laws in the 1960s. This was generally the adoption of one set of customary laws to the exclusion of others. The excluded groups by and large continued to quietly apply their own customary laws in their dealings with each other.<sup>19</sup> According to Bennett and Vermeulen, however, almost any codification will suffer from problems of credibility and acceptability, "because [customary law] is a system of law evolved by the people themselves, [and] any code will quite possibly seem to be an imposition by outsiders".<sup>20</sup>

The second objection is that customary law is in a fluid state, and thus constantly changing; codifying it, it is argued, would mean freezing it and hindering its future developments. Although a code can be kept up to date by amendment, experience shows that changes that have to be introduced by legislative processes often face long delays.<sup>21</sup> Osinbajo warns, however, that a code need not be seen as a complete statement of a particular set of laws, incapable of being added to without the intervention of the legislature. A code may contain inclusionary provisions that may allow for greater flexibility in its use.<sup>22</sup>

A third criticism of codifications is that there is no way of ensuring that the local experts of customary law are reliable. Many authors question the reliability of expert statements about customary law on the grounds that when asked to engage in such an exercise, people are invariably led to invent rules or to make inaccurate statements or subjective interpretations.<sup>23</sup> The difficulty of the process is enhanced by the challenge to find able drafters who will carry out their drafting duties without errors and omissions in an unbiased, professional manner, with an open and positive attitude to customary law.<sup>24</sup> Narebo sees a serious danger of those assigned with the task of codification coloring their findings with their preconceived ideas about a particular customary law.<sup>25</sup>

A number of authors discuss the timing of codification and the issue whether the formulation of law is appropriate in a rapidly developing society.<sup>26</sup> Codification of customary law at such a time may be “too early”<sup>27</sup> or “premature”<sup>28</sup> and “may easily result in extensive discrepancies between law and practice, and in the creation of the undesirable situation of the law becoming obsolescent in comparison with the evolution of legal concepts among a society subject to social and economic change”.<sup>29</sup> Perhaps it would be “wiser to let it evolve its own way, adapting spontaneously to its new socio-economic context, and coming eventually to maturity in the new society it is called upon to reflect and serve”.<sup>30</sup> Some authors are slightly ambivalent, however, such as Pogucki, who questions the appropriateness of codification in a time of rapid change, but at the same time contends that “whenever there is a progress in social and economic conditions legislation becomes imperative”.<sup>31</sup> The fact that the ‘not now’ argument has been made by scholars and administrators ever since independence led Azingo to conclude that the phase of maturity might never come: “it is wrong to create the impression that codification of customary law may become a practical reality at a later date”.<sup>32</sup>

## 1.2 Restatement

Restatement of customary laws refers to the exercise of making an authoritative but non-binding representation of customary law on a particular topic by bringing together and rearranging previous expressions of customary law in a more logical and comprehensive way.<sup>33</sup> Some well-known restatements were undertaken by the *Restatement of African Law* project initiated by the London School of Oriental and African Studies in 1959. The restatements involved bodies of experts on the customary law in the relevant territory, which usually included African court judges, chiefs, elders, young educated community members, and, where possible, women.<sup>34</sup> Detailed restatements were widely circulated and discussed with all those concerned with the administration of law, such as African court judges who did not sit on the expert panel, local administrators, District Councilors, etc.

According to Allott and Cotran, two of the researchers involved in the London restatement project, this work was explicitly undertaken with the purpose to “put into the hands of users a more precise and comprehensive statement of the applicable law, upon which they can rely in their execution of their daily tasks”.<sup>35</sup> It was their contention that administrators of customary law needed to know precisely what it was. Further, those wishing to change it, especially for its unification, harmonization or integration, needed to know the particular customary law that they wanted changed.<sup>36</sup> Thus, a restatement was regarded as a highly desirable means to bring certainty and make the customary law generally known, not so much to the ‘subjects’ of the law – who, according to Bennett and Vermeulen,<sup>37</sup> were relatively cognizant of their customary laws – but rather, to users such as judges and legislators. This should prevent judges from disregarding customary law in cases where they would otherwise have difficulty ascertaining its content. It should also diminish the discretion of judges through the use of the repugnancy clause and other general tests of validity. Furthermore, it

should protect the population against often-unscrupulous individual interpretations by traditional authorities or other locally powerful people.

Restatements have faced various objections, largely comparable to the critique on codifications.<sup>38</sup> First, the many variations of customary law within one ethnic group means that it could take a lifetime to complete the recording of the law of one group; not to mention that of all ethnic groups in a country. There is also the risk of freezing an evolving system with a restatement, which could create “a road block to modernity”.<sup>39</sup> In Uganda, Cotran<sup>40</sup> notes, it was thought unwise to record the customary law since that would “tend to freeze it and hinder its eventual disappearance.” The question of how to select reliable informants is as relevant for restatement as for codification. Shadle<sup>41</sup> shows that in colonial Kenya information provided by elders on customary law in expert panels led to the institution of rules that permanently favored elders to the disadvantage of women and junior men. He furthermore shows that what African court elders who served as law panel members represented as customary law in the panel minutes differed from the customary law they used in actual court cases. In these courts, presiding elders remained committed to a fluid and situational customary law, rather than the more fixed rules in the law panels.<sup>42</sup>

In their 1971 paper, Allott and Cotran attempt to refute the above criticisms.<sup>43</sup> First, they argue that in customary law the variations are more apparent than real, and that there are more similarities than dissimilarities. This response does not, however, deal with the cases where there are variations or contestations of customary law. With regard to the risk of freezing, they state that this would only materialize if the restatement were used as a code instead of as a guide with provisions made for its regular revision. According to Allot:

[j]udges are shown as constantly turning to the Restatement as a guide to the applicable law: at the same time judges show themselves ready to accept supplementary expert evidence which may displace the Restatement account or to rule that social circumstances have changed since the Restatements were originally complemented, or that there are overreaching policy reasons why the Restatement rule should not be applied in a particular case.<sup>44</sup>

This response ignores the fact that the whole reason for the project is the difficulty judges have in knowing the local customary rule. As a consequence of this difficulty, they might not be easily persuaded that customary law has changed. The restatements might thus not be a code *de jure*, but might in time become one *de facto*, which Shadle<sup>45</sup> states has occurred with the restatement of civil customary laws in Kenya. In their response, Allott and Cotran furthermore gloss over the more general fact that where a rule of customary law is written down in a restatement, codification or statute, its contents assume a different character. In disputes located outside state courts, this norm is negotiable and is worked out on a case-by-case basis through a process of bargaining and dispute settlement. Once written down, it becomes rigid and precise, and its application in state courts will be relatively strict.<sup>46</sup> Allott's and Cotran's response to the issue of reliable informants is this: the members of the panel are carefully selected; the restatements are subjected to the independent eyes of persons who do not sit on the panel; the panel meetings are not question-and-answer sessions, but detailed examinations of hypothetical or real trouble cases; and the researcher who leads the restatement process is highly knowledgeable of the subject matter and can therefore not be easily manipulated. According to Verhelst,<sup>47</sup> however, even the lawyers on the restatement project agree with anthropologists that a more anthropological approach of studying customary law would be sound, but consider this technically impossible.

Other authors have criticized the restatements for different reasons, for instance, since the use of language, legal categories and terminology are alien to customary law – most restatements were made in English – the nature of customary law is inevitably altered.<sup>48</sup> Furthermore, anthropologists claim that it is both a mistaken and unrealistic objective to try and mold customary law into a set of legal rules, since they have little meaning outside of the social context that explains and supports

them.<sup>49</sup> According to Verhelst, these differing views can be explained by the goals of the authors of the restatements. Their concern is neither the preservation of customary law nor the instant acceptance of the restatements by the population. As stressed above, their emphasis is on the effective administration of law.<sup>50</sup> If the anthropologists' directions were to be followed, the results would be too slow to come and likely difficult for administrators to use.

### 1.3 The development of case law

In a common law system, the doctrine of *stare decisis* will lead to a case-by-case recording of customary rules, as applied in specific court cases. In the absence of systematic records of customary law in the form of codes or restatements, judges will heavily depend on earlier decisions as a source of customary law. But even when systematic records do exist, case law will be relied on for interpretations and specifications of written customary laws.

Such development of a case-by-case record of customary rules has met with various criticisms. The first again deals with the danger of crystallization of customary law. When rules of customary law established by previous decision(s) are the basis of judicial notice in subsequent decisions, this might lead in some cases to "a sacrifice of future development on the altar of history".<sup>51</sup> Furthermore, a reliance on case law may result in the perpetuation of errors of interpretation.<sup>52</sup> This criticism seems to ignore the fact that even where a custom has been judicially recognized, it is open to a party to show that it is no longer supported by established usage. Courts will allow evidence in support of changes in judicially noticed custom. However, although this is officially so, in reality such a change is hard to prove, and most judges prefer to simply rely on earlier decisions. This is nicely illustrated by a remark from Ghanaian Judge Baffoe Bonny who, during a conversation about the gap between local and judicial customary law, opined that "what is in the courts is the customary law. Local practice differs from customary law because of ignorance and opportunity".<sup>53</sup> As a result, even when he knows local practice differs from judicial customary law, he considers himself bound to follow case law. A final criticism is that the reporting and publishing of decided cases, an obvious condition for a well-functioning case law system, is generally inadequate in many African countries. This makes it almost impossible for judges to know of and follow earlier decisions. Objections against the development of case law are in fact objections against the application of customary law by state courts in general, since all modern state legal systems have some degree of recording and reliance on case law. Many courts will in principal also follow earlier decisions of certain higher courts as well as their own earlier decisions, not only in common law systems, but also in civil law systems.

Claassens, describing legal developments in South Africa, provides an example of the power of 'official' written versions of customary law.<sup>54</sup> She explains that the South African Constitution is unusual in that it focuses explicitly on the need for change. It sets out to deal with the past and to address inequality. Constitutional Court judgments have rejected the 'official' codified version of customary law in favor of 'living law' interpretations based on the consideration of actual practice in changing contexts.<sup>55</sup> This can be explained by the legacy of colonial codifications that privileged chiefly versions of custom and silenced all contrary versions, thereby sanctioning an authoritarian version of custom as law. However, the potential benefits of the 'living law' interpretation remain vulnerable to deeply ingrained formalist assumptions about the operations of law.<sup>56</sup> Practice shows that it is difficult for ordinary people to challenge "chiefly versions" of customary law in state courts that are precedent-driven and rely on past judgments that upheld colonial and apartheid versions of customary law. In particular, "in the context of widespread regional variety and competing versions within particular localities",<sup>57</sup> establishing the content of 'living customary law' requires research that is often time-consuming and expensive. In spite of the well-known and widely acknowledged failures of the official versions of customary law, mere availability of information on these versions has had the effect of creating a *de facto* presumption in its favor.

As an example, Claassens describes a recent case challenging a woman's appointment as traditional leader.



Phillia Shilubana is the daughter of a Tsonga traditional leader. When her father died in 1968, her uncle was appointed to act in his place because she had no brothers. At that time, both Phillia and the Nwamtiwa clan accepted the appointment of a male chief as inevitable. However, by 2001 the political and constitutional environment had changed and a consensus emerged that Phillia was the most appropriate person to succeed her uncle when he died. This decision was extensively discussed in various forums and ultimately recommended by the royal family, the tribal council and a large consultative community meeting.<sup>58</sup>

In 2002, when Phillia Shilubana was officially installed as traditional leader, her uncle's son decided to challenge her appointment on the basis that it was in conflict with customary law. The Pretoria High Court ruled in his favor, and the decision was upheld by the Supreme Court of Appeal. This latter Court held that “according to customary law, succession follows particular customary rules and allows no leeway for choice whether by the royal family, tribal council or community.” The discussions at the Pretoria High Court and the Supreme Court of Appeal illustrate the danger of ossified rule-based versions of customary law – whether laid down in codes, textbooks, or case law – closing down processes of locally negotiated transformative change.<sup>59</sup> This was recognized by the Constitutional Court, which in a further appeal passed judgment in favor of Phillia Shilubana.

[C]ustomary law is by its nature a constantly evolving system. ... the content of customary law must be determined with reference to both the history and the usage of the community concerned. ... To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognize and give effect to that development, to the extent consistent with adequately upholding the protection of rights.<sup>60</sup>

## 2. Self-recording customary law in northern Namibia

The above shows that the three main historical mechanisms for recording customary law – codification, restatements and the development of a system of case law – all have similar drawbacks. Most importantly, the deliberate as well as the undeliberate alterations to customary law created in the process of recording, combined with the limited level of success in gaining local legitimacy for these new recorded versions, resulted in a large gap between the recorded version and the locally observed versions of ‘living’ customary law.

In May 1993, leaders of six Owambo<sup>61</sup> traditional communities assembled for a Customary Law Workshop.<sup>62</sup> According to the minutes of the meeting, the purpose was:

[t]o start a process of consultation between the Owambo Traditional Authorities in order to harmonize certain aspects of their traditional law, to adjust it to the new social and legal environment and to improve the legal status of women in line with the requirements of the Constitution of Namibia.<sup>63</sup>

Each of the Owambo Traditional Authorities was to include the agreed-upon norms in a written document containing its own recorded customary law.<sup>64</sup> According to Hinz,<sup>65</sup> the self-statements address two kinds of groups. The first consists of all outsiders who have to deal with the customary law. The second group consists of the community members “who have to be reminded that a given part of customary law had to be changed to meet constitutional requirements or standardized in view of needs that flow from the growing interaction of members of different communities”. Even within traditional authorities, local customary practices were far from uniform. Limited knowledge among village leaders of the norms as defined by the highest level of traditional leadership, discretionary powers of traditional leaders to include circumstantial issues such as the behavior of

the parties in the traditional court, and abuse of power by traditional leaders, all led to high variation in customary practices. Due to their written character, self-statements have the potential to bring change in this regard, to reduce the flexibility and negotiability of norms and thereby to enhance the certainty and equity of traditional dispute settlement. They also provide a simple way for villagers to gain knowledge about customary laws.

This chapter poses the question to what extent the 'homegrown' recording process in northern Namibia runs into similar difficulties as the other devices for recording, or whether it can be seen as a recipe for creating a genuinely legitimate recording of customary law. This section will analyze the process, the timing and the main change agents behind this transformation of customary law. It will give special consideration to the changes advocated with regard to gender equality. In addition, it will discuss the resulting written laws in one of the Owambo Traditional Authorities, i.e. the Uukwambi Traditional Authority. Section 3 will study what the impact has been of the recording of the main customary laws on the functioning of the Uukwambi justice system. Section 4 will focus on the attempt to change the position of widows in inheritance cases, and will study the awareness and implementation of the new norms. Section 5 will conclude with an evaluation of the success of Uukwambi's self-statements. Furthermore, it will analyze whether this process can be replicated elsewhere, or whether external factors such as political momentum created a unique point in time with preconditions that cannot easily be manufactured elsewhere.

## 2.1 Process, timing and change agents

The efforts to harmonize Owambo customary laws built on earlier self-statements by the participating traditional authorities, such as Ondonga (1989), Uukwaludhi (1984), Ongandjera (1982).<sup>66</sup> In the other Owambo Traditional Authorities, a first official draft of the laws was made in the process leading up to the harmonization workshop.<sup>67</sup> Interviews in the Uukwambi Traditional Authority revealed, however, that lists of rules and principles had been in the possession of senior traditional leaders for a number of decades, but these were not unified, nor widely known or distributed.<sup>68</sup>

The timing of the unification is intricately connected to events at the national political level. With independence finally arriving in 1990, the 1990s were characterized by a strong identification with the new Namibia and with a sense of urgency to make the concomitant changes to transform the remnants of the divisive apartheid government into a more inclusive, modern form of government. The Owambo Traditional Authorities were struggling to remain relevant in the new constellation of independent Namibia. In the run-up to independence, neither the report of the United Nations Institute for Namibia,<sup>69</sup> which was crafted as a blueprint for an independent Namibia, nor the Namibian Constitution<sup>70</sup> mentioned traditional authorities.<sup>71</sup> This can be interpreted as an indication that "the political minds behind the Constitution did not envisage much of a role for traditional authorities".<sup>72</sup> One year after the adoption of the first Constitution, President Sam Nujoma established a "Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities". This "Kozonguizi Commission" had the task, *inter alia*, of inquiring into the degree of acceptance of traditional leaders by the people.<sup>73</sup> The Commission concluded that, despite regional differences and individual dissatisfaction, traditional leadership was a necessary and viable institution, and recommended its retention, "within the context of the provisions of the *Constitution of the Republic of Namibia 1990* and having regard to the integrity and oneness of the Namibian Nation as a priority".<sup>74</sup> This ushered in a new dawn for traditional leaders, who were eagerly seeking to redeem the popular support they had lost due to their close alignment with the South African colonial regime.<sup>75</sup>

These push and pull forces combined to form a strong internal drive for the recording, harmonization and transformation of customary norms by traditional authorities, in order to adjust them to the legal and social environment of the new Namibia. In addition, government plans – albeit still vague – to engage in a codification of customary law,<sup>76</sup> brought a certain amount of urgency to the whole undertaking, in a bid to stave off undue governmental interference.

## 2.2 Gender issues

One of the domains in which change was advocated was gender relations. Women had played a prominent role in the period before independence, both as freedom fighters and in the functioning of the rural localities when men were away fighting in the war of independence or working on labor contracts at white-owned farms and companies. The notion of 'women's rights' entered Namibian politics when women freedom fighters not only expressed their opposition to colonial occupation, but also to contrived custom and tradition.<sup>77</sup> The collaboration of traditional leaders in indirect rule of the apartheid government was a determining factor in this articulation. The *Constitution of the Republic of Namibia 1990*, reflected the demand for gender parity in guaranteeing equality and freedom from discrimination on a number of grounds including sex (section 10(2)).<sup>78</sup>

The aims of the customary law workshop specifically included the improvement of the legal status of women in line with the requirements of the Constitution. The minutes of the workshop show that both Advocate F J Kozonguizi, the Chairman of the Kozonguizi Commission referred to above and the then Ombudsman of Namibia, and Ms Nashilongo Shivute, a representative of the President's Office in the Department of Women's Affairs, were present during the workshop and explicitly brought up the issue of gender equality:

In the past, the conditions of women were not as good as they should be, but today the government is trying [to] uplift the women's situation in Namibia.<sup>79</sup>

We, the women, have come to hear and see what is being done, so that if there is anything that may suppress the women [it] be done away with. Traditional laws and general laws should be equalized. Traditional laws must be adjusted properly. We do not say should be abolished. Widows must also be protected.<sup>80</sup>

Ms Shivute's reference to widows highlights the customary inheritance norm that when a man dies, his estate is inherited by his matrilineal family. This leaves the widow dependent on her husband's family, unless she chooses to return to her own matrilineal family. Despite a customary obligation of the husband's family to support needy widows and children, this often resulted in the widow and her children being chased out of the house. A related customary norm in Owambo is that when women remained on the land they had occupied with their husbands, they were required to make a payment to their traditional leaders for the land in question. At the workshop, the traditional leaders present unanimously decided that widows should not be chased from their lands or out of their homes and that they should not be asked to pay again for the land.<sup>81</sup> President Sam Nujomo was another high-profile proponent of such a change. Shortly after independence, he made a public appeal that widow dispossession should be stopped, and not long after that the National Assembly unanimously passed a motion demanding fair treatment for widows.<sup>82</sup> During the workshop, Adv. Kozonguizi conveyed the President's strong feelings regarding the topic to the traditional leaders assembled.<sup>83</sup>

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This normative change reflects a widely felt need in society to enhance the position of widows, both at local and national level. By the early 1970s, Tötemeyer already found that a large proportion of interviewees in Owambo stated that the widow/widower and children of the deceased should inherit all (60.9 percent of interviewees) or part (21.2 percent of interviewees) of the estate.<sup>84</sup> Research carried out in 1992/1993 in Uukwambi showed that when asked the attitudinal question whether they agreed or disagreed with the statement, "The husband's family should inherit all the property when the husband dies", 95.7 percent of respondents disagreed.<sup>85</sup> The statement, "Women should be allowed to inherit land without having to pay" yielded 96.7 percent positive responses. This research thus clearly showed that the respondents believed women should inherit their husband's land, rather than his family, and that this land should not be charged for through the headman.<sup>86</sup> Consequently, in 1993, more than 100 women demonstrated against discriminatory inheritance laws at the highest court of Oukwanyama Traditional Authority.<sup>87</sup>

Gordon shows the deep historical roots of widow dispossession, which has been a subject of contention in Owambo for over a century.<sup>88</sup> He elaborately describes earlier attempts by traditional authorities, colonial administrators, as well as missionaries to improve the inheritance situation for widows.<sup>89</sup> According to Gordon, these attempts were largely unsuccessful, which leads him to question the “much-vaunted power of ‘Traditional Authorities’ who have shown themselves to be aware, sometimes keenly, of inheritance issues and yet their own ‘traditional laws’ appear to be frequently ignored or side-stepped.”<sup>90</sup> This poses the questions to what extent will the Owambo Traditional Authorities’ latest efforts to enhance the position of widows be more effective or will the new customary laws again be ignored?

### 2.3 The written laws of Uukwambi

The Customary Law Workshop was not a law-making body. As such, the meeting’s decisions were to be recommendations for the councils of the various traditional communities, who could translate them into law for their respective communities.<sup>91</sup> The resulting ‘self-recording documents’ are not comprehensive codifications. They contain reference to a number of substantive and procedural norms that were felt to be of particular importance.

The written *Laws of Uukwambi (1950-1995)* consist of two sections. The first section consists of 11 pages describing the legal system of Uukwambi. It starts with a number of procedural rules, stipulating the procedure for lawmaking, the hierarchy of traditional courts, the obligation of obedience to traditional courts, and the right to bring witnesses. It then deals with substantive law, both of a criminal and a civil character.<sup>92</sup> It mentions a number of felonies – including murder, illegal abortion, abandonment of a baby, rape, adultery, impregnation of an unmarried woman, assault and intimidation – and their required penalty. It then turns to issues involving property and natural resources, such as land distribution, traditional inheritance, stolen properties, cattle (transportation, slaughter, loss), and protection of water, trees, wild animals, crops and grazing grass. The section ends with a number of rules regarding what may be loosely termed as “moral behavior”, including the sale of alcohol, the prosecution of witch doctors, the traditional upbringing of children, and the obligation to care for the elderly. The second part of the document contains 13 “law articles”. The first 12 of them merely state the penalty for certain felonies. The last law article consists of sub-sections ‘a’ to ‘r’ that repeat some of the issues mentioned earlier in the document, such as: “a. Nobody must transport cattle without a permit”.

The unanimous decision regarding widows’ inheritance made by the traditional leaders present at the Owambo workshop resulted in the following provision in the written *Laws of Uukwambi (1950-1995)*: “Traditional law give[s] provision that, if one spouse dies the living spouse shall be the owner of the house” (section 9.2). Section 9.4 adds: “Any widow [who] feel[s] treated unfairly during the inheritance process has the right to open up a case against those with the headmen/women or senior headmen/women or to the women and child abuse center.”

- 140 The Uukwambi Traditional Authority is currently in the process of updating its written laws. According to the *Laws of Uukwambi (1950-1995)* the traditional laws are reviewed every five years, but until now they have only changed the fines to adjust to the rising price of cattle. In the current process, they are explicitly checking whether their provisions do not contravene the Constitution. The draft<sup>93</sup> version of *The Laws of Uukwambi Traditional Authority (1950-2008)* repeats the right of the widow<sup>94</sup> and explicitly acknowledges that this right does not require any payment: “In the amendment of the traditional law of 1993, it was agreed that widows will no longer be chased out of their land and/or asked to pay for the land/field after their husbands’ death as it was before.”<sup>95</sup>

### 3. The impact of written laws on the Uukwambi customary justice system

Following the discussion of the process of recording in Owambo and the resulting document in the Uukwambi Traditional Authority, this section analyzes the local impact of the recording of Uukwambi customary law on the functioning of the Uukwambi justice system. To what extent are villagers

familiar with the existence and the content of the written laws? Do they regard the recording as having an influence on the administration of justice, and if so, in what way? How do traditional leaders perceive the impact of the new document? How and to what extent does it change the relationship between people and their traditional leaders?

### 3.1 Knowledge of the written laws

When 162 respondents of the survey were asked whether the Uukwambi Traditional Authority had written customary laws, only 40.7 percent responded yes; 10.5 percent responded no; and 48.8 percent did not know. When aggregated by age and by gender, it becomes clear that knowledge of written customary law is most prevalent among people between 40 and 70 years old (Table 1) and more among men than women (Table 2). When disaggregated by level of education, the data displayed no substantial differences.

**Table 1. Does the Uukwambi Traditional Authority have written customary laws?**

	Age group 20-29 (%)	Age group 30-39 (%)	Age group 40-49 (%)	Age group 50-59 (%)	Age group 60-69 (%)	Age group >70 (%)
Yes	17	29.2	51.6	61.9	63.3	47.1
No	14.9	16.7	3.2	0	9.1	17.6
I don't know	68.1	54.2	45.2	38.1	27.3	35.3

N=162

**Table 2. Does the Uukwambi Traditional Authority have written customary laws?**

	Men (%)	Women (%)
Yes	56.7	29.3
No	7.5	13.0
I don't know	35.8	57.6

N=162

When respondents were asked how well they were acquainted with the content of the laws of Uukwambi (whether written or unwritten), a similar pattern emerged: age and gender accounted for substantial variation – with men and age groups 40 to 70 scoring above average – whereas education did not.

When discussing knowledge of customary laws, it is important to highlight that approximately two-thirds of respondents (71.7 percent of female respondents and 62.7 percent of male respondents) had never attended a traditional court meeting in their village. Whereas 31.6 percent of the respondents had participated in court meetings, only 8.2 percent reported having attended “many times” or “almost always”. Traditional court meetings therefore do not engage the majority of the adult population of a village. Here also, the age groups 40 to 70, as well as men were overrepresented.

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### 3.2 A change for the better?

Of the 66 respondents who acknowledged the existence of written customary laws, a large majority claimed to feel positive or very positive about them (95.5 percent). In addition, almost all of these respondents agreed or strongly agreed that the headman or headwoman decides cases on the basis of the written laws (98.4), that they find it easier to accept a decision when it is based on written law (98.7 percent), and that written laws have made traditional court decisions fairer (98.4 percent).

These positive views are largely corroborated by participant observation at traditional court sessions as well as interviews with men and women who regularly attend them. When the subject of

the written customary laws of Uukwambi was broached with these interviewees, they almost all agreed that the written laws are actually being used in court. They explained that after the recording, the Uukwambi Traditional Authority gave all headmen and headwomen copies of the laws, which members of the traditional court bring to court meetings.<sup>96</sup> After the cases are called, the chairman or secretary usually starts by reading the appropriate parts of the laws to the public. Later in the proceedings, the written laws are often referred to in discussions, both by members of the court and by attending villagers.

Not all interviewees are convinced of the importance of the recording of Uukwambi laws; a small minority questions its impact. Some refer to the fact that not in all villages has the traditional leader told the people about the new laws. Others doubt whether a written document can make many inroads into the largely illiterate rural society. Yet others point out that the written source of the law might have increased legal awareness, but has not enhanced respect for and enforcement of decisions.

Most villagers, however, say that the written laws have brought positive change, especially through the recording of fixed fines. They state that the recording of laws has enhanced the certainty and predictability of customary law for its subjects, has brought forward the harmonization of decisions of different Uukwambi courts, and has increased the equality of decision-making.

An additional effect of the recording of customary laws and the inclusion of fixed fines is found in the significantly enhanced legal knowledge of local villagers, at least of those who attend traditional court meetings. People are much less dependent on local information, as the rules are the same everywhere in Uukwambi and even, at least with regard to most fines, in the other Owambo Traditional Authorities. The combination of fixed fines and increasing legal awareness among the people fosters the accountability of court members and limits their discretion. Consequently, the recorded laws act as a check on corrupt practices by traditional leaders in the realm of dispute settlement. The following statements refer to the discretion of traditional leaders in deciding on cases and especially penalties:

Because the law is now clearly set out, and traditional leaders are guided by the same document, there are no longer any differences between one village leader and another. For a long time it was quite different because there was no single document to guide them; any headman could decide how they wanted their people to behave.<sup>97</sup>

Previously, traditional leaders could determine the severity of a fine, depending on how you behaved. When they thought someone was not respectful, they would be fined four cows instead of two.<sup>98</sup>

- 142** When traditional courts fine someone for an amount higher or lower than is stated by the law, the villagers now question the traditional leaders about it. Such cases can and are brought to the court of the senior headman or headwoman, for him/her to rectify the fine in accordance with the law.<sup>99</sup>

### **3.3 Traditional leaders' perceptions**

The supremacy of the written laws seems generally accepted by the traditional leaders. As one headman puts it, "We cannot make a decision from thin air. We have to refer to the laws."<sup>100</sup> Even those few traditional leaders that do not often refer to the written laws in their decision-making acknowledge their general validity and applicability, and claim in interviews that they are well aware of their contents and judge accordingly.

Most traditional leaders expressed a marked appreciation of the changes that the recorded laws brought to the Uukwambi justice system. They state that the laws have helped them to make the right decisions. In addition, the written laws have enhanced the legitimacy and acceptability of their

decisions by the parties and the general public. They feel that people respect the law more, now that it cannot easily be applied discriminatorily. Two headmen explain:

The written laws have made my job easier. It is no longer me who is saying this or that; instead it is now the law. Everyone in the gathering will support a binding legal fine. So there will be no more revenge.<sup>102</sup>

Now that we have written laws, the decisions we make are no longer subjective; but rather based in law. During traditional court meetings we read the law to the people and show them: this is what the law says. Previously, when someone was fined, they felt the headman had personally punished them. Now that people know penalties are written in the laws, they cooperate with us much more. When we hold court meetings, we were told to explain the law relevant to the actions they have committed, so that each individual understands the legal reasoning behind the consequences of their actions.<sup>103</sup>

## 4. Protecting the inheritance of widows

As seen above, the written laws of Uukwambi included new provisions to protect the land of women on the death of their husbands. This section will discuss the effectiveness of these norms. To what extent are traditional leaders and common people aware of the new norms? Are the norms enforced by the traditional leaders? And has this led to effective behavioral change?

### 4.1 Legal awareness and behavioral change

In the research carried out in 1992/1993 600 female Owambo respondents were asked about property and inheritance in a customary marriage. Of the 63 respondents from the Uukwambi Traditional Authority, 58 percent answered that they were convinced that, on the death of their husbands, they would not inherit anything.<sup>104</sup> These figures are striking when compared with data from the current study. Survey results showed that of the 162 respondents in Uukwambi, 81.4 percent were aware of the norm prohibiting land grabbing and 80.8 percent were aware of the norm prohibiting payment to the headman/woman. Of the 132 respondents who were aware of the first norm, 92 percent answered they did not know of any case of land grabbing in their village in the last three years, compared to 8 percent who had heard of such a case. Interviews similarly indicated that the changed norms have become well known and enforced in Uukwambi. Many people were familiar with the norm and it was generally stated that cases of land grabbing had severely reduced over the last years, both in traditional courts<sup>105</sup> and at the Communal Land Boards.<sup>106</sup>

Land grabbing and payment of widows to the headman to retain the land were first outlawed in the written laws of Uukwambi and other Owambo Traditional Authorities, but later also by statutory law, in the *Communal Land Reform Act 2002*.<sup>107</sup> In interviews, both customary law and statutory law are referred to as sources of the new norm, and both institutions – traditional authority and government – are seen as enforcing agencies. It is difficult to clearly deduce which regulatory system has contributed most to the awareness of the norm. On the one hand, the data of the Communal Land Boards show that these institutions still received many land grabbing cases in the 2003-2006 period and then saw a gradual decline to almost none at present. This coincides with the introduction of the *Communal Land Reform Act 2002*, rather than with the abolishment of the customary norm by the Owambo Traditional Authorities in 1993. On the other hand, the quantitative data show that 21.2 percent of the people who are aware of the norm attribute its basis to statutory law, with 5.3 percent specifically referring to the *Communal Land Reform Act 2002* compared to 64.4 percent who mention customary law as the source, and 14.4 percent who say they do not know. In addition, people quoting the norm for widows regularly add that when both parents die and a child takes over, this child is not exempted from making a payment to the headman to retain the land. The



fact that this practice contravenes the *Communal Land Reform Act 2002*<sup>107</sup> but not the written laws of Uukwambi<sup>108</sup> indicates that knowledge of the content of the *Communal Land Reform Act 2002* is at best incomplete<sup>109</sup> and that awareness of statutory norms is greater when they reflect customary norms.

## 4.2 Comparative experiences

The awareness and acceptance of traditional leaders and common villagers of the changed norms and the resulting near eradication of land grabbing<sup>110</sup> is especially remarkable when compared with the experiences of other African countries. For example, in Ghana, the national outcry over widows' plight under customary law led to the enactment of the *Intestate Succession Law 1985* (Provisional National Defense Council (PNDC) Law 111). This law provides that the spouse and/or children are entitled to the self-acquired house of the deceased and the household chattels of the intestate. The chattels include jewelry, clothes, furniture, kitchen and laundry equipment, simple hunting and agricultural equipment, books, motor vehicles and household livestock.<sup>111</sup> The remainder of the estate – when it exceeds a certain minimum amount – is divided among the surviving spouse, children, parents and the extended family, with the widow and children together entitled to seven-eighths of the residue of the estate, and in cases where there are no children, the surviving spouse is entitled to three-fourths.<sup>112</sup>

A 1998 empirical study in four areas of Ghana revealed high levels of awareness of the existence of the law – although not necessarily of its exact contents – but limited application of its provisions at the local level.<sup>113</sup> Where the author found an “increasing recognition of the necessity to let children partake of the enjoyment of their deceased fathers' intestate estate”, the widow was still generally marginalized despite a small improvement over the original customary position.<sup>114</sup>

Several other African countries provide similar case studies. For instance, Malawi,<sup>115</sup> Zimbabwe,<sup>116</sup> Zambia,<sup>117</sup> Liberia<sup>118</sup> and Rwanda<sup>119</sup> all have statutes that protect the property of widows after the death of their husband. Application at the local level is, however, considered minimal, due partly to problems internal to the statutes such as vague wording and being based on assumptions that are largely urban-based and therefore insufficiently adapted to rural structures of kinship, marriage and co-habitation.<sup>120</sup> However, the main issues hampering effectiveness of the statutes are the limited awareness most people have of their statutory rights, the pervasiveness of cultural norms and beliefs surrounding property ownership and gender relations, problems of widows in accessing police and state justice structures, and the limited extent to which traditional justice structures are aware of, and are willing to apply, the statutory norms.<sup>121</sup>

Proposals to expand inheritance rights of women are currently debated in a number of African countries, sometimes drawing heavy criticism from certain segments of society. For instance, in Mali, a new family code that was to ameliorate women's rights of inheritance met with such extreme popular opposition – headed by Islamic organizations and leaders – that “at the last minute before it was approved, the President sent the bill back to the National Assembly to be reconsidered”.<sup>122</sup> An amended version was then tabled, which altered the previous version's enhancement of women's inheritance rights.<sup>123</sup> This version is endorsed by the High Islamic Council, but opposed by the rights groups who were behind the 2009 bill.<sup>124</sup> Until now, no new family code has been approved in Mali.

## 5. Conclusion

### 5.1 Self-recording evaluated

This chapter has discussed the three main historical mechanisms that have been developed for recording customary law, viz. codification, restatements and case law systems. In addition, it has examined the genesis and the wording of the self-statement in Uukwambi, and analyzed its impact on the functioning of the Uukwambi justice system. This analysis allows us to answer the question whether the self-recording process in northern Namibia runs into similar difficulties as the historical

devices for recording or whether it provides a recipe for creating a locally legitimate written statement of customary law.

Just as with the historical recording mechanisms, the process of self-recording created both deliberate and unintentional alterations to the justice system of the Uukwambi Traditional Authority. Most notably, the inclusion of norms for the protection of widows constituted a change in Uukwambi's substantive customary law, and the unification of penalties reduced the discretion of traditional leaders in dispute settlement processes. Despite these alterations, the written laws of Uukwambi seem to enjoy a large measure of local legitimacy, at least among the people that participate in traditional court meetings. These people almost unanimously agreed that traditional court cases are decided on the basis of the "*written laws of Uukwambi*", and a large majority stated that they find decisions based on the written laws easier to accept and more fair. In particular, the recording of fixed, unified fines is mentioned as a significant contribution to the certainty, predictability and equality of traditional court cases, through a diminution of the discretion and options for abuse by traditional leaders. The combination of fixed fines and the increased legal knowledge among the people resulting from a more unified application of customary norms further limits traditional leaders' room for maneuver and fosters a sphere of accountability. Traditional leaders themselves also generally accepted the supremacy of the written laws and welcomed them as a positive change to the Uukwambi justice system, one that has enhanced the legitimacy and acceptability of their decisions. One might thus conclude that the local legitimacy of Uukwambi's customary justice system, among traditional leaders and common villagers alike, is strengthened rather than weakened by the process of self-recording.

The new norms protecting widows have generally become well-known and enforced in Uukwambi. The number of disputes concerning allegations of land grabbing has significantly reduced over the last 15 years to almost none at present. These figures are witness to a real behavioral change regarding inheritance rights of widows. It seems safe to conclude, therefore, that the two main changes that the self-statement propagated – increased protection for widows and unified fixed fines – have both led to real changes in the application of Uukwambi customary law. They have therefore not led to a schism between a written version of customary law and a 'living' version of customary law, and thereby avoided the main pitfall of the historical devices for recording customary law.

## 5.2 Can Uukwambi's success be replicated elsewhere?

Three important factors can be identified in the Uukwambi self-statement that set it apart from other attempts to record customary laws. The first is that the Uukwambi self-statement is not comprehensive and focuses on a small number of substantive norms in addition to the documentation of fixed fines. Since law and order issues make up the bulk of traditional court cases in northern Namibia, the latter has a profound impact in Uukwambi. Documenting fixed fines – and applying those uniformly in traditional courts – is obviously much simpler than recording and applying the intricate rules surrounding, for instance, marriages, divorce, and other family matters. In such cases, traditional dispute settlement normally allows for flexibility and negotiation, taking into consideration circumstantial factors and the proper or improper conduct of the parties. Recording these subtleties is complicated. Uukwambi traditional courts do not seem to deal with many family law disputes, which is reflected in the self-statement: in addition to short sections on adultery and pregnancy of unmarried women, and the new norms on traditional inheritance, the written *Laws of Uukwambi* 1950-1995 do not include any family law provisions.

The second factor setting Uukwambi's self-recording apart from other recording experiences is that traditional leadership does not offer many lucrative opportunities to most of the traditional leaders in northern Namibia. In fact, many traditional leaders stated that they used their own money to do their job well, for instance, for transportation costs to meetings or police stations, or for telephone costs. Traditionally, these leaders made some money from the allocation of land, but this source has largely dried up, with almost no unused land in the villages and the new provision that widows do not

have to pay to retain their land.<sup>125</sup> Other small amounts of money might come from traditional court fees, cattle permit fees, and hut taxes, but these incomes are neither regular nor substantial. The lack of financial incentive to become a traditional leader or to execute this function in a particular way influences processes of self-recording. It is easier to reach agreement on the rules of the game when the stakes are not very high for its players. In addition, the lack of substantial monetary gains by traditional leaders of recorded norms will not obstruct popular acceptance and legitimacy of these norms.

A third factor also relates to the willingness of traditional leaders to record norms that are beneficial to the general welfare of their people. In Namibia, this willingness should be seen in the light of the involvement of traditional authorities in the administrative structures of the apartheid government. When the Kozonguizi Commission recommended the retention of traditional leadership, traditional leaders were eager to seize the opportunity and sought ways to redeem the popular support they had lost due to their close alignment with the South African colonial regime. This drive has presumably facilitated the inclusion of fixed fines and widow protection norms. The latter reflected a widely felt local need as well as a national priority, and the measure to document fixed fines has been applauded by both common villagers and traditional leaders. In its turn, the inclusion in the self-statement of norms that are regarded as legitimate in society likely increased the acceptability and legitimacy of the entire self-statement.

What the above factors have in common is their demonstration that power matters. A self-statement, as well as any other form of recording customary law, is not a mere technical exercise. It addresses the definition and crystallization of certain rights and interests as well as the articulation of desired changes in them, and thus invariably involves a power struggle. The particularities of the local power constellation, as well as the role and function of traditional leaders and courts, will determine whether the positive example of self-recording in Uukwambi can be replicated in other areas of Africa and the developing world.

## footnotes

- 1 See section 2 for an elaborate discussion of these critiques.
- 2 Some initial movements towards community dialogue processes and self-ascertainties of customary law can also be witnessed in southern Sudan: T. Mennen, 'Putting theory into practice. Improving customary justice' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 140); Rwanda: (RCN Justice & Démocratie and Haguruka Association for Defense of Women and Children's Rights, *Beyond raising awareness: Shifting the social power balance to enable women to access land. Project document* (2010); and Indonesia: S. Clark and M. Stephens, *Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia*, IDLO (2011)
- 3 This terminology is borrowed from M.O. Hinz, 'Law reform from within: Improving the legal status of women in northern Namibia' (1997) 39 *Journal of Legal Pluralism* 69.
- 4 Land grabbing refers to the customary practice that, upon the death of a husband, his land is inherited by his matrilineal family, and the widow is no longer allowed to live on it. Land grabbing is part of a wider practice of property grabbing, involving the taking of both movable and immovable property. The changes in Owambo mainly target non-movable property, the land, although this also has some effect on the distribution of movable property. The term widow dispossession is also used to describe land and property grabbing.
- 5 Y. Osinbajo, 'Proof of Customary Law in Non-Customary Courts' in Y. Osinbajo and A.U. Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 264.
- 6 A.N. Allott (ed), *The Limits of Law* (1980) 61.
- 7 E.C.J. Azinge, 'Codification of Customary Law: A Mission Impossible?' in Y. Osinbajo and A.U. Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 285-6; D. Narebo, 'Codification of Customary Law' in Y. Osinbajo and A.U. Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 301-2.
- 8 Osinbajo, above n 5.
- 9 Many colonial and post-colonial African statutes and constitutions contain a clause that allows judges not to apply customary law where it seems to them to be in conflict with the principles of natural justice.
- 10 Azinge, above n 7, 287; Narebo, above n 7, 301-2; M.I. Ojo, 'Codification of Customary Law in Nigeria' in Y. Osinbajo and A.U. Kalu (eds) *Towards a Restatement of Customary Law in Nigeria* (1991) 313.
- 11 Azinge, above n 7, 285-6; Ojo, above n 10, 316; Osinbajo, above n 5, 264.
- 12 T.W. Bennett and T. Vermeulen, 'Codification of customary law' (1980) 24(2) *Journal of African Law*, 207.
- 13 Ibid 208.
- 14 Ibid.
- 15 K. Eso, 'Towards Certainty in Our Laws' in Y. Osinbajo and A.U. Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 58.
- 16 J-H Jezequel (ed), 'Collecting Customary Law': *Educated Africans, Ethnographic Writings, and Colonial Justice in French West Africa, Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa* (2006) 139.
- 17 B.L. Shadle, 'Changing traditions to meet current altering conditions': Customary law, African courts and the rejection of codification in Kenya, 1930-60' (1999) 40 *Journal of African History*, 413.
- 18 M. Odje, 'The Repugnancy Doctrine and the Proper Development of Customary Law in Nigeria' in Y. Osinbajo and A.U. Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 36; Bennett and Vermeulen, above n 12, 209.
- 19 E. Cotran, 'Some recent developments in the Tanganyika judicial system' (1962) 6(1) *Journal of African Law*; Osinbajo, above n 5, 265; Azinge, above n 7, 287.
- 20 Bennett and Vermeulen, above n 12, 219.
- 21 A.J. Kerr, 'The reception and codification of systems of law in Southern Africa' (1958) 2(2) *Journal of African Law*, 96.
- 22 Osinbajo, above n 5, 265.
- 23 A.N. Allott, 'The judicial ascertainment of customary law in Africa' (1957) 20 *Modern Law Review*, 248; T. Verhelst, *Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration*, UCLA International Institute, James C. Coleman African studies Center, Occasional Papers Series (1970) 42, University of California <<http://repositories.cdlib.org/international/asc/opc/verhelst>> at 19 April 2011.
- 24 Kerr, above n 21, 97; R.E.S. Tanner, 'The codification of customary law in Tanzania' (1966) 2(2) *East African Law Journal*, 106-7.
- 25 Narebo, above n 7, 305.
- 26 Odje, above n 18, 36-7; R.J.H. Pogucki, A note on the codification of customary law on the Gold Coast' (1954) 8(4) *Journal of African Administration*, 193; Shadle, above n 17, 412, 416, 421-2; Verhelst, above n 23, 41.
- 27 Shadle, above n 17, 421.
- 28 Odje, above n 18, 36.
- 29 Pogucki, above n 26, 193.
- 30 Verhelst, above n 23, 41.
- 31 Pogucki, above n 26, 194.
- 32 Azinge, above n 7, 286.
- 33 A.N. Allott and E. Cotran, 'A Background Paper on Restatement of Laws in Africa: The need, value and value of such restatement' in A.N. Allott (ed), *Integration of Customary and Modern Legal systems in Africa: A conference held at Ibadan on 24th-29th August 1964* (1971) 18-20. See also W. Twining, 'The restatement of African customary law: A comment' (1963) 1(2) *The Journal of Modern African Studies*.
- 34 Allott and Cotran, above n 33.
- 35 Ibid 18-19.
- 36 Ibid 25.
- 37 Bennett and Vermeulen, above n 12, 9-10.
- 38 Odje, above n 18, 36-7; Tanner above n 24.
- 39 Shadle, above n 17, 416.
- 40 E. Cotran, 'The integration and codification of law in East Africa: The differing approaches of Kenya, Tanzania & Uganda' in *Colloque de l'Association Internationale de Droit Africaine* (1972) 7.
- 41 Shadle, above n 17, 413.
- 42 Ibid 424.
- 43 Allott and Cotran, above n 33, 32-3.
- 44 Quoted in Eso, above n 15, 58.
- 45 Shadle, above n 17, 430.
- 46 G.R. Woodman, 'Customary law, state courts, and the notion of institutionalisation of norms in Ghana and Nigeria' in A. Allott and G.R. Woodman (eds), *People's law and state law: the Bellagio Papers* (1985). Allott himself has pointed out in one of his articles that, although a restatement is only a guide, writing customary law down will change its character (A.N. Allott, 'The judicial ascertainment of customary law in British Africa' (1957) 20(3) *The Modern Law Review*, 258).
- 47 Verhelst, above n 23, 42.
- 48 Ibid 39.
- 49 Ibid 39.
- 50 Ibid 40.
- 51 F.A. Ajayi, 'The Judicial Development of Customary Law in Nigeria' in A.N. Allott (ed), *Integration of Customary and Modern Legal systems in Africa: A conference held at Ibadan on 24th-29th August 1964* (1971) 124; Osinbajo, above n 5, 261.
- 52 Ajayi, above n 51, 124.
- 53 Personal communication, 5 September 2003.
- 54 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).
- 55 Ibid 360.
- 56 Ibid 363.
- 57 Ibid 360.
- 58 Ibid 363.
- 59 Ibid 364.
- 60 Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC); (4 June 2008), para 45-49.
- 61 Owambo is a collective name for 12 tribal

- groups that live in northern Namibia and southern Angola. Seven of these closely-related societies, linguistically and culturally, live in present-day Namibia: the Ondonga, Oukwanyama, Ongandjera, Uukwambi, Ombalantu, Uukwaluudhi and Uukolonkadhi (C.H.L. Hahn, 'The Ovambo' in C.H.L. Hahn, H. Vedder and L. Fourie (eds), *The Native Tribes of South West Africa* (1966); G. Töttemeyer, *Namibia Old and New: Traditional and modern leaders in Ovamboland* (1978)). The Ovambo people constitute the largest population group in Namibia. Their home was called Owamboland during the colonial period, but today is divided into the Omusati, Ohangwena, Oshana and Oshikoto regions. Almost half of the entire population of Namibia lives here on less than 7 percent of the Namibian territory (National Planning Commission, *Population and Housing Census* (2001) National Planning Commission (NPC) <<http://www.npc.gov.na/census/index.htm>> as of 5 May 2011).
- 62 Similar workshops were held in 1994 and 1995 by the Kavango and Nama Traditional Authorities (M.O. Hinz and S. Joas, *Customary Law in Namibia: Development and perspective*, Centre for Applied Social Sciences (CASS) (1996) 207-237).
- 63 Minutes of the Customary Law Workshop of Owambo Traditional Leaders (ibid 193-206). The Traditional Authority of Uukwaluudhi was not represented, but their king later expressed his full consent to all the decisions made at the workshop.
- 64 Recently, the Council of Traditional Leaders resolved that all traditional communities of Namibia embark on such a self-recording process (M.O. Hinz, 'Traditional governance and African customary law: Comparative observations from a Namibian perspective' in N. Horn and A. Bösl (eds), *Human Rights and The Rule of Law in Namibia* (2009) 85).
- 65 Ibid 85.
- 66 Hinz and Joas, above n 62; See also for Ondonga: Hinz, above n 3, 72. Gordon cites efforts by the Ongandjera to develop a legal written code in the early 1960s (R.J. Gordon, 'Widow 'dispossession' in northern Namibian inheritance' (2008) 31(1-2) *Anthropology Southern Africa*, 5).
- 67 Hinz and Joas, above n 62.
- 68 Interview 40, senior headman (3 December 2009); Interview 44 woman traditional councilor (4 December 2009); Interview 57, woman traditional councilor (27 January 2010). Chief lipumbu reported that his earliest copy of written laws dates from 1956. The author has not seen this copy (Interview 55, Chief and Former Secretary (19 January 2010)).
- 69 United Nations Institute for Namibia, *Namibia, Perspectives for national reconstruction and development* (1986).
- 70 Their recognition can only be deduced from Articles 66(1) and 102(5) of the *Constitution of The Republic of Namibia* 1990. The first Article stipulates the validity of the customary law and common law in force on the date of independence, subject to the condition that they do not conflict with the Constitution or any other statute law. The latter Article calls for the establishment of a Council of Traditional Leaders whose function it is to advise on communal land management and on other matters referred to it by the President. In addition, Article 19 of the Constitution, guaranteeing the right to culture and tradition, is understood to include the right to live according to one's customary law.
- 71 Hinz, above n 64, 68-69.
- 72 Ibid 69.
- 73 Commission of Inquiry, *Report by the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders* (1991); Hinz, above n 65, 69-70; C. Keulder, *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (1998) 65-66.
- 74 Commission of Inquiry, above n 73, 73; S. Düsing, *Traditional Leadership and Democratisation in Southern Africa: A comparative study of Botswana, Namibia and South Africa* (2002) 188; Hinz, above n 64, 69-70.
- 75 South Africa's indirect rule, characterized by the extensive use of indigenous political institutions, had "transformed the indigenous polities into local administrative organs dependent on the colonial state." H. Becker, 'New things after independence': Gender and Traditional Authorities in postcolonial Namibia' (2006) 32(1) *Journal of Southern African Studies*, 33. From the 1960s, Ovamboland became the centre of Namibia's independence struggle and the scene of severe fighting between the South West African People's Organisation (SWAPO) and the South African army, in which thousands of lives were lost. From the 1970s until independence, SWAPO and the churches were seen as the main sources of authority by the population, rather than the chiefs or the Owambo (homeland) authorities (Becker, 33; Keulder, above n 73, 84; Töttemeyer, above n 61, 104-5; I. Soiri, *The Radical Motherhood: Namibian women's independence struggle* (1996) 50. The chiefs' already diminished popularity and legitimacy further waned due to their involvement with reconnaissance work and the reporting of strangers to the colonial authorities and with the drafting of people for the South West African Territorial Forces – formed in 1977 in response to SWAPO's military successes. The results were serious, as Keulder describes: "Chiefs and headmen were often identified as soft targets to be eliminated (by both sides) in order to strike back at the enemy. Many chiefs and headmen accordingly lost their lives" (Keulder, above n 73, 49, 52).
- 76 The 1986 report of the United Nations Institute for Namibia (*Namibia: Perspectives for national reconstruction and development* (1986) as well as the *Law Reform and Development Act 1991*, art 29, s 6, mention codification.
- 77 Becker, above n 75, 47.
- 78 Article 10 of the *Namibian Constitution* 1990, provides that all persons shall be equal before the law, and that no one may be discriminated on the grounds of sex, race, color, ethnic origin, religion, creed or social or economic status. With this Article, the Namibian Constitution follows Article 1 of the *Universal Declaration of Human Rights* 1948 as well as Article 2 of the African Charter on Human and Peoples' Rights.
- 79 Advocate F.J. Kozonguizi, quoted in the Minutes of the Customary Law Workshop of Owambo Traditional Leaders, above n 63, para 5.
- 80 Ms Nashilongo Shivute, quoted in the Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 62, para 5.
- 81 Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 62, para 10. In addition, it was unanimously decided that women should be allowed full participation in community courts (para 12).
- 82 Gordon, above n 66, 8.
- 83 Interview 43, female traditional councilor (4 December 2009).
- 84 Töttemeyer, above n 61, 146.
- 85 Namibia Development Trust, *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi*, Final Report, Namibia Development Trust, with assistance from SIAPAC-Namibia (1993) 63.
- 86 Ibid 63.
- 87 *The Namibian*, 11 and 13 August 2003, referred to in Becker, above n 75, 48.
- 88 Gordon, above n 66.
- 89 According to the former Secretary of Chief lipumbu, Maria Angungu, some districts in Uukwambi were already taking steps towards protecting widows before the new norm was stipulated in the written *Laws of Uukwambi* (1950-1995) (Interview, 4 December 2009).
- 90 Gordon, above n 66, 9.
- 91 Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 62, para 8.
- 92 Customary law does not make a clear distinction between criminal and civil law issues.
- 93 This draft was still being discussed by the Traditional Council when the author left the field in February 2010.
- 94 Clause 9.2: "The law states that (the/a)

- house belongs to the husband and wife and if the husband dies, then the house will belong to the wife."
- 95 Clause 9.1.
- 96 Many people who have a copy of the written laws of Uukwambi also own copies of the *Traditional Authorities Act 2001* (in Oshiwambo) and the Oshiwambo version of J. Malan, *A Guide to the Communal Land Reform Act, Act No. 5 of 2002*, Legal Assistance Centre and Namibia National Farmers Union (2003).
- 97 Interview 32, woman traditional councilor (16 November 2009).
- 98 Interview 51, headman (5 January 2010).
- 99 This occurred in the village of Omaandi, where the senior headwoman, at the request of villagers, wrote a letter to the headman ordering him to adjust the fine (interview 49, women's group discussion (29 December 2009)).
- 100 Interview 48, headman (21 December 2009).
- 101 Interview 50, headman (29 December 2009).
- 102 Interview 52, headman (8 January 2010).
- 103 Namibia Development Trust, above n 85, 62 and 72. The study revealed that even when men write wills, their wishes are not taken into consideration upon their death.
- 104 At the court of one of the senior headmen of Uukwambi traditional authority, they received only one case regarding land grabbing in 2009.
- 105 The Communal Land Boards (CLBs) are institutions established in 2003 in line with the *Communal Land Reform Act 2002* and tasked among others with dispute resolution regarding certain land matters. At the Omusati CLB, one of its members recounted that they had received many cases in the first three-year term [2003-2006] dealing with land grabbing. In the second three-year term, the number of these cases was severely reduced, and now, in the third term, they no longer receive them (interview 35 (CLB member Omusati Region), 18 November 2009). A member of the Oshana CLB confirmed this trend. They also did not receive any cases regarding land grabbing in the third term of this CLB (interview 48, headman/CLB member (21 December 2009)).
- 106 Section 26 of the *Communal Land Reform Act 2002* provides that upon the death of a holder of a customary land right, the right will be re-allocated to the surviving spouse. Section 42 adds that no compensation may be demanded or provided for this reallocation.
- 107 Section 42 of the *Communal Land Reform Act 2002* prohibits the payment of any consideration for the allocation of any customary land right – save for the costs involved in registration.
- 108 Section 9 of the written laws of Uukwambi mentions only the surviving spouse.
- 109 Limited public awareness of the *Communal Land Reform Act 2002* is reported by Lotta Ambunda and S. De Klerk, 'Women and Custom in Namibia: A research overview' in O.C. Ruppel (ed), *Women and Custom in Namibia: Cultural practice versus gender equality?* (2008) 80.
- 110 Grabbing of movable property, especially livestock, although diminishing, is still a problem in Owambo, see W. Werner, *Protection for Women in Namibia's Communal Land Reform Act: Is it working?* (2008) 28-9.
- 111 *Intestate Succession Law 1985 (PNDC Law 111)* sections 3, 4, 18.
- 112 See for discussions of the *PNDC Law 111* of Ghana: G.R. Woodman, 'Ghana reforms the law of intestate succession' (1985) 29(2) *Journal of African Law*; K.Y. Yeboa, 'Ghana's intestate succession law 1985 PNDC Law 111: A requiem to Islamic law of succession for Ghanaian domiciliaries?' (1992) 4 *African Society of International and Comparative Law*; D.M. Dzidzornu, 'Human rights and the widow's material security: The case of the 'Intestate Ghanaian widow' (1995) 28(4) *Verfassung und Recht in Übersee*; E.V.O. Dankwa, 'The application of *PNDC Law 111* and its social and economic impact' (1998) 2 *Recht in Afrika*; H.J.A. N. Mensa-Bonsu, 'The intestate succession law of Ghana: practical problems in application' (1994) 8 *Jahrbuch für Afrikanisches Recht*; K. Awusabo-Asare, 'Matriliney and the new intestate succession law of Ghana' (1990) 24(1) *Canadian Journal of African Studies*.
- 113 Dankwa, above n 112.
- 114 Ibid 243.
- 115 In Malawi, the *Wills and Inheritance Act No. 25 of 1967*, mandates the following division of the estate: in patrilineal societies, 50 percent to the wife, children and dependents, and 50 percent to the customary family; in matrilineal societies, 40 percent to the wife, children and dependents, and 60 percent to the customary family (S.V.R. White, D.K. Kamanga, T. Kachika, A.L. Chiweza and F.G. Chidyaonga, *Dispossessing the Widow. Gender based violence in Malawi* (2002) 36). A new Bill, Bill no. 8 of 2010, *Deceased Estates (Wills, Inheritance and Protection)* is currently debated by Parliament. This Bill no longer includes customary heirs as beneficiaries of the intestate estate (D. Mmana, 'Bill removes hardships on deceased estates' *The Nation*, (Malawi) 19 November 2010, *The Nation* <[http://www.mwnation.com/index.php?option=com\\_content&view=article&id=9727:bill-removes-hardships-on-deceased-estates&catid=62:national-news&Itemid=59](http://www.mwnation.com/index.php?option=com_content&view=article&id=9727:bill-removes-hardships-on-deceased-estates&catid=62:national-news&Itemid=59)> at 19 April 2011).
- 116 Zimbabwe's Administration of Estates Amendment Act number 6 of 1997 determines the distribution of the estate in case of dispute: one third to the surviving wife or wives, and two thirds to the surviving child or children (J. Pfumorodze, 'Protection of widows and surviving children under the intestate succession laws of Zimbabwe: The case of estates of persons subject to customary law' (2010) 25(1) *Journal of Social Development in Africa*, 47-8).
- 117 Zambia's *Intestate Succession Act 1989* entitles the widow to receive 20 percent of the deceased's estate; his children are entitled to equally share 50 percent; his parents, 20 percent; and other relatives, 10 percent. The Act only applies to land held under statutory law. Of all land in Zambia, 80 percent is held under customary tenure. This land and homesteads built thereon are excluded from the Act (CLEP, *Property Rights in Zambia* issue paper prepared for the Commission on Legal Empowerment of the Poor (DATE) United Nations Development Programme <<http://www.undp.org/legalempowerment/reports/concept2action.html>> at 19 April 2011).
- 118 An Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages (7 October 2003). Published by the Ministry of Foreign Affairs (Monrovia, Liberia, 1 December 2003). See B. Allen, 'Liberia: Paper Rights Flimsy Protection', *Women's Net*, 13 January 2010, Women's Net <<http://www.womensnet.org.za/news/liberia-paper-rights-flimsy-protection>> at 5 May 2011; E. Mooney, *Liberia and the Implications of Women's Inheritance Rights for IDP Return and Reintegration: Findings and Recommendations from Mission in April-May 2004* (2004), Internal Displacement Monitoring Centre (IDMC) <[http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/D30786EFC327074D802570B700599D40/\\$file/Mooney+Liberia+paper.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D30786EFC327074D802570B700599D40/$file/Mooney+Liberia+paper.pdf)> at 28 April 2011; R. Murray, 'Liberia's Land Just for Some' IPS, 9 June 2009 <<http://ipsnews.net/africa/nota.asp?idnews=47147>> at 26 January 2011.
- 119 Government of Rwanda, *Law No 22/99 of 12/11/1999 to Supplement Book One of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions*. This law stipulates 'community property' as default marriage property regimes and thereby "firmly established gender equality in land inheritance and in property ownership within the majority of marriages" (E. Daley, R. Dore-Weeks, and C. Umuhozo, 'Ahead of the game: land tenure reform in Rwanda and the process of securing women's land rights' (2010) 4(1) *Journal of Eastern African Studies*, 132, 134).
- 120 See for instance Mensa-Bonsu, above n 112, 108; Pfumorodze, above n 116, 48-54.
- 121 For Malawi: B. Ligomeka, 'Property grabbing impoverishes widows' (2003),

IPS News <<http://ipsnews.net/news.asp?idnews=20520>> at 28 April 2011; White et al, above n 115, 38, 101, 105. For Liberia: Allen, above n 118; Zambia: R. Maumbu, 'Women organising for change in Zambia: Constituting the law on inheritance 1970-1991' (paper presented at the conference *Southern Africa: Women's Perspectives and the Dutch Connection*, Utrecht, 1-3 December 1993); Zimbabwe: Pfumrodze, above n 116, 54-5; and for Rwanda: Daley, Dore-Weeks, and Umuhoza, above n 119, 137-140; and RCN Justice & Démocratie and Haguruka Association for Defense of Women and Children's Rights.

- 122** R. Stewart, *The Family Code* (a film by Rebecca Stewart, aired on Al Jazeera from 14 October 2010), Al Jazeera

<<http://english.aljazeera.net/programme/s/witness/2010/09/201095141841631119.html>> at 26 January 2011. See also C. Debrabandère, 'Women's rights languish in Mali' *Deutsche Welle*, 8 March 2010, *Deutsche Welle* <<http://www.dw-world.de/dw/article/0,,5323121,00.html>> at 5 May 2011; Integrated Regional Information Networks (IRIN), *Mali: New family law faces opposition from Muslim organisations*, 2 May 2008, <<http://www.unhcr.org/refworld/docid/4820057d1f.html>> at 5 May 2011; D.E. Schulz, 'Political factions, ideological fictions: The controversy over family law reform in democratic Mali' (2003) 10(1) *Islamic Law and Society*.

- 123** Radio France International (RFI), *Mali's parliament continues family law debate* (6 October 2010), Radio France International

<<http://www.english.rfi.fr/africa/20101006-malis-parliament-continues-family-law-debate>> at 19 April 2011.

- 124** Library of Congress, *Mali: Bill Seeing to Modernize Family Law Regime Defeated* (12 October 2010) Library of Congress <[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402305\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402305_text)> at 19 April 2011.

- 125** The going price for piece of residential land and the surrounding mahangu fields was widely set at 800 Namibian dollars, which, at the time of research, amounted to approximately US\$80. In comparison, in 2003, a much smaller piece of residential land in the surroundings of Kumasi, the second biggest town in Ghana, was worth an equivalent of US\$1,500.



Ellen Desmet\*

## 1. Introduction

This chapter analyses the interaction between customary legal systems and the formal legal system of Peru. It will show that the recognition of customary law by the Peruvian state legal system does not lead to real acceptance of customary norms and structures. This is demonstrated by the Peruvian legislation on autonomy, land rights and nature conservation. The implications of such a half-hearted recognition of customary law in state legislation at the local level are illustrated with the experiences of the Airo Paj (Secoya), an indigenous people living in the extreme north of the country.

The chapter is based on extensive field experience in the Peruvian Amazon. Doctoral fieldwork during six months in 2006 (April September) and five weeks in 2009 (April May) was complemented by annual research visits from 2003 until 2007. Multiple data collection techniques were used. At the national level, the main sources of information were semi-structured interviews, document analysis and, to a more limited extent, attendance at meetings. At the local level of the Airo Paj territory, these data collection techniques were combined with participant observation.

The two most important sources of document analysis were legislation and scholarly literature. Interviews were conducted with representatives of the Peruvian state, indigenous organizations, non governmental organizations (NGOs), independent experts and local people. The interviews were held in the national capital of Lima, in the regional capital of Iquitos, and in the ancestral territory of the Airo Paj. The interviews were structured around some general topics, leaving sufficient room for delving into subjects of particular interest to, or in areas of particular expertise of the respondents. All taped interviews were transcribed.

The interviews with the Airo Paj were characterized as follows: the younger, male population communicated directly in Spanish; whereas the elderly and women needed interpretation between Spanish and their mother tongue *Paj Cocua*, “language of the people”, which was mainly conducted by a family member or a local Airo Paj teacher. In addition to these interviews, information was gathered through informal conversations.<sup>1</sup>

After an introduction on the Airo Paj, the relevance of customary law with respect to the organizational and jurisdictional autonomy of indigenous peoples is reviewed. Subsequently, the two central themes of this chapter are addressed: land rights and nature conservation. Both themes

\* Ellen Desmet is a research fellow at the Institute for Foreigners Law and Anthropology of Law of the University of Leuven, Belgium. She holds a master in law and a master in Cultures and Development Studies, as well as a master in development cooperation. She obtained her PhD at the University of Leuven (Belgium) with a dissertation on the relationship between nature conservation and the rights of indigenous peoples and local communities, from a human rights and legal anthropological perspective. Ellen also works for the interdisciplinary Children's Rights Knowledge Centre, where she is responsible for research and policy advice. She can be contacted at [desmet\\_ellen@hotmail.com](mailto:desmet_ellen@hotmail.com). This chapter builds on the results of fieldwork carried out in her doctoral research, published in *E Desmet, Indigenous Rights Entwined with Nature Conservation* (forthcoming, Intersentia 2011). The author thanks Janine Ubink and Ilaria Bottiglieri for their very valuable comments on earlier versions of this article.

follow the same structure. First, there is an explanatory note on the different concepts of lands, territories and property, and on the ambiguous relationship between nature conservation and indigenous peoples. Second, the growing recognition of the relevance of customary legal systems at the international level is reviewed with regard to both land rights and nature conservation. Third, some aspects of the customary legal systems on land rights and nature conservation among the Airo Paj are described. Finally, the Peruvian legal system is examined in terms of how it incorporates and respects customary legal systems, and the impact that this has had on the Airo Paj.

## 2. The Airo Paj

The Airo Paj (Secoya) are the ancestral inhabitants of the region, today situated in the north of the Peruvian Amazon. The analysis focuses on the experiences of the Airo Paj communities of the Putumayo basin. The Putumayo River forms the natural border between Peru and Colombia. The other population groups of the Upper Putumayo region are the indigenous peoples of the Kichwa and Huitoto, and mestizos.

There are eight Airo Paj communities in Peru, which have a total population of about 588 inhabitants. Six of these communities are situated at the tributaries of the Putumayo River. Navigating the Yubineto affluent upstream, one successively encounters the villages of Bellavista, San Martín de Porres, Santa Rita and Nuevo Belén. The community of Mashunta lies at the Angusilla tributary, while Zambelín de Yaricaya is named after the Yaricaya River. One community, Vencedor Guajoya, lies at the Santa María River, a tributary of the Napo River, while the community of Puerto Estrella was recently established at the Lagartococha River.

**Map 1. The titled native communities in the Teniente Manuel Clavero District**



Source: Detail adapted from the map "Territorio de las Comunidades Nativas Tituladas del Río Putumayo", Information System on Native Communities of the Peruvian Amazon (SICNA), Instituto del Bien Común (April 1998). The map was adapted to the actual ubicación of the communities of Bellavista, San Martín de Porres and Santa Rita.

*Airo Pai* can roughly be translated as “People (*Pai*) of the Forest (*Airo*)”. The auto-denomination of this people already indicates their strong identification with their ancestral territory, rooted in their cosmology and daily life.<sup>2</sup> The outside world knows the *Airo Pai* from Peru and their relatives in Ecuador as *Secoya*, a Spanish adaptation of *Sieco Pai* (people painted with rainbow colors). This is the name of a now extinct clan and refers to the custom that continues today of facial and corporal painting using natural pigments.<sup>3</sup>

The *Airo Pai* belong to the linguistic family of western Tucano. The first missionary chronicles designate these Tucano-speaking groups as “the nation of the *encabellados*”, because of the custom of the men to wear their *cabello* (hair) long.<sup>4</sup> Other descendents of these Tucano-speaking groups today are the Mai Huna in Peru, the Coreguaje and Macacuaje in Colombia, and the Siona and Secoya in Ecuador.<sup>5</sup>

### 3. Autonomy

#### 3.1 Organizational autonomy

The Constitution of Peru does not recognize ‘indigenous peoples’ as a legal subject, but only recognizes *comunidades campesinas* (peasant communities) and *comunidades nativas* (native communities).<sup>6</sup> The indigenous peoples of the Andean Highlands and the coastal areas are organized in peasant communities. The indigenous peoples of the Peruvian Amazon were requested to organize themselves in native communities. These communities are historical constructions; their establishment has led to the fragmentation of the indigenous peoples of Peru in various legal entities. Today, both types of communities have the same constitutional rights. Nevertheless, their legal histories and their past social contexts are very different.

The Constitution of Peru 1979 provided for the first time that peasant and native communities “are autonomous in their organization, in their community work, and in the use of their land, as well as in the economic and administrative management within the framework established by law”.<sup>7</sup> The 1993 Constitution added that the communities were also autonomous “in the free disposition of their land”.<sup>8</sup> The inclusion of the latter phrase undermined the security of indigenous land rights. Indeed, granting the communities autonomy to freely dispose of their land – which is in general foreign to their traditions and norms – could lead to the risk that these communities will be put under pressure by external actors to transfer their land to them. Examples include companies wanting to acquire the land in order to extract natural resources.

The qualification “within the framework established by law” in the constitutional provision strongly limits the apparent autonomy of the communities.<sup>9</sup> In the different areas where autonomy is granted by the Constitution, Peruvian law imposes its own regulations. As such, peasant and native communities are not free to organize themselves according to their traditions and/or present views. The Regulations of the New Law on Native Communities of 1979 prescribe an organizational structure consisting of an *asamblea general* (General Assembly) and a *junta directiva* (Board of Directors).<sup>10</sup> The General Assembly is the supreme organ of the community and is composed of all the registered community members.<sup>11</sup> The Board of Directors is responsible for the government and administration of the community, and consists of a President, a Secretary and a Treasurer.<sup>12</sup> According to the Civil Code, the Directors are periodically elected, by means of “personal, equal, free, secret and obligatory” vote.<sup>13</sup> Gray observes that these provisions have had “the effect of superimposing a western representative democratic system on top of the customary direct democratic system in which decisions were taken by consensus. In fact, most communities have adapted the law to fit in with their own customs and the two systems co-exist, but not without tensions.”<sup>14</sup>

How does this restricted constitutional autonomy then materialize in the daily life of the *Airo Pai*? The Board of Directors of an *Airo Pai* community consists of the *Cacique* (Chief/President), the Vice-

*Cacique* (Vice-Chief/Vice-President), a Secretary, a Treasurer and one or two *vocales* (persons responsible for reminding the community members about upcoming meetings). Elections take place every two years *a la pizarra* (at the blackboard). Adult members of the community, men and women, mark a line next to the candidate of their preference. In contrast to what the Civil Code prescribes, there is no secret vote. Also, the free character of the vote is doubtful, because it is plausible that the first voters will influence those who vote after them.<sup>15</sup> It was observed that candidates who did not receive votes in the beginning, did not receive votes later on, and that influential people in the community affected the voting behavior of people after them. On the other hand, some persons strategically waited to vote until the end.

Also, with respect to land use and economic issues, peasant and native communities are not as autonomous as the Constitution states. In reality, economic policies are decided by the national government, principally the Ministry of Agriculture and the Ministry of Energy and Mines, with little or no involvement of the indigenous peoples.

The lack of autonomy of the Airo Paj in the use of their land and in economic management is apparent from the natural resources policy of the Peruvian Government. Driven by a neoliberal economic vision, the Peruvian state has given in concession the major part of the Peruvian Amazon to transnational companies for the exploration and exploitation of hydrocarbons. For example, in March 2006, the Peruvian state signed an agreement with the company Petrobras Energía Perú S.A. for 30 years of petroleum exploitation and 40 years of gas exploitation in Block 117. This block covers the ancestral territory of the Airo Paj, Kichua and Huitoto peoples. They were not consulted prior to the concession, which constitutes a violation of International Labour Organization (ILO) Convention No. 169.<sup>16</sup>

Finally, the autonomy in administrative management is limited by the system of *gobernadores* and *teniente gobernadores* (local authorities representing the central government) installed by the Peruvian state. These local authorities represent the Executive Power within the ambit of their jurisdiction and oversee the implementation of government policies. They are charged with monitoring compliance with the Constitution and laws, and oversight of the internal order. In principle, there is a *teniente gobernador* in each peasant or native community. The “autonomy” of rural and native communities is thus much more restricted than appears in the Constitution.

It is worth noting that the system of *teniente gobernador* is rarely implemented in the Airo Paj communities of the Upper Putumayo region. The principal authorities in the daily life of the Airo Paj are the *caciques* of the communities and the president of the *Organización Indígena Secoya del Perú* (OISPE, Indigenous Secoya Organization of Peru), the local, representative indigenous organization.

### 3.2 Judicial autonomy

**154** Article 149 of the Constitution of Peru 1993 states that “[t]he authorities of the Peasant and Native Communities ... may exercise judicial functions within their territorial ambit in accordance with customary law, always providing that they are not violating the fundamental rights of the person”.

The *caciques* of the Airo Paj communities identify the following as belonging to their functions: organizing communal work; representing the community in meetings with external actors; negotiating for the benefit of the community; and giving advice to their people. The education of children mostly takes the form of advice on how to work and behave.<sup>17</sup> The advisory function is also used to maintain peace within the community and to mediate conflicts. In addition, the *caciques* do not identify conflict resolution as one of their tasks, but only provide advice. Not only the *caciques*, but also the elderly, teachers and other wise persons may give advice. Conflicts are rare and of a minor nature, mainly occurring during drinking events, but have become more frequent as people are turning away from religious convictions that prohibit alcohol. Sources of frictions are, for example, jealousy, or livestock roaming and dirtying community patios.

Among the Airo Paj there is little familiarity with the rules of the formal judicial system, and access to the state judicial system is weak. Until 2004, the Airo Paj villages fell under the jurisdiction of the Putumayo District, Maynas Province, Department of Loreto. The nearest state court was a justice of the peace,<sup>18</sup> situated in the capital of the Putumayo District, San Antonio del Estrecho, various days of boat travel from the Airo Paj communities. The remaining state judicial institutions were located in the regional capital of Iquitos. The large distances and the high transport costs implied that there was little interaction between the Airo Paj and state actors.

In 2004, the Teniente Manuel Clavero District was created, with the village of Soplín Vargas as its capital.<sup>19</sup> This new jurisdiction, covering the Upper Putumayo region, seceded from the Putumayo District. A justice of the peace was established in the community of Tres Fronteras, a few hours by boat from the Airo Paj communities. In this way, state institutions became closer and thus more accessible for the Airo Paj communities of the Upper Putumayo region. To facilitate implementation of the state policy of access to justice, in March 2010 the judiciary of Peru donated a solar panel to the justice of the peace of Tres Fronteras, because the village does not have electricity.

In conclusion, until recently, the physical remoteness of judicial institutions implied the weak influence of the state judicial system in the Airo Paj's daily life. With the recently created justice of the peace situated closer to the Airo Paj communities, this may change in the future.

## 4. Land rights

### 4.1 The relationship between indigenous peoples and their territories

Indigenous peoples have a unique relationship with their territories. In the Indigenous Peoples' Earth Charter<sup>20</sup> of 1992, indigenous peoples described this bond as follows:

31. Indigenous Peoples were placed upon our Mother, the Earth, by the Creator. We belong to the land. We cannot be separated from our lands and territories.

32. Our territories are living totalities in permanent vital relation between human beings and nature. Their possession produced the development of our culture. Our territorial property should be inalienable, unceasable [sic]<sup>21</sup> and not denied title. Legal, economic and technical backup are needed to guarantee this.

34. We assert our rights to demarcate our traditional territories. The definition of territory includes space (air), land and sea. We must promote a traditional analysis of traditional land rights in all our territories.

The Charter of the Indigenous and Tribal Peoples of the Tropical Forests of 1996 states:

Our territories and forests are to us more than an economic resource. For us, they are life itself and have an integral and spiritual value for our communities. They are fundamental to our social, cultural, spiritual, economic and political survival as distinct peoples.<sup>22</sup>

The indigenous and tribal peoples of the tropical forests demand:

[s]ecure control of our territories, by which we mean a whole living system of continuous and vital connection between man and nature; expressed as our right to the unity and continuity of our ancestral domains; including the parts that have been usurped, those being reclaimed and those that we use; the soil, subsoil, air and water required for our self reliance, cultural development and future generations.<sup>23</sup>

On the basis of the views of indigenous leaders of the Amazon basin, the indigenous territory was defined by Chirif, García and Smith as:

the mountains, valleys, rivers and lagoons that are identified with the existence of an indigenous people and that have provided it with its means of subsistence; the richness inherited from their ancestors and the legacy they are obliged to transmit to their descendants; a space where every little part, every manifestation of life, every expression of nature is sacred in the memory and in the collective experience of that people and which is shared in intimate interrelation with the rest of living beings, respecting its natural evolution as a unique guarantee of mutual development; the environment of freedom on which that people exercises control, permitting it to develop its essential national elements and for the defence of which every member of the people is prepared to shed his blood, rather than supporting the shame of having to look in the eyes of his dispossessed people.<sup>24</sup>

According to indigenous peoples' views, the land not only provides them with their means of subsistence, but also has a spiritual meaning and constitutes the source of traditional knowledge of fauna and flora, such as medicinal plants. Moreover, the territory usually forms the basis of their political organization and socio cultural interactions. The description also refers to the collective and intergenerational dimensions of the relationship to the territory. However, it must be noted that there is not always a physical link with the ancestral territory, for example, when indigenous persons migrate to cities or have been displaced.

In the struggle to defend their territorial rights, indigenous peoples used in their language a legal concept of the dominant Western order, "property".<sup>25</sup> As Pedro García Hierro describes, some attributes of the property concept were deemed helpful by the indigenous movement to protect indigenous territoriality, especially the absolute, exclusive and permanent nature of the power that a right of property confers to its titular. Given that most legal systems do not offer other possibilities to protect the indigenous territory, using the concept of property seemed the most appropriate option.

Nevertheless, there are some fundamental differences between indigenous and Western concepts of property and ownership, which interfere with the use of the property concept to adequately protect indigenous territories. The concept of private property lies at the core of the Western economic system, providing the basis for the free and unlimited circulation and accumulation of goods. While indigenous peoples do have a sense of ownership, for example, with regard to certain artifacts, traditionally they will rarely use the property concept in relation to the land. In Western legal systems, the property of land corresponds to an individual or a legal entity, such as a company or association; these natural or legal persons can freely dispose of the land. In contrast, according to the indigenous view, the land is not an individual property, but rather is linked to a people.

**156** Because various characteristics of the private property concept collide with indigenous conceptions, some "adaptations" were introduced. For instance, one of the essential qualities of private Western property is that the owner can freely dispose of the property and mortgage it. Given the threats this poses to the tenure security of indigenous territories, indigenous peoples claim that their land is inalienable and unseizable. Also, because the subject of Western property is a natural or legal person, García Hierro notes how, in the Peruvian legal order, a new legal subject was created, the "community", in order to reflect – albeit inadequately – the collective relationship of indigenous peoples to their territories. These adaptations do not accurately reflect and protect the relationship between indigenous peoples and their territories; rather, they denaturalize the classical private property concept. Therefore, the concept of territory more appropriately reflects indigenous views and rights than the Western property concept.

## **4.2 On the international scene**

The particular attachment of indigenous peoples to their lands, territories and resources is reflected in various international legal instruments. ILO Convention No. 169 recognizes the "special

importance for the cultural and spiritual values” of indigenous peoples of their relationship with their lands or territories.<sup>26</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) refers to the “distinctive spiritual relationship” of indigenous peoples with their “traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources.”<sup>27</sup>

For indigenous peoples, “territory” is thus a much broader concept than land. Article 13(2) of ILO Convention No. 169 states “[t]he use of the term *lands* ... shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”. In contrast, the UNDRIP uses the expression “lands, territories and resources” without further specification.

The customary land rights of indigenous peoples have been recognized in particular within the Inter-American human rights system. The landmark case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* of 2001 was the first instance where an international court issued a legally binding decision recognizing the collective rights of indigenous peoples to their lands, territories and resources.<sup>28</sup> In this case, the Inter-American Court of Human Rights stated that “[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”<sup>29</sup> The land, territorial and resource rights of indigenous peoples do not therefore depend on prior recognition within the national state legal framework.

In addition to pecuniary redress, the Court ordered two measures in the *Awes Tingni* case. First, pursuant to article 2 of the *American Convention on Human Rights*,<sup>30</sup> Nicaragua was ordered to adopt in general “the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, *in accordance with their customary law, values, customs and mores*.”<sup>31</sup> Second, in the specific case under consideration, the Court ordered the state to “carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the *Awes Tingni Community*” and until then, “to abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the *Awes Tingni Community* live and carry out their activities.”<sup>32</sup> As Anaya puts it, the Inter American Court “affirmed not only a right against state interference with indigenous peoples’ rights in lands and resources without their consent, but also an affirmative right to state protection from such interference by private parties.”<sup>33</sup> The road to enforcement of the judgment was not straightforward. In 2002, the Court ordered provisional protection measures for the members of the *Awes Tingni* community on the use and enjoyment of the property of their lands and natural resources, with the aim of avoiding immediate and irreparable damages caused by natural resource exploitation activities by third parties on these lands.<sup>34</sup> In 2007, these provisional measures were lifted, but the Court continued to supervise the enforcement of the judgment.<sup>35</sup> On 14 December 2008, the Government of Nicaragua finally handed over the property title to 73,000 hectares of its ancestral territory to the *Awes Tingni* community.<sup>36</sup>

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### 4.3 Customary land rights among the Airo Pai

As mentioned, the Airo Pai are the original inhabitants of the land situated between the Upper Putumayo River and the Aguarico, Lartococha and Upper Napo Rivers in Peru. It has been estimated that they have been present in this region for 1,500 to 2,000 years.<sup>37</sup> Their greater presence at the tributaries of the Putumayo River is recent. Until some decades ago, they held a semi-nomadic lifestyle.

Different clans lived separately at small tributaries deep in the forest, each in a *maloca* (oval multi-family house). Every three to four years, the clan moved for a variety of reasons: the death of a shaman or another important member of the community (because according to custom, they must be buried in their own homes); the creation of new families; natural events such as a river silted with sand or the exhaustion of nearby firewood; or boredom.



From the 1970s onwards, the presence of mestizo teachers, the establishment of health posts and evangelization all led the Airo Pai to create stable and more accessible villages, closer to the principal rivers. The first such village was San Martín de Porres at the Yubineto River.

Every family has two or three agricultural fields on which manioc, maize and banana are cultivated based on a shifting cultivation system.<sup>38</sup> Each household cultivates its “own” agricultural fields. Belaunde notes that “[t]he personal property of the fields is based on the notion that a plot of land belongs to who works and organizes its management. The forest around the community is like a large parcelled garden.”<sup>39</sup> Also, when the field is left as a *purma* (abandoned field) to recover, the link with the household that first cultivated the field remains. If other persons want to establish a new field on the *purma*, they need to ask permission to that household.

There are various fruit trees in the agricultural fields, such as *pijuayo* (*Bactris gasipaes*). These trees are “like a stamp that marks the territory with the identity of those who sowed them”;<sup>40</sup> The landscape is also modified by cemeteries of the ancestors. Casanova has noted “[a] river may be uninhabited for decades, but there remain the marks of their ancestors, present in the *purmas* ... and in the thinking of the elderly of today.”<sup>41</sup> The forest is therefore not an empty or virgin place, untouched by people; its current state is the result of an age long interaction between man and nature.<sup>42</sup>

Various agricultural tasks are carried out on the basis of a *minga*, which is an organizational form of communal work whereby a family invites relatives and friends to work together on its field. In exchange, the organizing family brings *masato* (manioc beer) and sometimes food. They commit themselves to return the favour at a following *minga*.

The remainder of the forest, outside the agricultural fields, is considered common property. Within the Airo Pai villages, every family has a house with an adjacent garden, where peppers (*ají*) and fruit trees are grown. The members of the community can precisely indicate the borders between the different gardens, although generally they are not physically demarcated.

In addition to subsistence, the territory is also essential for the identity and cultural reproduction of the Airo Pai as a people. Various places of historical mythical importance can be identified. Moreover, the forest provides the Airo Pai with a range of plants essential for their livelihood and cultural identity, such as medicinal plants, *ayahuasca* (*yaje*), *yoco* and the chambira palm.

#### 4.4 Peruvian legislation and land rights

The Peruvian state has been particularly reluctant to recognize the territorial rights of indigenous peoples. This is evidenced by Peru's abstention from voting on ILO Convention No. 169 at the International Labour Conference due to, among other reasons, its concern over the use of the term “territories”;<sup>43</sup> The Peruvian Parliament subsequently approved the Convention, which came into force in February 1995. Legislation was not adapted to the international standards, however, as the concept of indigenous territories is not recognized. The peasant and native communities can only acquire collective rights over limited lots of land. Indigenous peoples cannot obtain state legal recognition of the totality of their ancestral territory as such.

In the course of the years, four Airo Pai native communities have been registered and titled. In the Putumayo basin, the communities are: i) San Martín de Porres with its annexes Bellavista, Santa Rita and Nuevo Belén, at the Yubineto River; ii) Mashunta, at the Angusilla River; iii) Zambelín de Yaricaya, at the Yaricaya River; iv) Vencedor Guajoya, at a tributary of the Napo River at the Santa María River. However, the Airo Pai ancestral territory is considerably larger than the sum of the titles of these four native communities. Important mythological cultural places, such as the *Hupo* (also called “the historical monument of the man of stone”) and the *cochas encantadas* (bewitched lakes) at Lagartococha, as well as a large number of cemeteries of the ancestors are not included in these titles. Moreover, the title of the community Vencedor Guajoya at the Napo River is very small, only

1,000 hectares; the village today is situated outside its borders. The community of Puerto Estrella at the Lagartococha River has not yet been titled.

Moreover, within the native communities, only agricultural lands are transferred as property to the communities; the forest areas within their communal lot are given in concession.<sup>44</sup> Given that most of the lands in the Amazon are forests, on which the native communities depend for their subsistence activities and cultural reproduction, this provision constitutes a serious limitation of their rights. The measure may stimulate the slashing and burning of the forest, with the objective of sowing and requesting titling.<sup>45</sup>

At present, the effects of these different regulations for agricultural lands and forest lands seem to be limited. Natives use the whole of their lands irrespective of whether they are agricultural lands given in property or forest lands given out for use. Nevertheless, there remains a situation of legal insecurity, which is potentially dangerous. Usage rights are less secure than property rights: at any moment, the state may decide to assign these lands to another use. According to a lawyer associated with the indigenous rights movement: “[u]ntil now, there is kind of a dormant situation, in the sense that people occupy their space and their forests, but that does not mean that the situation is not dangerous.”<sup>46</sup>

## 5. Nature conservation

Peru hosts a rich biological diversity. The creation of protected areas by the state is often considered by conservationists as the preferred way of protecting biodiversity *in situ*. Nevertheless, indigenous peoples and local communities often engage in ways of nature conservation other than the typically Western protected areas established and managed by government actors.

### 5.1 The ambiguous relationship between indigenous peoples and nature conservation

Perspectives on the relationship between nature conservation and indigenous peoples are very divergent: from a proclaimed incompatibility of interests between nature conservation and local people to a fundamental interdependence between the future of both. Some conservationists perceive the goals of nature conservation and the interests of indigenous peoples and local communities as contradictory. In their view, conservation of nature requires strict preservation, which cannot be reconciled with human presence or resource use.<sup>47</sup> Other actors perceive a convergence between the aims of nature conservation and the interests of local people. Given that most local communities depend on their natural environment for their subsistence and well-being, it is in their own interests to conserve their natural resources.<sup>48</sup> This convergence of interests has been particularly advanced with respect to indigenous peoples. Indigenous peoples have been represented as ‘the stewards of Mother Earth’, those who live in harmony with nature. The Romantic image of Indians as noble savages, promoted by Locke and Rousseau was taken up again in the 20<sup>th</sup> century with a focus on the allegedly balanced relationship of native people with nature. The term “ecologically noble savage” was created; indigenous peoples were represented as “natural conservationists”.<sup>49</sup>

A more nuanced position is proposed here: indigenous peoples and local communities are neither intrinsic destroyers of nature nor ecologically noble savages. First, indigenous peoples and local communities are not natural conservationists, at least not as understood by Western conservationists.<sup>50</sup> Philosophical or rhetorical declarations of harmony with nature do not suffice to conclude that effective conservation is taking place.<sup>51</sup> Not all local norms and practices were, are, or will be sustainable or conservationist. Some may even have the opposite effect. For instance, some groups used to employ poisonous substances to fish in small pools. Also, land scarcity and poverty, a growing interaction with the liberal market economy and the introduction of new technologies that facilitate rapid resource extraction may induce more depredatory practices.<sup>52</sup> These accelerating changes often endanger a continued sustainable relationship between the community and its

natural environment. In fact, few indigenous peoples have managed to “develop a sustainable life-style once technological inventions or social and economic opportunities have entered their lives”.<sup>53</sup>

However, “to reject environmental myths about native peoples does not mean suppressing their historical associations with the land”.<sup>54</sup> Various authors observe that many indigenous peoples and local communities are not familiar with the word “conservation”. Just like “biodiversity”, the concept of “conservation”<sup>55</sup> seems to be a creation of Western rational culture. This does not imply that conservation – understood as a cultural and political process of protecting nature – is not practised in non-Western societies, but it is conceived differently.

Indigenous peoples and local communities are not inherent destroyers of nature either. In many different times and places, local people have managed their communal resources through cultural practices, attributing “symbolic and social significance to land and resources beyond their immediate extractive value”.<sup>56</sup> Indigenous peoples and local communities have protected certain areas, species or ecosystems for a variety of reasons, which may be livelihood-related or cultural-spiritual. It is difficult, however, to ascribe such practices and outcomes to an explicit and conscious conservation ethic. As Little concludes, “cases in which local communities in low-income regions manage their resource bases with the prime objective of conservation – rather than improving social and economic welfare – are virtually nonexistent”.<sup>57</sup>

Nevertheless, many indigenous peoples and local communities have acquired deep knowledge about the ecosystems with which they have been interacting on a daily basis for so many years. This traditional knowledge is still largely unknown and/or insufficiently appreciated by Western conservation. For instance, the combination of the semi-nomadic lifestyle of Amazonian peoples with slash-and-burn agriculture left enough time for the forest to recover, which is necessary due to the limited soil fertility. Slash-and-burn agriculture has long been negatively perceived in conservation science; it is now recognized that this practice relies on a sustained knowledge of and insight in the functioning of forest ecosystems.<sup>58</sup> Thus, although in most cases no explicit conservation ethic can be attached to local practices, they often entail beneficial consequences for the natural environment.

## 5.2 On the international scene

The relevance of customary legal systems within nature conservation initiatives has been recognized at the international level. For example, the Corobici Recommendations, adopted at the international Expert Meeting on the Implementation of Traditional Forest Related Knowledge and the Implementation of Related International Commitments in San José, Costa Rica, in 2004, address the issue of traditional forest-related knowledge.<sup>59</sup> The following recommendation on conservation and protected areas was included:

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6. Reform national forest and conservation policies, laws, institutions, and land tenure regimes to recognize indigenous peoples’ unambiguous and secure rights to collectively own, manage, and control their territories, forests and other natural resources, *taking into account their traditional lifestyles and customary systems of tenure*, especially those relevant to traditional knowledge.<sup>60</sup>

In recent years, the concept of Community Conserved Areas (CCAs) was proposed by the World Conservation Union (IUCN)<sup>61</sup> to refer to conservation initiatives of indigenous peoples and local communities.<sup>62</sup> At the fifth World Conservation Congress in Barcelona, the terminology was refined to Indigenous Peoples’ and Community Conserved Areas (IPCCAs). Three key conditions must be fulfilled for an area to qualify as an (IP)CCA:

(I) a *strong relationship* exists between a given ecosystem, area or species and a specific indigenous people or local community concerned about it because of cultural, livelihood-related or other strongly felt reasons;

(II) the concerned indigenous people or local community is a major player in decision making about the management of the ecosystem, area or species; in other words, the community possesses – *de jure* or *de facto* – the power to take and enforce the key management decisions regarding the territory and resources (a community institution exists and is capable of enforcing regulations);

(III) the voluntary management decisions and efforts of the concerned community lead to the conservation of biodiversity, ecological functions and associated cultural values, regardless of the objectives of management originally set out by the community.<sup>63</sup>

There is a huge diversity of IPCCAs, including sacred lakes and forests, indigenous territories, community forests, and formal protected areas managed by local communities. Borrini-Feyerabend and Lassen have distinguished four governance sub-types of IPCCAs. In two types, IPCCAs are governed by traditional institutions; in the two other types, IPCCAs are governed by “relatively new institutions”, which make use of modern techniques such as written rules and voting systems. Traditional institutions may have maintained their basic characteristics over time (sub-type T1), or may have recently been tailored to new conditions, such as the interaction with the Government. However, the traditional institutions maintain their unique character and accountability towards the communities (sub-type T2). IPCCAs may also be governed by relatively new institutions. These may have developed spontaneously within the community, without substantial external influence (sub-type N1), or may be the result of the impact of government agencies, NGOs, and/or conservation and development projects. In this case, the rules and governance institutions match external (legal) criteria (sub-type N2).

IPCCAs may also differ in their relationship with the government. One of the three essential characteristics of an IPCCA is that indigenous peoples or local communities have *de facto* authority over the IPCCA. A distinction between four sub-types may be made: two subtypes of *de facto* IPCCAs and two subtypes where IPCCAs are formally recognized by the government. First, there are IPCCAs governed by indigenous peoples or local communities without any interference by government agencies or incorporation in state legislation (sub-type DF1). Second, some IPCCAs are in an uncertain situation, “with the power relationship between the state and the indigenous peoples or local communities being unclear and at times negotiated on an *ad hoc* basis” (sub-type DF2).<sup>64</sup> Third, the community institutions governing IPCCAs may be formally recognized by the government, but this recognition does not curtail local autonomy or decision-making authority. On the contrary, the position of the IPCCAs is reinforced and supported by legal authority (sub-type DJ1). Finally, the community institutions governing the IPCCAs may be formally recognized by the government, but in a way that requires modifications to the prior governance institutions, to comply with legal or other criteria (sub-type DJ2).

Two types of IPCCAs seem to be particularly successful: i) IPCCAs situated in remote areas, outside the influence of government agencies or private actors (sub-types DF1/T1); and ii) IPCCAs benefiting from “an appropriately supportive legal and policy framework, matching community institutions able to take advantage of it”.<sup>65</sup> With respect to the latter situation, Borrini-Feyerabend and Lassen state:

Although many CCAs are based on customary law and traditional practice, the level of recognition and support by the state and other social actors can be decisive for their survival. ... CCAs that are most “visible” and important in terms of ecological values and natural resources are critically dependent on the ability of indigenous peoples and local communities to be recognized as legal subjects, to make decisions about land and resource uses, to hold secure tenure over resources, and to exclude outsiders from appropriating these resources.<sup>66</sup>

In October 2007, the Second Latin American Congress on Protected Areas was held in Bariloche, Argentina. In the Bariloche Declaration, the concept of Indigenous Conservation Territories was

proposed as a “legitimate governance model for protected areas established in indigenous peoples’ ancestral territories”.<sup>67</sup> IUCN was requested:

to consider integrating the concept of Indigenous Conservation Territories as a legitimate governance model for protected areas established in indigenous peoples’ ancestral territories, whatever the management category may be, and to recognize in that model the integration of culture and nature, the *role of customary rights*, the traditional institutionality and the exercise of indigenous authority in such territories.<sup>68</sup>

### 5.3 Customary conservation-related norms among the Airo Pai

Various places within the Airo Pai ancestral territory can be categorized as culturally protected areas.<sup>69</sup> These areas are avoided or left untouched for cultural-spiritual reasons and thus strictly conserved in practice. This is the case for *Hupo*, where, according to their mythology, the Airo Pai originated. This place is also called “the historical monument of the man of stone”, because it is told that once there was a young man laying there in a hammock. According to the mythology, the young man was too lazy to go hunting and despite various invitations, he always insisted on being left to sleep. In the end, his hammock was shaken; the young man fell out and was converted into a stone. Today, if one goes there, the animals can talk but one is not allowed to speak. To sharpen a machete on the rock, one must first strew *no’cua cono* (traditional banana beer) and if not, blood will come out of the stone. It takes five days to get there and one day to return.

Another example of culturally protected areas is the *cochas encantadas* (bewitched lakes), which are mostly found in the Lagartococha area but also elsewhere. The Airo Pai say that “if one goes there, even if it is one o’clock in the afternoon it will become dark with flashes of lightening and rain. One cannot walk there”.<sup>70</sup>

These culturally protected areas can be qualified as indigenous peoples’ and community conserved areas (IPCCAs) because they fulfill the three requirements proposed by IUCN (cf. supra): i) a strong relationship between the given area and a specific indigenous people; ii) the indigenous people concerned has (or had) *de facto* the power to take and enforce the management decisions as regards the territory; and iii) the voluntary management decisions lead to the conservation of biodiversity and associated cultural values.

An example of a conservation-related norm recently agreed on is the establishment of fish quota by the families living in the community of Zambelín de Yaricaya. In contrast to the other Airo Pai communities, in Zambelín, fish can be sold to Colombian merchant boats. This is because of the geographical location of Zambelín de Yaricaya at a tributary more upstream the Putumayo River and closer to the Colombian city of Puerto Leguizamó, the main commercial centre of the region where the fish can be put up for sale. At a certain point in time, this economic opportunity was leading to overfishing. To counter this, the community of Zambelín agreed in a communal assembly to establish fish quotas per family. At the time of the fieldwork in 2006, these norms were relatively well complied with, and new resource management rules were adopted in response to overexploitation.

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### 5.4 Peruvian conservation legislation

The Protected Natural Areas Law of 1997 lays the foundations for the current legal regime on protected areas in Peru. Since May 2008, the responsible state institution for protected areas is the *Servicio Nacional de Áreas Naturales Protegidas por el Estado* (SERNANP, National Service of Natural Areas Protected by the State), which falls under the newly created Ministry of the Environment.<sup>71</sup>

There are three types of protected natural areas: national, regional and private. The protected areas at the national level are divided into nine management categories, depending on their objectives and the degree of natural resource use allowed. These nine categories are grouped together into “indirect use” protected areas and “direct use” protected areas.<sup>72</sup>

In indirect use protected areas, both the extraction of natural resources and the modification of the natural environment are prohibited. Only indirect uses are permitted, such as non-manipulated scientific investigation, education, recreation, tourism and cultural activities. There are three categories of indirect use protected areas: national parks, national sanctuaries and historical sanctuaries. In direct use protected areas, on the other hand, natural resource use or extraction is allowed, primarily for the local population, in the manner provided for in the management plan. Other uses and activities carried out must be compatible with the objectives of the protected area. Direct use protected areas include: landscape reserves, wildlife refuges, national reserves, communal reserves, protection forests and hunting refuges. Here, the focus is on the category of communal reserves, because the local population enjoys more extensive management and resource use rights in these areas than in other categories of protected areas.

Pursuant to the Protected Natural Areas Law of 1997, communal reserves are defined as “areas destined to the conservation of wild flora and fauna, to the benefit of the nearby rural population”.<sup>73</sup> The Protected Natural Areas Regulations of 2001 explicitly include “peasant or native communities” among the beneficiary population.<sup>74</sup> Given that communal reserves, in contrast to the other protected areas, are established to the benefit of the neighbouring population, a special regime of administration applies to this category. The 2001 Regulations envision the central tenets of this regime along the following lines:

The administration of the Communal Reserves corresponds to a Special Regime ... Their management is done directly by the beneficiaries in accordance with their organizational forms, in a long-term process, wherein they consolidate their knowledge associated with conservation and sustainable resource use, exercising their rights and obligations with the State, for the administration of the Patrimony of the Nation.<sup>75</sup>

The aim of the special regime is therefore that the beneficiaries themselves directly administer the communal reserve “in accordance with their organizational forms”. This phrase seems to open up the possibility for the application of customary norms and organizational structures.

In 2005, the Special Regime for the Administration of Communal Reserves (Special Regime) was adopted. According to this norm, the management of communal reserves aims at “strengthening the strategic alliance” between the state and the beneficiaries for the conservation and sustainable use of biodiversity.<sup>76</sup> The glossary annexed to the Special Regime describes the term “strategic alliance” as a “voluntary union, long-term agreement”.

The communal reserves are administered on the basis of a contract of administration between the Peruvian state and the beneficiaries of the communal reserve, who are represented by the Executor. The national protected areas institution SERNANP is represented in the communal reserve by the Chief of the protected area. The actual management of the communal reserve is entrusted to the *Ejecutor del Contrato de Administración* (Executor of the Contract of Administration), who represents the beneficiaries. The beneficiaries are the peasant or native communities, or the local organized population who complies with the criteria of “proximity, traditional use of the natural resources and conservation of biodiversity”.<sup>77</sup> The Executor is a non-profit legal person created by the beneficiaries with the aim of managing the communal reserve. When the communal reserve involves two or more indigenous peoples, the Executor is multicommunal and intercultural. The Special Regime prescribes that, as a minimum, the Executor consists of two organs: a General Assembly and an Executive Committee.

The General Assembly consists of the direct representatives of the beneficiaries — “presidents, chiefs, *apus* (leaders) or other denominations of these representatives of the native and peasant communities and of the local organized population, and other members of the community or local organized population adjacent to the Communal Reserve, expressly elected to represent them

through assembly minutes.” No attention is paid to guaranteeing the participation of women. Pursuant to Article 13 of the Special Regime, the representative organizations of the peasant and native communities belonging to indigenous peoples and the local organized population can also participate in the General Assembly.

The members of the Executive Committee are elected among the beneficiaries of the General Assembly. The Committee is responsible to SERNANP for compliance with the contract of administration. The Special Regime thus assigns the task of representing the Executor to the Executive Committee as a whole. Given that in the Executive Committee, there is no clear definition of the competence of its members, this may cause problems of representation. For instance, the President, the Secretary and the Treasurer take decisions independently such as on reaching different agreements with the Chief of the communal reserve. Logically, one might deduce and accept that the President of the Executive Committee has the competence and power to represent the Committee and the Executor. However, an interviewed expert described the mentality in Peru in this regard as follows:

So says the law, so it must be done [*Tal como dice la ley, se debe dar*]. The law does not explicitly state that there must be a representative person, who can be the president, it can be whoever. It does not say it; therefore who reads [the law] – and especially all those that are in the state always have a very faithful reading of what is said [in the text] – will always wait until 4 or 5 persons are together [before doing] anything.<sup>78</sup>

The beneficiaries can decide to create other organs of the Executor, in accordance with the characteristics of the communal reserve, taking into account various factors such as its location, extension, the number of ethnic groups, and the number of beneficiary communities. Aspects concerning the establishment of the Executor that are not regulated by the Special Regime are subject to the norms of the Civil Code and “where appropriate”, to their own traditional mechanisms of decision-making. This formulation subjects the application of traditional mechanisms to arbitrary interpretations, as discussed below.

The original idea expressed in the Protected Natural Areas Regulations of 2001 that the beneficiaries manage the communal reserve “in accordance with their organizational forms” has thus been seriously mitigated in implementation. The beneficiaries are not free to organize themselves as they see fit given that the Special Regime imposes the basic structure of the Executor: a General Assembly and an Executive Committee. This structure reflects the organizational structure of a native community as prescribed by the Regulations of the New Law on Native Communities of 1979, which consists of a General Assembly and a Board of Directors, as explained above (section 2.1).

- 164** This organizational system at the communal level is thus replicated for the Executor of the Contract of Administration, where the Board of Directors is called the Executive Committee. Not only is this organizational system unconnected with indigenous tradition and limits the announced freedom of organization, but it may also be inappropriate because the Executor does not represent one, but various communities. During an interview, an expert expressed doubt as to the appropriateness of applying the internal organizational structure of the community to a multicommunal entity.<sup>79</sup>

With respect to the right of self-determination and the autonomy of indigenous peoples, the author believes that it should have been left to the beneficiaries to determine their organizational structure among themselves. An agricultural engineer with long-standing experience in the administration of communal reserves suggested that the only binding requirement, necessary for the appropriate operation and coordination, would be the explicit designation of the representative of the Executor answering to SERNANP.<sup>80</sup> The structure of a General Assembly and Executive Committee could then have been provided as a subsidiary system. It can be concluded that the original idea expressed in the Protected Natural Areas Regulations of 2001, i.e. that the beneficiaries would



manage the communal reserve “in accordance with their organizational forms”, has been seriously mitigated in its further development in the Special Regime of 2005.

The Special Regime for the Administration of Communal Reserves contains various other illustrations of the ambiguous manner in which the state legal system is dealing with customary law. In some cases, no further requirements are attached to the application of customary law. An example is the system of vigilance and control of the activities carried out within the communal reserve. In case of peasant and native communities, these actions of vigilance and control are established “considering the norms of customary law, ILO Convention No. 169 and, where applicable, the provisions of Article 149 of the Political Constitution of Peru”.<sup>81</sup>

In other cases, the application of customary law is subordinated to standards of “appropriateness” and/or compatibility with other interests. For example, the Special Regime states that for issues not regulated by it, the general norms on protected areas apply, and “where appropriate, the customary norms compatible with the objective of the Communal Reserve”.<sup>82</sup> The use of customary norms is thus subject to a rather vague norm of “appropriateness”. Moreover, customary norms may only be applied when they are in line with the aims of the communal reserve, thus subordinating the application of customary law to conservationist interests. Similarly, the supervision of the communal reserve is carried out “in harmony with the provisions of the Special Regime and, where applicable, with the traditional government systems of the beneficiary indigenous peoples”.<sup>83</sup> No further guidance is provided on the situations in which traditional government systems would apply.

To date, no communal reserves have been effectuated in the Airo Pai ancestral territory. In 1997, a provisional protected area, the Güeppí Reserved Zone, was superimposed on the Airo Pai territory. Nevertheless, as of January 2011, the proposal to categorize this area as one national park and two communal reserves had not yet been endorsed at the national level. Therefore, the impact of the organizational structure of communal reserves on the Airo Pai as prescribed by Peruvian law could not be assessed.

## 6. Conclusion

In this country-specific study of Peru, it was illustrated how the recognition of indigenous customary law and traditional forms of organization and decision-making has often been nullified or seriously mitigated by the subsequent imposition in legislation of rules, organizational structures, and decision-making processes that are at odds with the indigenous systems concerned.

The constitutionally enshrined “organizational autonomy” is restricted by legal provisions on the organizational structure of peasant and native communities. The lack of indigenous autonomy in the use of their land and in economic management is apparent from the natural resources policy of the Peruvian Government. The autonomy in administrative management is limited by the system of political authorities installed by the Peruvian state. As regards judicial autonomy, it was noted that, until recently, the Airo Pai enjoyed judicial autonomy in practice because of the physical remoteness of the state judicial system; this may be about to change, however.

The customary land rights of indigenous peoples have been recognized at the international and Inter-American levels. And yet, in Peru, peasant and native communities can only acquire rights over limited lots of land. Moreover, only agricultural lands are given in property; forest lands are ceded in use.

Also, with regard to nature conservation, the relevance of customary legal systems is being increasingly acknowledged at the international level, as shown, for instance, from the advancement of the concept of Indigenous Peoples’ and Community Conserved Areas. Although in Peru the protected area category of communal reserves to some extent accommodates the customs and traditions of indigenous peoples, there are some legal clauses limiting the weight given to customary legal systems.

Provisions on the recognition or application of customary law are therefore often mitigated by qualifiers that pave the way for arbitrary interpretations. Customary law or traditional decision-making mechanisms are, for instance, only applied “where appropriate”. No real and effective space is given to the application of rules other than those originating in the state legal system.

## footnotes

- 1 This could be while rolling the spears of the chambira palm before sunrise, bathing and washing clothes in the river, working on the field, having dinner, navigating in a canoe, or participating in a festivity. Notes were written down immediately afterwards whenever possible.
- 2 J. Casanova, ‘Migraciones aido pai (Secoya, Pioje)’ (1980) III(5) *Amazonia Peruana* III 75, 101.
- 3 L.E. Belaunde, *Viviendo bien. Género y fertilidad entre Los AiroPai de la Amazonia Peruana* (2001), 31-33.
- 4 J. Chantre and Herrera, *Historia de las misiones de la Compañía de Jesús en el Marañón Español 1637-1767* (1901), 62-63.
- 5 Ibid 34-35; M.S. Cipolletti, ‘Jesuitas y Tucanos en el Noreste Amazónico del siglo XVIII. Una Armonía Imposible’, in S. Negro and M.M. Marzal (eds), *Un reino en la frontera. Las Misiones Jesuitas en la América colonial* (1999), 223, 230.
- 6 See generally M. Ludescher, ‘Las sociedades indígenas de la Amazonia en el derecho peruano: La ‘comunidad nativa’ – institución jurídica y realidad social’ (1986) 1 *Law and Anthropology* 131-176.
- 7 *Constitution of Peru* 1979, art 161.
- 8 Ibid art 89.
- 9 See generally M. Ludescher, ‘Indigenous peoples’ territories and natural resources: international standards and Peruvian legislation’ (2001) 11 *Law and Anthropology* 156-178.
- 10 *Regulations of the New Law on Native Communities* 1979, Supreme Decree No. 003-79-AA.
- 11 Ibid art 21. See also *Civil Code* 1984, art 138.
- 12 *Regulations of the New Law on Native Communities* 1979, art 22.
- 13 *Civil Code* 1984, art 138.
- 14 A. Gray, *Indigenous Rights and Development. Self-determination in an Amazonian Community* (1997) 78. An example of this adaptation of the law to local customs is the electoral process among the Airo Pai, as elaborated further in the following paragraph.
- 15 E. Desmet, ‘El impacto de procesos transnacionales en la organización de los Airo Pai (Secoya) de la Amazonia Peruana’ (2009) 71 *Nueva Antropología* 162.
- 16 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), opened for signature on 27 June 1989, 72 ILO Official Bull 59 (entered into force 5 September 1991) (“ILO Convention No. 169”). Approved in Peru by Legislative Resolution No. 26253 on 2 December 1993 and ratified by the Executive Power on 17 January 1994. The Convention entered into force on 2 February 1995. Article 15(2) states: “In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”
- 17 Belaunde describes different ways of giving advice. Formal advice is provided before sunrise or on important occasions such as the first wedding. Advice is also given in humorous myths or when consuming important plants such as yoco. Belaunde, above n 3, 111-117.
- 18 The justice of the peace is at the lowest hierarchical level of the judicial power; in principle, each district has a justice of the peace.
- 19 *Law Creating the Teniente Manuel Clavero District in the Province of Maynas, Department of Loreto, 2004*.
- 20 The Indigenous Peoples’ Earth Charter was the outcome of the Kari Oca Conference, an event organized by indigenous peoples to have their voices heard, in parallel with the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.
- 21 The Earth Charter uses the term “unfeasible”, although the idea was presumably to state that the territorial property of indigenous peoples is to be “unseizable”, that it cannot be seized.
- 22 International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests, ‘Charter of the Indigenous and Tribal Peoples of the Tropical Forests’ (Established Penang, Malaysia, 15 February 1992; Revised Nairobi, Kenya, 22 November 2002), art 3.
- 23 Ibid art 14.
- 24 A. Chirif Tirado, P. García Hierro and R. Chase Smith, *El indígena y su territorio son uno solo: estrategias para la defensa de los pueblos y territorios indígenas en la cuenca amazónica* (1991) 27-28.
- 25 P. García Hierro, ‘Territorios indígenas: tocando a las puertas del derecho’ in A. Surrallés and P. García Hierro (eds) *Tierra Adentro. Territorio Indígena y Percepción del Entorno* (2004) 277, 279-283.
- 26 ILO Convention No. 169, art 13, 1.
- 27 UN General Assembly, Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 61st session 2007, art 25, UN Doc A/RES/47/1 (UNDRIP).
- 28 Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Ser C no 79.
- 29 Ibid para 151.
- 30 In the American Convention on Human Rights article 2 states: “Where the exercise of any of the rights or freedoms [recognized in the American Convention] is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”
- 31 Emphasis added. Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Ser C no 79, para 164. In the case of the *Sawhoyamaya Indigenous Community v Paraguay*, the state was similarly obliged to take the “legislative, administrative and other measures necessary to provide an efficient mechanism to claim the ancestral lands of indigenous peoples enforcing their property rights and taking into consideration their customary law, values, practices and customs”. Emphasis added. Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v Paraguay*, Ser. C, no. 146, para 235 (29 March 2006).
- 32 Inter-American Court of Human Rights, above n 28, para 164.
- 33 J. Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources” (paper presented at the American Association of Law Schools Conference, January 2005, 14).
- 34 Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Provisional Measures (6 September 2002).
- 35 Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Provisional Measures (26 November 2007).

- 36 See, e.g. Inter-American Commission on Human Rights, 'IACHR hails titling of Awas Tingni Community Lands in Nicaragua', Press Release no. 62/08 (18 December 2008).
- 37 W. Vickers, *Los Siona y los Secoya. Su Adaptación al Medio Ambiente* (1989).
- 38 Traditionally, the Airo Paj practise agriculture according to the moon. The moon indicates the start of a different phase in the agricultural cycle: a complete cycle consists of five moons. For a detailed analysis of the agricultural system of the Airo Paj, see J Casanova, 'El sistema de cultivo Secoya' in A Chirif (ed), *Etnicidad y Ecología* (1978) 41-53.
- 39 Belaunde, above n 3, 169.
- 40 Ibid 68.
- 41 J. Casanova, 'Parentesco, mito y territorio entre los aido pai (Secoya) de la Amazonía peruana' (2005) 15(IX) *Investigaciones Sociales* 15, 18.
- 42 A. Gomez Pompa and A Kaus, 'Taming the wilderness myth' (1992) 42(4) *Bioscience* 271-279.
- 43 J. Anaya, *Indigenous Peoples in International Law* (2<sup>nd</sup> edition, 2004) 85-86, 100 and 103.
- 44 *New Law on Native Communities* 1978, art 11, Decree Law No. 22175.
- 45 B. Monteferrri, 'Áreas naturales protegidas: los efectos jurídicos de su establecimiento sobre predios de propiedad privada' (2008) 6 *Revista de Derecho Administrativo* 338-361.
- 46 Interview on file with the author (7 September 2006, Iquitos).
- 47 See, for example, R. Kramer, C. van Schaik, and J. Johnson (eds), *Last Stand: Protected Areas and the Defense of Tropical Biodiversity* (1997); J. Terborgh, *Requiem for Nature* (2004).
- 48 J.O. Lynch and J.B. Alcorn, 'Tenurial rights and community based conservation' in D. Western and M.R. Wright (eds) *Natural Connections: Perspectives In Community-Based Conservation* (1994) 373, 385.
- 49 K.H. Redford, 'The Ecologically Noble Savage' (1991) 15(1) *Cultural Survival Quarterly*.
- 50 N. Rouland, S. Pierré-Caps and J. Poumarède, *Droit des minorités et des peuples autochtones* (1996) 430.
- 51 E.A. Smith and M. Wishnie, 'Conservation and subsistence in small scale societies' (2000) 29 *Annual Review of Anthropology* 493, 501.
- 52 M. Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*, World Rainforest Movement and Forest Peoples Programme (2003).
- 53 K. von Benda-Beckmann, 'The environmental protection and human rights of indigenous peoples: a tricky alliance' (1997) 9 *Law and Anthropology* 302, 303.
- 54 R.H. Keller and M.F. Turek, *American Indians & National Parks* (1999) 239.
- 55 See, for example, A. Gray, 'Indigenous peoples, their environments and territories' in D.A. Posey (ed), *Cultural and Spiritual Values of Biodiversity* (1999), 61 66; D.A. Posey, 'Interpreting and applying the "reality" of indigenous concepts: what is necessary to learn from the natives?' in K.H. Redford and C Padoch (eds) *Conservation of Neotropical Forests* (1992) 21-34.
- 56 Gomez-Pompa and Kaus, above n 42.
- 57 O.J. Little, 'The link between local participation and improved conservation: a review of issues and experience', in D. Western and M.R. Wright (eds) *Natural Connections: Perspectives in Community-Based Conservation* (1994) 347, 350.
- 58 Gomez-Pompa and Kaus, above n 42.
- 59 International Expert Meeting on the Implementation of Traditional Forest-Related Knowledge, 'Corobici Recommendations' (2004).
- 60 Emphasis added. Ibid para 17.
- 61 The International Union for Conservation of Nature (IUCN), also known as the World Conservation Union, is an NGO with a remarkable membership, as its members include states, government agencies, national and international NGOs. IUCN has taken a leading role on the international environmental scene in general, and in promoting the integration of the rights and interests of indigenous peoples and local communities in conservation policy, in particular.
- 62 G. Borrini-Feyerabend and B. Lassen, 'Community Conserved Areas: A Review of Status & Needs after Durban 2003 and CBD COP 7 2004. Preliminary Synthesis' (2008) 7.
- 63 It has also been accepted that the management decisions and activities "are well in the process of leading to" conservation. Ibid 9.
- 64 Ibid 12.
- 65 The authors do not link a specific sub-type of IPCCA to this second category of successful IPCCAs.
- 66 G. Borrini-Feyerabend and B. Lassen, 'Community Conserved Areas: a review of status & needs after Durban 2003 and CBD COP 7 2004. Preliminary Synthesis' (2008) 14.
- 67 IUCN, 'Indigenous Conservation Territory: A New Option for Governance of Protected Areas' (2008), <[http://www.iucn.org/about/union/commissions/wcpa/wcpa\\_focus/?11/Indigenous-Conservation-Territory-A-new-option-for-governance-of-protected-areas](http://www.iucn.org/about/union/commissions/wcpa/wcpa_focus/?11/Indigenous-Conservation-Territory-A-new-option-for-governance-of-protected-areas)>.
- 68 Emphasis added. Second Latin American Congress on National Parks and Other Protected Areas, 'Bariloche Declaration' (2007) para 17, <<http://www.rlc.fao.org/es/tecnica/parques/pdf/BariDecl.pdf>>.
- 69 In general, biological investigations in the region demonstrate that the Airo Paj ancestral territory is characterized by a rich biodiversity and high species endemism. These data support the proposition that the Airo Paj traditionally lived in a more or less ecologically balanced way. See W Alverson et al (eds) *Ecuador-Perú: Cuyabeno-Güepí*, Rapid Biological and Social Inventories Report 20 (2008); Asociación Peruana para la Conservación de la Naturaleza – ECO Studien Sepp & Busacker Partnerschaft, *Estudio de Línea de base biológico y social para el monitoreo en la Zona Reservada de Güepí* (2006).
- 70 Similarly, with respect to the Kayapó, Posey noted that they "believe that old, abandoned village sites are full of spirits. Fear of spirits puts these old sites off limits for many Indians. Only those that deal with spirits – shamans – and special hunting parties go to these sites. Thus, these abandoned camps and villages effectively become protected reserves with a high diversity of secondary growth that also attracts many animals. The spirits effectively serve as ecological protective agents." Posey, above n 55, 25.
- 71 Until May 2008, the state authority responsible for protected natural areas was the *Instituto Nacional de Recursos Naturales* (INRENA, National Institute of Natural Resources).
- 72 *Protected Natural Areas Law* 1997, art 19.
- 73 Ibid art 22(g).
- 74 *Protected Natural Areas Regulations* 2001, art 56.1.
- 75 Ibid art 56.2.
- 76 *Special Regime for the Administration of Communal Reserves* 2005, arts 11, 19, 48.
- 77 Ibid art 6.
- 78 Interview with Soplin Vargas (27 April 2006).
- 79 Interview (Iquitos, 8 September 2006).
- 80 Interview (Iquitos, 7 September 2006).
- 81 *Special Regime for the Administration of Communal Reserves* 2005, art 44.
- 82 Ibid art 4.3.
- 83 Ibid art 37.



## Negotiating Land Tenure: Women, Men and the Transformation of Land Tenure in Solomon Islands

Rebecca Monson\*

### Introduction

Land issues are currently high on the agenda of national governments and donor agencies throughout the South Pacific.<sup>1</sup> At the centre of debates about land in the Pacific lies an issue common to many post-colonial countries, namely, the interaction between customary and state legal systems. In most South Pacific nations, constitutional or statutory law expressly provides that land is governed by “custom” or “customary law”.

The roles of customary and state legal systems with respect to land tenure have been extremely contentious among women’s groups and feminist scholars in many parts of the world. Some writers argue that customary law discriminates against women and advocate the intervention of the state to secure their rights to land. Others see the use of state law as an attempt to open up customary systems to market forces, a process that has generally had adverse implications for women. There are also major disagreements over a range of conceptual and normative issues, including the nature of men’s and women’s interests under customary law, the ways in which customary and state legal systems actually operate, and the effect of economic, political and legal transformations on those systems.<sup>2</sup>

Compared to other geographic regions, the gendered aspects of land tenure, or natural resource management more broadly, have received only very limited attention in the South Pacific.<sup>3</sup> In the Melanesian<sup>4</sup> nation of Solomon Islands, very little of the research on land has been undertaken by women, or focused on differences in men’s and women’s perspectives and experiences of land tenure.<sup>5</sup> There is, therefore, a general lack of accessible information on women’s experiences of customary and state laws governing land, or on the ways in which women might be empowered within these systems.

This chapter examines the interaction of customary tenure systems with the state legal system in two sites in Solomon Islands, one rural and one peri-urban.<sup>6</sup> Part 1 provides a brief overview of land tenure in Solomon Islands, which is characterized by the overlapping arenas of the state, *kastom*,<sup>7</sup> and Christianity. Parts 2 and 3 examine land tenure arrangements in the two field sites, focusing in particular on transformations in customary systems occurring since colonization, and the impact of

\* Rebecca Monson is a geographer and lawyer with a background in both research and practice, focusing on disaster management, natural resource management, and aid and development. She is particularly interested in the interaction between customary and state-based systems of justice in the postcolonial countries of the southwest Pacific. Rebecca is currently a doctoral candidate and Associate Lecturer in the ANU College of Law at the Australian National University in Canberra. Correspondence can be directed to [MonsonR@law.anu.edu.au](mailto:MonsonR@law.anu.edu.au). This author wishes to thank the Solomon Islands Government for permission to conduct this research, and the people of Kakabona and the Bareke Peninsula for their generous support. The fieldwork was supported by the Australian Federation University of Women Georgina Sweet Fellowship (2008) and a Fieldwork Funding Grant from the Australian National University (ANU) College of Law. Some of the work on Kakabona has appeared in R Monson, ‘Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands’ (2010) 4(3) *World Bank Justice for the Poor Briefing Note*. The views in this chapter are the author’s own and do not necessarily reflect the views of any of the organisations associated with the author.

those transformations on women. The first case study focuses on the renegotiation of traditional leadership institutions on the rural Bareke Peninsula, in central Marovo Lagoon, through the arenas of the church and state. It shows how during the colonial era, missionaries and colonial administrators recognized some segments of the local polity and disregarded others, with implications that continue today. The second case study examines some of the ways in which *kastom* and the state legal system interact in Kakabona, a peri-urban area on the outskirts of the capital of Honiara, on north Guadalcanal. The state legal system requires that landholding groups be represented by a small number of individuals. In practice, this has concentrated control over lands in the hands of a small group of male leaders who have the customary authority to discuss land matters inside a public arena. The interaction of *kastom* and the state legal system has therefore enabled the transformation of customary “rights to speak” into effective ownership. The concluding section makes some general observations about the interaction of custom and the state, and the ways in which women may be empowered within these systems.

## 1. Land tenure in Solomon Islands: Kastom, church and state

Solomon Islands is a scattered archipelago of over 900 mountainous islands and low-lying coral atolls in the South Pacific Ocean. The population is extremely diverse, with some 500,000 people speaking about 90 indigenous languages. Around 10 percent of the country's population live in Honiara, the capital, which is located on the largest island, Guadalcanal. The majority of the population lives in small, highly dispersed settlements scattered across the country and is engaged in subsistence agriculture and fishing. Customary land is the dominant form of land tenure, with more than 80 percent of land held according to customs that vary from place to place. Landlessness is virtually unknown, but the recognition of rights to land by the state legal system and the distribution of financial benefits associated with these rights are a source of significant concern for many women and men.

### 1.1 State legal recognition of customary tenure

Under the *Constitution of Solomon Islands 1978*, only “Solomon Islanders” may hold a perpetual interest in land.<sup>9</sup> The manner of holding, occupying, using, enjoying and disposing of customary land is determined by “current customary usage” [LTA, s 239]. This is defined in a circular manner as the practice of Solomon Islanders relating to the matter in question, at the time when that question arises, regardless of whether that usage has existed from time immemorial or for any lesser period [LTA s 2(1)].<sup>9</sup> “Customary law” is also recognized as a general source of law, and the Constitution provides that the rules of customary law prevailing in an area of the Solomon Islands are applicable to that area, subject only to the Constitution and the statutes of Parliament.<sup>10</sup> These definitions acknowledge that Solomon Islands *kastom* is neither static nor “unimaginably ancient”, but is dynamic and will continue to develop and form part of the legal system.

Only a very small percentage of customary land has been registered.<sup>11</sup> When there is registration, it usually occurs under the *Land and Titles Act 1996* [Cap 133]. This provides for group ownership of land by means of appointment of a maximum of five trustees, who are listed on a register.<sup>12</sup>

Disputes over customary land in Solomon Islands must be submitted to the local chiefs for adjudication before the matter can be referred to the courts.<sup>13</sup> Parties must file a certificate showing that this has occurred before seeking the judgment of a local court.<sup>14</sup> Local Courts are constituted “in accordance with the law or customs of Islanders of the area in which the court is to have jurisdiction”, or alternatively, by the Chief Justice “if he shall think fit”.<sup>15</sup> Decisions of the Local Courts may be appealed to the Customary Land Appeal Court (CLAC), whose members are appointed by the Chief Justice. Both of these courts apply customary law. There is a right of further appeal to the High Court on a question of state law or procedure, but not customary law.<sup>16</sup> The Local Courts and CLAC lie at the heart of the intersection of *kastom* and the state legal system, yet sittings of these courts are often irregular due to a lack of financial resources.<sup>17</sup> Furthermore, with very few

exceptions, the members sitting on these courts, and the parties before them, are chiefs and male elders. Women appear only occasionally as parties or witnesses, and even more rarely as members.

### 1.2 *Kastom* and customary tenure

In this chapter, the terms “custom” and “customary law” are used interchangeably, and are subsumed within the Solomon Islands Pijin term *kastom*, which is generally used to refer to local norms and practices.

*Kastom* varies throughout Solomon Islands, not only from island to island, but even between villages.<sup>18</sup> Any generalization must therefore be treated with immense caution. Nevertheless, some very general observations can be made.

As is the case elsewhere in Melanesia and throughout the South Pacific, land is not merely an economic asset for Solomon Islanders, but has spiritual, political and social significance. Land is vested in exogamous kin-based groups whose lineage may be traced to an original settler through the mother, the father, or both.<sup>19</sup> Autochthons are often said to have a stronger claim to participate in decision-making and dispute-resolution regarding land than do migrants, including those who have married into a land-owning group. Membership in a kin-based group is often cumulative, so an individual may be able to trace ancestral ties to many groups, provided he or she has the necessary knowledge.<sup>20</sup>

Kin groups tend to hold relatively large territories, within which there are smaller divisions associated with smaller sub-groupings. For example, land used for gardens is often associated with particular individuals or families, as are hamlets within a larger village. Historically, these territories and their subdivisions were defined less by boundaries and more by ‘focal points’ marked by rivers, rocks, trees and sacred sites.<sup>21</sup> Land is governed by the histories of the ancestors, preserved in these sites, as well as in genealogies, stories and the landscapes they belong to.<sup>22</sup> When used in relation to land, *kastom* often refers to these genealogies, stories and places, as well as the production and reproduction of the knowledge and practices that preserve them. Access to knowledge about certain aspects of *kastom* may be passed on in a controlled and deliberate manner. For example, information about genealogies may be given to particular people rather than readily available to everyone.

Solomon Islands *kastom* is often perceived to be contrary to women’s rights.<sup>23</sup> In the few cases in which a conflict between *kastom* and the human rights provisions in the Constitution has arisen, the courts have tended to reinforce this view.<sup>24</sup> While Solomon Islands *kastom* can undoubtedly be mobilized in ways that are discriminatory towards women, attention also needs to be paid to ways in which many Solomon Islanders are working to promote a more inclusive *kastom* within their own communities. As Bronwen Douglas points out, “Melanesians, like people everywhere, exercise actual or potential agency”, even if that agency is “circumscribed by gender, age, status, circumstance, and aptitude.”<sup>25</sup>

### 1.3 Christianity and the churches

Christianity and the different churches play a significant role in circumscribing actual and potential agency and probably have a greater influence on people’s lives than the state.<sup>26</sup> Growing numbers of missionaries began to arrive in Solomon Islands towards the end of the nineteenth century, and their activities gathered pace after the establishment of the British Solomon Islands Protectorate in 1893. Today, the vast majority of Solomon Islanders identify themselves as belonging to one of the Christian churches.<sup>27</sup> The churches have a strong influence on everyday life, not only through their respective doctrines, but also by promoting distinctive denominational identities.<sup>28</sup> In Solomon Islands, as in other parts of Melanesia, Christian theologies and church women’s groups play an important role in women’s training, leadership, and networking.<sup>29</sup>

The role of Christianity in influencing land tenure is also increasingly recognized.<sup>30</sup> Christian missionaries had a fundamental impact on landholding and settlement patterns when they encouraged converts to move from the hills down to the coast to live in much larger settlements



surrounding the mission stations.<sup>31</sup> Today, variations in doctrines promote different attitudes towards both cash and natural resources. For example, the different doctrines of the three denominations in Marovo Lagoon promote different patterns in material production and cash reliance. The majority of the population in Marovo belongs to the Seventh-Day Adventist Church, which is characterized by a more individualistic approach to both salvation and economic activity, and prohibits consumption of betelnut, alcohol, shellfish, crustaceans and pigs. By contrast, there is a greater emphasis on cooperative economic activity in villages belonging to the United Church. The Christian Fellowship Church, an indigenous church, has a significant emphasis on communalism and cooperative work.<sup>32</sup> These three denominations have also all been involved in various sustainable forestry initiatives.<sup>33</sup>

Christianity and *kastom* are sometimes juxtaposed by Solomon Islanders, but they are also regularly interwoven to produce new “ethno-theologies”,<sup>34</sup> which may have an impact on land tenure. In Marovo Lagoon, Christian concepts, metaphors and symbols are regularly mobilized in making claims to land before chiefs and courts, and church pastors may also be involved in resolving land disputes. Christianity is not mobilized in court disputes in the same manner on north Guadalcanal, but as the case study will show, it nevertheless plays a significant role in land matters. Christianity therefore overlaps and interweaves with both *kastom* and the state, and land tenure is characterized by multiple, overlapping arenas, norms and institutions emanating from the state, *kastom* and Christianity, as they vary from place to place.

## 2. Case 1: The strategic simplification of authority on the Bareke Peninsula

The Bareke Peninsula is a large peninsula on north-east Vangunu Island, in central Marovo Lagoon.<sup>35</sup> Most land in this area is customary land, although some of the islands surrounding the peninsula are registered. The Bareke Peninsula is the most densely populated part of the island, and there is a notable absence of inland settlement. However, this was not always the case. In pre-colonial times, there was a strong distinction between people living in the hills of Vangunu, and those on the small islands dotting the lagoon, referred to as “bush” and “coastal” people, respectively.<sup>36</sup> This old settlement pattern gradually disappeared at the turn of the century as Methodist and Seventh Day Adventist missionaries encouraged their converts to move down to the coastal areas to live in much larger settlements. While aspects of the bush-coastal distinction began to break down during the 20<sup>th</sup> century, it remains an important distinction in terms of language, social organization, territorial holdings and ecological orientation. Most villages on the Bareke Peninsula are populated by bush people who are United Church adherents, whereas most villages on the surrounding islands are populated by coastal people and Seventh Day Adventists. As noted above, the theologies of these churches promote different patterns of subsistence production and consumption as well as cash reliance.<sup>37</sup> The language of the bush people is Bareke, while that of the coastal people is Marovo. This chapter adopts Bareke terminology and focuses on the land tenure regimes of the bush people.

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For the Bareke people, the landscape is divided into named and marked *pepesa* (territories) that belong to particular *kokolo*, which comprise a number of families that claim descent, through both men and women, from the first settler of the land. Since the 1990s, many of these *kokolo* have entered into logging agreements with transnational logging companies; and discussions about logging provide a sharp reminder that the *kokolo* may never be considered a homogenous group. Many Bareke women and men are angry about the extent to which control over decision-making processes and royalties are concentrated in the hands of a small number of men, to the exclusion of most other members of the landowning group. They argue that these practices are at odds with *kastom*, in particular the emphasis on sharing, group control over land, and matrifocal values. For instance, at a meeting with a group of Bareke women from a small village, one elderly woman angrily remarked:

Every good thing that was practised before, has gone. Lots of people have come inside, and jealousy and hatred have changed every good thing! The love of money has

changed every good thing. Love of money, hatred, jealousy have come inside! You white men have spoiled every good thing!<sup>38</sup>

While statements like this could be interpreted as an appeal to a more secure past that never existed, an understanding of the transformation of key socio-political institutions since the colonial period suggests that such complaints cannot be so easily dismissed.

## 2.1 *Bangara, siama and vuluvulu*: Pre-colonial sociopolitical institutions

The concept of *vuluvulu* was introduced to the author in one of her first “lessons” on Bareke *kastom*, by a man in his late 30s, who is very knowledgeable in *kastom*:

The number three is very important in Bareke culture. In the past, we had three important people: the *vuluvulu*; the chief or *bangara*; and the warrior or priest, who was called the *siama*. The role of the *bangara* was to talk about land, to fight, and to perform witchcraft. These are the chief’s responsibilities. The *vuluvulu* was/is a woman. The *bangara* must consult with the *vuluvulu* - the chief must consult the woman. The chief is a spokesperson, and there are two senior people to help him, one man and one woman. My grandmother taught me about this. The *siama* were Bareke warriors. They did lots of things. They performed the priestly activities.

This description of bush leadership highlights the role of the matrifocal *vuluvulu* in the bush polity. The term *vuluvulu* has multiple meanings and exists in both Bareke and Marovo languages. One meaning refers to the people who constitute the blood core of a *kokolo*, with an emphasis on matrilineal descent or cumulative matrilineal filiation.<sup>39</sup> Bird explains that the term symbolizes the intertwining of relationships within the *kokolo*. The term derives from *vulu*, a pandanus-type shrub: “...a *vulu* standing by itself is easy to uproot, but if it grows as a whole – which by very nature should be the case – it is extremely difficult to be uprooted.”<sup>40</sup> The term *vuluvulu* is also used to refer to particular women of high standing. In this sense, the term is often translated as meaning “the oldest female”, “the first-born girl”, “a princess”, and “a queen”. It also has many other meanings, as one respondent explained, “Lots of words go back to *vuluvulu*, almost everything relates to *vuluvulu*.”

The second institution of leadership named in the above quote is that of the *bangara*, which is often translated in Pijin as *jif* (chief). The *bangara* had many roles, including: holding the important ancestral valuables and keeping genealogical information; regulating land use; amassing and redistributing wealth through the organization of feasts; organizing warfare; and providing a link to the divine “other”.<sup>41</sup> The role was based on both male primogeniture and ability. A man who demonstrated exceptional fighting skills or extraordinary leadership skills, or who built up and distributed wealth, might become a *bangara*. Equally, if a young man lacked these qualities, the current chiefs and elders of the family would bypass him and support a more capable uncle, brother or cousin.<sup>42</sup>

During fieldwork, Bareke people often explained that, “the *vuluvulu* and *bangara* cannot be separated, they belong together”, and Hviding has observed that while cumulative matrifiliation predominates in the formation of the *vuluvulu*, political leadership is determined by cumulative patrification.<sup>43</sup> The *vuluvulu* and *bangara* appear to be one of the many examples of the ways in which bush and coastal people of Marovo Lagoon “make sides” or dualistic divisions in which both halves are complementary.<sup>44</sup>

The third role mentioned — the *siama* — was tied to pre-Christian religious beliefs and pre-colonial warfare, and could be described as both a leader in warfare and a priest. Warfare and conflict occupied a dominant position in the cultural organization of pre-colonial Marovo and throughout the western Solomon Islands.<sup>45</sup> Both the bush and coastal people engaged in headhunting, slavery and cannibalism, which were closely linked to ritual cycles and ceremonial occasions.<sup>46</sup> The *siama* occupied a critical role in pre-colonial warfare and was responsible for conducting divination rituals to “see” the likely outcome of an intended raiding or headhunting expedition.<sup>47</sup> The position was

rarely inherited, but was usually chosen from among those of matrilineal descent or could include also a great warrior from elsewhere.

The institutionalized positions of *vuluvulu*, *bangara* and *siama*, together with the *pepesa*, formed the foundation of the *kokolo*. Liligeto writes of the coastal people that, “without these important elements, the [*kokolo*] could not exist.”<sup>48</sup> Bareke genealogies are characterized by both male and female links, and the *kokolo* appears to have been personified by both male and female leaders, chosen through both male and female primogeniture.<sup>49</sup> This suggests a degree of exchange and complementarity between gendered domains of social organization and authority. There were similar exchanges and a degree of complementarity between the people of the bush and the people of the sea, who were integrated into networks of warfare, alliance and exchange with each other and with people of other islands. These constructs of complementarity were fluid and flexible,<sup>50</sup> and with the establishment of trading with Europeans, the BSIP and missionization, some people were better equipped than others to negotiate a new complementarity that would be more to their interests.

## **2.2 Trade, colonization and missionization: Selective recognition of sociopolitical institutions**

The coastal people on the islands around the Bareke Peninsula were increasingly involved in trading as the 19th century progressed, which must have led to a number of significant changes in local social organization and tenure systems. Bush people lived in less accessible areas and were probably not involved in trading to the extent that the coastal people were, but they would nevertheless have been affected by these changes.

Coastal groups had access to the resources that traders desired and in return received iron goods, including axes. These were useful not only for gardening and building canoes, but also for warfare.<sup>51</sup> Leaders of the coastal groups that controlled these resources went to great lengths to monopolize trade with Europeans,<sup>52</sup> an agenda that would have fitted neatly with the desire of the traders to identify and deal with a fixed, presumably male, leader. This enabled the control over trade to be concentrated in the hands of a few men. As McKinnon observes, “[t]he big man role was created out of indigenous culture and ambition, but trade with Europeans made this possible.”<sup>53</sup>

Trading not only altered the scale of leadership, but also led to the development of a new relationship between the people and the natural resources that sustained them. Bennett notes that old products were now directed to commercial ends, while previously unused products were gathered and sold.<sup>54</sup> As resources acquired a commercial value, they were commodified, and individuals within a *kokolo* sought to control access to products that had previously been protected for the benefit of the group. These trends gathered pace as the Protectorate era commenced.

When the British established the BSIP in 1893, one of the first tasks for the administration was to pacify the infamous headhunters of Marovo Lagoon.<sup>55</sup> Pacification meant the loss of power by *siama* and *bangara*, as the Government enforced laws against the acquisition of firearms and suppressed practices related to headhunting. In doing so, the Government destroyed the link between the *bangara*'s organization of productive activities and ceremonial activities, and undermined the basis of their power.<sup>56</sup> It also weakened the role of the *siama*, tied to warfare and associated religious beliefs. The Christian missions had a similar effect, by discouraging, apparently successfully, the continuation of traditional feasting, dancing and ceremonial activities.<sup>57</sup>

While undermining many of the traditional avenues to spiritual and material authority, the missions and the BSIP, in particular its conceptions of land tenure, also provided new arenas in which to negotiate the terms of production, authority and obligation. The opportunities that the missions offered were predominantly available to men, in particular aspiring or existing *bangara*, who often became leaders within the church. For example, Ishmael Ngatu, a young man from a chiefly line, introduced Methodism to the Bareke Peninsula in 1912. The Methodist Mission (which later became the United Church) also used the term *bangara* to translate “lord”, thereby incorporating the institution of *bangara* into the liturgies and songs of the church.<sup>58</sup> The concept of the *siama* and

*vuluvulu* were not translated into these new institutions and practices in this manner. Given the view of headhunting and other ritual practices taken by the missionaries and the BSIP, it is likely that the role of the *siama* was even actively undermined. Indeed, today the role appears to have been consigned to history.<sup>59</sup>

The newly created infrastructure of the BSIP, in particular its conceptions of land, also provided new ways for the *bangara* to retain their authority by obtaining and distributing wealth. A number of the *bangara* of central Marovo Lagoon were able to persuade district officers to construct fixed cement markers in strategic locations, which then enabled the boundaries of the *pepesa* to be surveyed and registered.<sup>60</sup> At the same time, the different entitlements of people within the *kokolo* were changing. Bareke people often stress that historically the *bangara* did not “own” land but “looked after” it.<sup>61</sup> The aim of the registration of boundaries was to strengthen the capacity to “look after” the land in negotiations with white planters, traders and administrators. In many instances, the foreigners’ perceptions of property and authority enabled male leaders to claim rights wholesale. Ishmael Ngatu, for example, not only held a new position of leadership within the Methodist Mission, but was also able to use his chiefly status to sell land to the government.<sup>62</sup> The state legal system therefore facilitated a strategic simplification of the tenure system, by enabling the *bangara* to consolidate their control over the land in the eyes of the state and in practice.

The introduction of government headmen in 1914 consolidated the role of the *bangara* even further. Ishmael Ngatu was appointed District Headman for Marovo, and due to his success in negotiating all three arenas of church, state and *kastom*, he became known as the chief over a large area, from Nggatokae to Ramata.<sup>63</sup> The Protectorate’s ambitions of indirect rule made it convenient to perceive *kastom* as collapsing political authority and customary tenure into one figure, the *bangara*.<sup>64</sup> It also strengthened the power of the *bangara* in a context where the customary polity was being renegotiated and traditional leaders were struggling to secure their continued relevance.

None of this is to suggest that other members of the *kokolo* were unable to participate in the ongoing renegotiation of land tenure. Women on the Bareke Peninsula undoubtedly contributed to the process of adaptation, contestation and recognition of claims to land in a variety of ways. There are, for example, some women who were recognized as experts on *kastom*.<sup>65</sup> There are also rare examples of women playing a significant role in the negotiation of land transactions and appearing in court hearings.<sup>66</sup> However, the records of Lands Commissions and courts, like the liturgies of the churches, make no reference to the role of *vuluvulu* despite regularly referring to the role of the *bangara*.<sup>67</sup> The failure of the state legal system to accord any recognition to the role of *vuluvulu* contributed to the marginalization of the connection between women and the land, at least within the arena of the state. This had implications for the role of women, which continue today.

### 2.3 *Bangara* and entrepreneurs: Logging and authority today

Logging has become a major issue on the Bareke Peninsula since the 1990s, and occurs at intersection of the state and customary legal systems. The *Forest Resources and Timber Utilisation Act 1978* [Cap 40] (*‘FRTU Act’*)<sup>68</sup> provides that any person who is interested in logging customary land must apply to the Commissioner of Forests Resources for consent to negotiate with the relevant government authorities and the owners of the land. The Provincial Government then holds a timber rights hearing, at which it determines a range of issues, including whether the people who propose to grant the timber rights represent all those who are entitled to grant such rights and how any profits will be shared. This information is recorded in a certificate of customary ownership, known as “Form Two”. The individuals listed in Form Two are those entitled to negotiate with the logging company. There is a right of appeal to the Customary Land Appeal Court, the decision of which is final and conclusive, subject only to the original jurisdiction of the High Court.<sup>69</sup>

In practice, negotiations between logging companies and landowners have often been underway for a long time before the issue of a Form Two. While forested land is usually subject to multiple and overlapping rights, logging companies have focused their efforts on negotiating with individuals that

are influential within the landowning group, and proponents of logging. These individuals are nearly always men, some of whom are *bangara* and other male leaders, and some of whom are younger, entrepreneurial individuals with a relatively high level of formal education.<sup>70</sup> These younger men are often of influential descent, but have also become powerful through their understanding of the logging licence procedures and their ability to persuade elderly, sometimes illiterate *bangara* to promote logging.

Proponents of logging are widely believed by other landowners to receive financial and other forms of support from the logging companies when appearing in timber rights hearings and court appeals. Many landowners also believe that companies are able to influence the outcome of timber rights hearings and court appeals through the provision of funding to the members of the fora that determine their claims. For example, while the High Court has emphasized the government's obligation to provide the funds necessary for the Customary Land Appeal Court to operate, it has also reluctantly allowed the parties in some matters to share the costs of having their case dealt with.<sup>71</sup> This contributes to the perception that companies are able to influence the outcome of hearings.

According to principles of the state legal system and *kastom*, the representatives listed in Form Two are obliged to share royalties with other members of the landowning group. However, it is widely acknowledged that there is a general lack of transparency and accountability as to how this occurs. Landowners regularly complain that they do not know when royalties are distributed or how much money they are entitled to.<sup>72</sup> Furthermore, licence negotiations and royalty distributions often occur in urban centers that are located hundreds of kilometres away from the villages in which landowners live, thus involving expensive and time-consuming travel. This makes it extremely difficult for landowners to access information and hold signatories accountable. Thus, as was the case with traders, missionaries and the BSIP administrators, logging companies wish to identify and engage with individuals rather than the entire *kokolo*, and this is facilitated by the requirements of the state legal system. 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.<sup>73</sup>

176 While many men are marginalized by these processes, women as a social group are particularly likely to be excluded. When the author asked women how their *kokolo* made decisions about logging, a typical response was to laugh sarcastically, or to declare with either anger or resignation: "I don't know, they don't tell us anything". Women probably have a greater role in negotiations than these quotes suggest; for example, they often exert significant influence through informal conversations within the household. However, forestry records and court records support their perceptions of exclusion from highly public fora of decision-making. In the logging files reviewed, each file for Marovo Lagoon had a Form II which listed between one and 15 names of men as those "lawfully able and entitled to grant timber rights". Of the dozens of court records reviewed, none listed women as parties or witnesses in timber rights hearings or court appeals. Some women report that they have attempted to attend hearings and have waited on the beach for hours for this purpose, only to be told when a canoe arrives that "there's only room for men, there's no room for any women". Women's names are absent from the official documents and agreements produced by the state legal system. This confirms and constructs women's role in decision-making as marginal, at least within the arena of the state; while simultaneously reinforcing the dominance of a small number of men in decision-making for the entire landowning group.

The predominance of male leaders within formal decision-making fora and the absence of women are often explained by reference to *kastom*. In particular, Bareke people often refer to the idea that only *bangara* or other elders can be responsible for formalizing decisions, and they are inevitably men. This view of *kastom* is also contested, however. During a meeting with a large group of Bareke women, one senior woman explained angrily:

...When it comes to logging, we're *victims*, the men *dominate* us, we're *oppressed*! [...] This is because traditionally, women could not talk. It was a sign of *respect*. The *men*

must talk about everything. So today, women are not allowed to talk. If a woman talks, the axe will come! (*The woman then sat down and the other women laughed*).

This elderly woman was simultaneously describing and contesting a common statement of *kastom*, which has become entrenched by the state legal system and in the practices of logging companies. Her passionate outburst was received with enthusiastic laughter from most, if not all, women in the meeting. This serves as a reminder that communities are not merely “bound” by *kastom*, but also produce it. For example, while many Bareke men and women explain the absence of women from decision-making by reference to the idea that “women cannot talk”, they also criticize these practices and contrast them with the concept of *vuluvulu*.

The concept of *vuluvulu* is an extremely complicated one linguistically and conceptually. In *Pijin*, it may be used to refer to an individual woman, a group of women, or the “blood core” of the tribe. This may indicate problems of translation across languages and cultures, particularly as the author speaks Solomon Islands *Pijin* but does not speak any local languages. However, several Bareke people have also suggested that the concept of *vuluvulu* is changing or is not as well understood as it once was.

Whatever the explanation for the lack of clarity, it is clear that the concept of *vuluvulu* has not been incorporated into, and reified by, the arenas of the church and state to the extent that the concept of the *bangara* has been. The fact that Bareke people can clearly and succinctly explain the role of *bangara* in *Pijin*, but are unable to do so for the role of *vuluvulu* may not tell us anything about their historical roles. It does, however, tell us something about the ways in which some segments of the customary bush polity, and not others, are being reified through the state legal system.

The concentration of control over logging in the hands of a small number of male leaders and entrepreneurs, and the exclusion of most women therefore needs to be understood as not merely the product of current practices or a flawed legislative framework, but as emerging from history. Missionaries and colonial administrators may not have intended to “rewrite” *kastom*, but by empowering a certain segment of the bush polity and disregarding others, political authority and control over land have become concentrated in the hands of the *bangara*. Bareke people themselves, particularly customary leaders, have often had an interest in this “essentialization” of *kastom*.<sup>74</sup> The strategic simplification of *kastom* continues today, with logging companies and the courts treating the *bangara* as the most legitimate representatives of the population as well as the *kastoms* regarding land.<sup>75</sup>

### 3. Case 2: Consolidation of control over land in peri-urban Kakabona

In this case study, Kakabona refers to a series of peri-urban villages strung out along the coastline and the Tandai Highway as it runs west from Honiara, between White River and Poha River. Historically, land in this area was divided into large territories, each associated with one of a number of matrilineal totemic tribes. Prior to colonisation, the population lived in small, isolated hamlets in the interior, and the coastline was generally unpopulated since it was regularly visited by headhunting parties from the western Solomons and neighbouring Savo Island.<sup>76</sup>

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Today, however, Kakabona is densely populated. The bulk of the population is located relatively close to the coastline, in the narrow strip of flat land between the beach and the foothills, which rise almost immediately from the sea and are covered in grassland. On the eastern side, close to the town boundary, numerous parcels of land have been registered under the *Land and Titles Act*. These parcels are registered in the names of a small number of male leaders who are representatives of the landowning tribe. Land around the Kongulai water source, which provides most of Honiara’s water supply, has been registered in a similar manner. Most of the land further west is divided into large blocks associated with particular tribes. Within these blocks there may be smaller parcels that have been registered by, or are associated with, particular families.

In Kakabona, as on the Bareke Peninsula, a male is usually appointed as the spokesperson for the family and kin group on all land-related issues. These spokespersons are often described, in *Pijin*, as having the “ability to talk”. The idea of being “able to talk” about land is important across Guadalcanal, and during the colonial period, land deals were often between foreigners and men who had the ability to read, speak and write some English.<sup>77</sup> The “ability to talk” about land depends partly on an individual’s level of education and skill in managing land relationships within the landowning group, as well as with outsiders. Since women often have less access to education than do men, they are less likely to possess the skills necessary to negotiate the state legal system and manage land transactions. Further, according to some Guadalcanal people, custom dictates that “*women no save tok*” (women should not/cannot talk) about land. People in Kakabona often explain that women must “stand behind” the men when it comes to speaking about land and dealing with land in the public arena. This norm is often explained by reference to the role of men as warriors and protectors of women.<sup>78</sup> Today, these concepts are being translated into the state legal system in a manner that turns the customary “right to speak” about land into effective control over land.

### 3.1 *Hu nao save tok*?<sup>79</sup> Urbanization and the development of Kakabona

Prior to World War II, the population of Honiara and its surrounding areas was sparse. However, development on this part of Guadalcanal increased during the war when the United States forces developed an airfield and other infrastructure. At the end of the war, the capital of Solomon Islands was relocated from Tulagi in the Nggela group to Honiara, which further concentrated economic development in the area and drew migrants to Honiara and the surrounding region.<sup>80</sup> Urbanization gathered pace in the 1960s, and indigenous villages on the outskirts of Honiara grew as Guadalcanal people relocated from more remote areas. Migrants from other islands settled on government land under Temporary Occupation Licences, but by the 1980s, these settlements were beginning to spill over from town land onto customary land.<sup>81</sup>

Today, much of the land on the western side of Kakabona is claimed by one particular tribe, who traces its claim to those who originally settled and cleared the land. There have been a series of transactions through which some of the land has been divided up and acquired by other landholding groups.<sup>82</sup> Land transactions such as these often involve cash and are increasingly commercialized, but they are also rooted in customary practice and have historical precedents. Most involve feasting or *tsupu* — the ceremonial exchange of gifts, particularly food. The maintenance of claims to land depends on these feasts and ceremonies being remembered through oral histories and *tutungu* (genealogies).<sup>83</sup>

During the 1980s and 1990s, a number of disputes concerning land in west Kakabona came before the chiefs and courts. These disputes were often triggered by attempts to register blocks under the *Land and Titles Act*, and usually concerned the boundaries and “ownership” of the land.<sup>84</sup> Historically, land tenure on Guadalcanal was characterised by a complex web of nested and overlapping interests in land, with particular tribes living in close proximity to one another and intermarrying. However the requirements of the *Land and Titles Act* meant that land acquisition officers, chiefs and courts are now required to identify which of these groups “own” the land. Other groups are often described as “living under” the “owners”. In some cases, the land was later registered under the *Land and Titles Act* and in the name of a maximum of five “duly authorized representatives” of the landholding group, who are joint owners on a statutory trust.<sup>85</sup> These representatives are, with few exceptions, the individuals that appeared before land acquisition officers, chiefs and courts on behalf of the successful tribe; in the vast majority of cases, they are male leaders. Thus, the individuals who have the authority to speak about land within the arenas established by the state are able to consolidate that authority through registration.

It is a principle of both *kastom* and the state legal system that the trustees of land consult with the other landowners before dealing in the land.<sup>86</sup> There is evidence, however, that trustees have often failed to fulfil this obligation. Land in Kakabona has often been sold to migrants from other areas, as well as to local landowners who wish to establish new hamlets or gardens. Many of these sales have been made by trustees, although other members of landowning groups have also sold land. These



transactions are often illegitimate in the eyes of many landowners, because deals are often struck by individuals in exchange for cash, without adequate consultation of other members of the landholding group and without distributing the proceeds of sale.<sup>87</sup> As a result, land transactions are often highly controversial and a significant source of conflict.

While women are rarely listed as land trustees and are largely absent from records of public hearings, they nevertheless play a role in determining access to and control over land. There is much that occurs beyond the purview of the state. Women influence land transactions and court disputes through informal conversations, particularly with their husbands, brothers and uncles.<sup>88</sup> Many of the women consulted in Kakabona believed that they were more likely to be consulted in land matters if they had extensive knowledge of *kastom*. For example, Ruth Maetala reports of a recent instance in which a woman's knowledge of *kastom* and genealogy appeared to be influential in preventing the sale of land:

A businessman in Honiara tried to buy the Kongulae<sup>89</sup> water source. He used his mother, who is from Guadalcanal, to pay each of the landowners US\$50,000 to transfer to him their rights to the water source – which supplies water to the Honiara township. Payments were made to all the men who, for the transaction, were deemed principal landowners but when a particular woman's uncle's turn came, he turned to his niece for a decision. This was her response:

"If you sell my land right, you have sold my great, great grandmother, my great grandmother, my grandmother, my mother and me to this businessman. If you respect my ancestors who are your ancestors also, then you will not sell my right to Kongulae water source."

This woman's words were influential in the final decision: the Kongulae water source was not sold to the businessman.<sup>90</sup>

This woman appears to have successfully drawn on *kastom*, in particular her knowledge of *tutungu* and the idea of land being passed through women, in order to persuade her uncle not to sell the land. Information about certain aspects of *kastom* appears to be more closely guarded in Kakabona than on the Bareke Peninsula, and some information may only be handed down to men.<sup>91</sup> Nevertheless, there are also many aspects of *kastom* that may be learned by women. In 2009, the author, together with the Landowners Advocacy and Legal Support Unit in the Public Solicitors Office, held a participatory legal literacy workshop on natural resource management in Kakabona.<sup>92</sup> During the workshop, women openly discussed the fact that they are not as knowledgeable of *tutungu* (genealogy) as their mothers and grandmothers were. They traced this to a number of factors, including involvement both in the subsistence and cash economies, as well as in activities run by donors, non-government organizations and churches. These activities limit the ability of many women to engage in the time-consuming task of learning about *kastom*.<sup>93</sup> The women acknowledged that this contributes to the likelihood that it will be men, rather than women, who speak in public fora, as it is often men who have the knowledge of *kastom* necessary to make a case in court hearings. One of the outcomes of these discussions at the workshop was a resolution by the women to take active steps to learn more about *tutungu*.

However, even if women have extensive knowledge of *tutungu* and other aspects of *kastom*, their participation in land matters may be constrained by the consolidation of the customary role of male leaders within the realm of the state legal system. Many women report that they find out about the details of a land transaction or dispute only after male leaders have reached a decision.<sup>94</sup> If such decisions have been entrenched in signed agreements or in court decisions, it may be difficult to challenge them due to state legal norms and to many people's hesitation to challenge leaders in formal settings such as court appeals. All of this contributes to a trend whereby the notion "*women no save tok*" limits the role of women within the sphere of the state legal system and similarly, the traditional role of tribal elders is transformed in a manner that strengthens their formal control over land.

### 3.2 Distribution of financial benefits from natural resources

Many of the residents of Kakabona are members of landowning groups that are involved in logging, and their experiences of the decision-making processes and the distribution of financial benefits are similar to those of the people on the Bareke Peninsula.<sup>95</sup> The distribution of benefits from other resource uses is similarly problematic. The Kongulai catchment, more commonly known as the “Kongulai water source”, is a case in point.

The Kongulai water source lies to the west of Honiara and provides about 70 percent of the city’s water supply.<sup>96</sup> Land in this area has been divided into parcels and registered in the names of trustees, all of whom appear to be members of a relatively small group of male leaders. As with logging on the Bareke Peninsula, the role of traditional “big men” or chiefs has carried over into the cash economy, which is important for negotiations and in the signing of agreements providing access to the Kongulai water source. The men who are listed as leaders on official documents and agreements are also those who receive royalties when they are distributed. Under both the state legal system and *kastom*, they are obliged to share these benefits with other members of the landowning group. However, as is the case with logging, there is a general lack of transparency and accountability as to how this occurs. Landowners complain that they do not know when royalties are distributed or how much money they are entitled to. Most women need to be vigilant if they want to receive a share of royalties associated with either logging or the Kongulai water source. News that a payment will be made is often passed by word of mouth. As a result, women may travel into Honiara and spend several days sitting outside the office buildings where payments are made. They report that it is necessary for them to be there when their male relatives emerge with money; otherwise, “they will just drink it and eat it.”<sup>97</sup>

The inequitable distribution of financial benefits is related to inequality in decision-making. Male leaders have been registered as the trustees and therefore assume control of negotiations with Solomon Islands Water Authority, and women do not appear to be adequately consulted in decision-making or informed of royalty distributions.<sup>98</sup> This is a common feature of resource-dependent industries in Solomon Islands.<sup>99</sup> Initial research by the author also suggests, however, that some landowning groups may have more transparent and inclusive methods of decision-making, dispute-resolution and the distribution of financial benefits than others. Further research is required to determine whether this is the case, and if so, why.

### 3.3 *Hao nao olketa meri save tok*:<sup>100</sup> The mobilization of *kastom* and Christianity

From 1998 to 2003, Solomon Islands suffered from a violent conflict that is now known as “the Tensions”, which resulted in hundreds of deaths, the displacement of thousands of people, and the destruction of the country’s narrow economic base. The primary protagonists were militant groups formed by the indigenous inhabitants of Guadalcanal and those who originally came from the neighbouring island of Malaita. While the causes of the conflict are immensely complex,<sup>101</sup> they include social conflicts arising from the use of land, which remain largely unaddressed today.

The beginning of the Tensions are usually traced to late 1998, when the Guadalcanal people petitioned the Government calling for the return of land “stolen from the people” and demanding compensation for the use of Honiara as the national capital. A Guadalcanal militia group then embarked upon a deliberate campaign of harassment and evicted thousands of settlers from Guadalcanal to their islands of origin. This campaign was directed primarily at Malaitan settlers on the Guadalcanal Plains and in the vicinity of Honiara. A Malaitan militant group emerged in response, and Honiara fell under its control, while Guadalcanal militants controlled areas outside the town boundary.<sup>102</sup> The fighting therefore was concentrated in peri-urban areas around the town boundary. Residents of these areas fled as their homes were burnt and looted, their vehicles seized, and their physical safety threatened.

While there were many and complex underlying drivers of the conflict, the centrality of land issues is underscored by the Guadalcanal militants’ slogan, “Land is Our Mother, Land is Our Life, Land is Our Future”. The land-related drivers of the Tensions included social conflicts arising from the expansion

of migrant settlements onto customary land; the destructive impacts of development; and the inequitable distribution of revenue from activities such as logging and mining.<sup>103</sup> Land dealings underlying development and migrant settlement were called into question due to the exclusion of most landowners from decision-making and the distribution of financial benefits. A common argument was that many land dealings were illegitimate because they had been undertaken without consulting women, who are the “real landowners” in Guadalcanal’s matrilineal systems. Many Guadalcanal youth felt that they had been dispossessed of their rightful inheritance, and while much of their anger was directed at settlers, there is also anecdotal evidence of reprisals against senior Guadalcanal men who had been involved in land dealings.<sup>104</sup>

When violence escalated in mid-2000, the volunteer Women for Peace Group was formed with the aim of enabling women to contribute to the peace process. Their activities and strategies drew on customary practice, cultural values (particularly the idea of “women as mothers”), and principles drawn from Christianity. For example, in some cultures in Solomon Islands, women may intervene in conflict both physically and verbally, and Women for Peace members drew on this approach to physically stand between warring parties. Women also visited the camps of militants, where women and militants (predominantly young men) shared food, prayed together, and discussed issues such as the consequences of the violence for women and children. Women for Peace also held fora, conferences and meetings with police officers, parliamentarians and foreign diplomatic missions. Prayers and Bible readings were always an important part of these meetings.<sup>105</sup> It is noteworthy that the strategies adopted by Women for Peace in affirming women’s roles in dispute resolution and peace-building drew on *kastom* and Christianity, rather than the state legal system or international human rights standards.

In the years since the Tensions, similar strategies appear to have been adopted by Guadalcanal landowners seeking to expand the role of women in land matters. For example, one Guadalcanal woman believed that the role of women has expanded since the Tensions, because many people have realized that it is a “sin” to exclude them from land matters:

God made Adam and Eve, and it is a Christian principle that women should be included in decision-making regarding land. It is a sin to not include women. When we sin, there will be consequences...and now we’ve seen what those consequences are.

#### 4. Strengthening women’s land rights

The case studies demonstrate that land tenure in Solomon Islands is characterized by a highly complex and dynamic interplay of *kastom*, Christianity, and state laws and institutions that varies from place to place. While this institutional and normative plurality provides ample scope for the renegotiation of tenure, the case studies clearly show that some people are better equipped than others to influence the direction of those renegotiations.<sup>106</sup>

The dynamism of customary tenure means that contemporary practice needs to be understood in its historical context. The Bareke Peninsula case study reveals the usefulness of such an approach. Logging is controversial among the people of the Bareke Peninsula, with both men and women contrasting current practices with the matrifocal concept of *vuluvulu*. A historical perspective suggests that this cannot be easily dismissed as a romanticisation of *kastom*. It is not surprising that the role of *bangara* can be explained with ease, having been reified through the state legal system and the missions. The difficulty that Bareke people have in explaining the concept of *vuluvulu* suggests that the concept has not been reified through the state legal system to the same extent. Contemporary practice must therefore be understood not merely as the product of a flawed legislative framework, but also as embedded in history.

Recognizing that customary tenure is dynamic and negotiable requires moving beyond simplistic assessments of *kastom* as discriminatory towards women and that their interests would be better

served by the intervention of the state. The records produced by the state legal system generally record the names of a small number of male leaders, thus solidifying their formal control over land. However this practice is often contested by the commonly-heard statement that “women are the real owners of land on Guadalcanal.”

Interpretations of *kastom* in Kakabona today suggest that some people have greater authority than others to “talk about” land. While there is a need for further research, it is possible that the informality of customary systems in the past provided all landowners with a variety of means to influence decision-making and even resist the decisions of those with the recognized authority to “speak about” land. However, urbanization and increased competition for land has led to elite attempts to capture the value of land, which are facilitated by greater resort to the state legal system. This has narrowed the scope for participation in decision-making, concentrating formal control over land in the hands of a small number of people.

Neither *kastom* nor the state legal system provide adequate mechanisms for ensuring transparency and accountability in relation to land matters. On the Bareke Peninsula and in Kakabona, both men and women regularly complain of a general lack of knowledge about land dealings and the distribution of financial benefits such as royalties. There is a need for increased attention to issues of access to information. For example, in both fieldsites, transparency and accountability in the distribution of royalties might be improved if they were highly public and advance notice were given to all landowners pending royalty payments.

Formal rights to land and the distribution of cash benefits associated with them are obviously just one part of the much larger picture of access to land and other natural resources. In the context of Solomon Islands, however, where landlessness is relatively unknown, it is the issue of formal rights to land that is of most concern to women. It is in the intersection of *kastom* with the state that many landowners find themselves losing out, and a small number of people are able to strengthen their role within land tenure systems.

While attention must be paid to the intersection of *kastom* with the state, the case of Kakabona demonstrates that women may be more likely to draw on informal systems based in *kastom* and Christianity in affirming their roles in relation to land, dispute resolution and the distribution of financial benefits. In the context of Solomon Islands, where land reform is on the agenda of the national government and donors, there is an urgent need for further research into the operation of local norms and practices, which arguably play a more significant role in determining women's rights to land.

Furthermore, while it is now axiomatic to state that participatory methodologies are critical to the empowerment of women, issues of methodology have not received a great deal of attention in research into customary systems.<sup>107</sup> The participatory workshop held in Kakabona enabled all of the workshop participants (the author included) to pursue the shared goal of empowering Solomon Islander women through the provision of information about the state legal system. At the same time, the author learned a great deal about the operation of *kastom* and Christianity, and the local women participants identified the active pursuit of knowledge about *tutungu* as critical to their empowerment within *kastom*.<sup>108</sup>

Finally, it must be noted that the case studies have tended to focus on the experiences of the “average” woman, with less attention paid to other cross-cutting axes of difference such as age, marital status, and status as an autochthon or migrant. This is partly because those with the most vulnerable rights to land, such as migrant women, are also those who have the least authority to speak publicly about land matters. This was often noticeable in meetings, during which migrant women were quiet, and in a small number of instances even left the meeting. It is likely that these women felt unable to express their views on land matters within public meetings. This again

highlights the importance of long-term, ethnographic research methodologies that provide scope for the inclusion of a greater range of voices and experiences, and pay increased attention to the operation of customary systems of tenure on the ground.

## footnotes

- 1 See for example Australian Agency for International Development (AusAID), *Making Land Work*, Volume 1 and 2 (2008).
- 2 For a review of these debates see A Whitehead and D. Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: the Implications of the Return to the Customary' (2003) 3(1-2) *Journal of Agrarian Change* 67-112; S Razavi, 'Liberalisation and the Debates on Women's Access to Land' (2007) 28(8) *Third World Quarterly* 1479-1500.
- 3 Notable exceptions include: C Bolabola et al, *Land Rights of Pacific Women* (1986); R. Monson, *Land Rights of Melanesian Women: Women's Rights to Customary Land in Fiji and Vanuatu*, Honours Thesis, Monash University (2004); E. Huffer (ed), *Land and Women: the Matrilineal Factor: the Cases of the Republic of Marshall Islands, Solomon Islands and Vanuatu* (2008); and G. Nelson, *Review of the Gender Dimensions of Land-Based Conflict in the Pacific*, Consultancy Report commissioned by the Pacific Islands Forum Secretariat (2008).
- 4 The South Pacific (or Oceania) is often understood as being composed of the subregions of Melanesia, Polynesia and Micronesia.
- 5 See, however, R. Maetala, 'Matrilineal Land Tenure Systems in Solomon Islands: the cases of Guadalcanal, Makira and Isabel Provinces' in E. Huffer (ed) *Land and Women: the Matrilineal Factor: the Cases of the Republic of Marshall Islands, Solomon Islands and Vanuatu* (2008) 35.
- 6 Approximately seven months were spent in each field-site during 2008-2009. This fieldwork was supported by the Australian Federation University of Women Georgina Sweet Fellowship (2008) and a Fieldwork Funding Grant from the ANU College of Law. Some of the work on Kakabona has appeared in R Monson, 'Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands' (2010) 4(3) *World Bank Justice for the Poor Briefing Note*.
- 7 "Tradition" or "custom" in Solomon Islands Pijin (as well as the Papua New Guinean Tok Pisin and Vanuatu Bislama).
- 8 *Constitution of Solomon Islands* 1978, s.110. "Solomon Islanders" are persons born in Solomon Islands and who have two grandparents who were members of a group, tribe or line indigenous to Solomon Islands: *Constitution of Solomon Islands* 1978, s 113; *Land and Titles Act* 1996 [Cap 113], s 2.
- 9 *Land and Titles Act* 1996 [Cap 113], s 239.
- 10 Ibid ss 76, 144(1) and Schedule 3.
- 11 In 2002, only 12 percent of land had been registered: Pacific Island Forum Secretariat *Session 3 Paper: Land Issues* (Paper prepared for the Forum Economic Ministers Meeting, Port Vila, Vanuatu, 2002).
- 12 The *Customary Land Records Act* 1994 [Cap 132] establishes an alternative system for recording interests in land, but this has not been widely used.
- 13 *Local Courts Act* 1996 [Cap 19], s 12(1)
- 14 *Constitution of Solomon Islands* 1978, above n 8, s 257.
- 15 *Local Courts Act* 1996, above n 13, s 3.
- 16 *Constitution of Solomon Islands* 1978, above n 9, s 257. See further *Buga v Ganifiri* [1982] SILR 119; *Teika v Maui* [1985/86] SILR 91.
- 17 D. Paterson 'Some thoughts about customary land' (2001) 5 *Journal of South Pacific Law* <<http://www.paclii.org/journals/fjspl/vol05/7.shtml>> at 14 August 2010.
- 18 J. Corrin Care, 'Customary Law in Conflict: Status of Customary Law and Introduced Law in Post-Colonial Solomon Islands' (2001) 21(2) *University of Queensland Law Journal* 167.
- 19 People on Isabel, Makira, Guadalcanal (with the exception of Marau) and Ngqela follow matrilineal descent systems, while Malaita and most of the western islands (including Vangunu Island) are inhabited by ambilineal descent societies.
- 20 See, for example, B. Burt, 'Land in Kwara'ae and Development in the Solomon Islands' (1994) 64(4) *Oceania* 317; M.W. Scott, 'Neither "New Melanesian History" nor "New Melanesian Ethnography": Recovering Emplaced Matrilineages in Southeast Solomon Islands' (2007) 77(3) *Oceania* 337.
- 21 I C Heath, *Land Policy in Solomon Islands* (1979).
- 22 See also Burt, above n 20; E. Hviding, *Guardians of Marovo Lagoon: Practice, Place and Politics in Maritime Melanesia* (1996); E. Hviding, 'Contested Rainforests, NGOs, and Projects of Desire in Solomon Islands' (2003) 55(4) *International Social Science Journal* 539.
- 23 See for example Brown and Corrin Care, 'More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly' (2001) 32(3) *Victoria University of Wellington Law Review* 653; J. Corrin Care, 'Customary law and women's rights in Solomon Islands' (2000) 51 *Development Bulletin* 14.
- 24 In each of *Remisio Pusi v James Leni and Others* [1997] HCSI 218/1995; *Minister for Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1; CA-CAC 003 of 1997 and *Tanavalu v Tanavalu and Solomon Islands National Provident Fund* [1998] SBHC 4; HC-CC 185 of 1995, the court held in obiter that the human right at issue would not prevail over customary law.
- 25 See for example B. Douglas, 'Christian Custom and the Church as Structure in "Weak States" in Melanesia' (Paper presented at *Civil Society, Religion and Global Governance: Paradigms of Power and Persuasion*, Canberra, September 2005, 2).
- 26 T.T. Kabutaulaka, *Pacific Islander Stakeholder Participation in Development: Solomon Islands*, Pacific Islands Discussion Paper Series No. 8, report commissioned by World Bank (1998).
- 27 Ibid; A. Makim, 'State, Community Development and Melanesia: The North New Georgia Sustainable Social Forestry and Rural Development Project' State, Society and Governance in Melanesia Working Paper (2002).
- 28 E. Hviding, *Guardians of Marovo Lagoon: Practice, Place and Politics in Maritime Melanesia* (1996).
- 29 B. Douglas, 'Introduction: Hearing Melanesian Women' (2000) 51 *Development Bulletin* 39; D. McDougall 'Fellowship and Citizenship as Models of National Community: United Church Women's Fellowship in Ranongga, Solomon Islands' (2003) 74(1/2) *Oceania*.
- 30 See for example M.W. Scott, *The Severed Snake: Matrilineages, Making Place and a Melanesian Christianity in southeast Solomon Islands* (2007); D. McDougall, *The Shifting Ground of Moral Community: Christianity, Property and Place in Ranongga (Solomon Islands)*, PhD Thesis, The University of Chicago (2004); C. Bird, *Pepesa – The Household of Life: Theological Exploration of Land in the Context of Change in Solomon Islands*, PhD Thesis, Charles Sturt University (2008).
- 31 Brookfield and Hart, *Melanesia: a Geographical Interpretation of an Island World* (1971).
- 32 Hviding, above n 29. See also K. Fa'anunu, *Christian Fellowship Church Reforestation: A Change in Customary Land Tenure in the Solomon Islands?* Unpublished Report.
- 33 Ibid; Bird, above n 30; Kabutaulaka, above n 26.
- 34 Strathern and Stewart, 'Series Editors' Preface' in M.W. Scott, *The Severed Snake*:

*Matrilineages, Making Place and a Melanesian Christianity in Southeast Solomon Islands* (2007).

- 35 Land and marine tenure systems in Marovo have been the subject of extensive and detailed analysis by social anthropologist Edvard Hviding: see, in particular E. Hviding, *Guardians*, above n 28; E. Hviding, 'Indigenous Essentialism? "Simplifying" Customary Land Ownership in New Georgia, Solomon Islands' (1993) 149(4) *Bijdragen tot de taal - land - en volkenkunde* 802; Hviding and Bayliss-Smith, *Islands of Rainforest: Agroforestry, Logging and Eco-tourism in Solomon Islands* (2000); Hviding, *Contested rainforests*, above n 22; E. Hviding, 'Disentangling the *Butubutu* of New Georgia: Cognatic Kinship in Thought and Action' in Hoëm and Roalkvam (eds), *Oceanic Socialities and Cultural Forms Ethnographies of Experience* (2002) 71; and E. Hviding, 'Contextual Flexibility: Present Status and Future of Customary Marine Tenure in Solomon Islands' (1998) *Ocean and Coastal Management* 40, 253-269.
- 36 E. Hviding, above n 28. The terms "coastal" or "coastal" people are often used to refer to the maritime-oriented segments of a regional population. "Coastal-bush" or "coastal-inland" dichotomies, as well as associated fish-for-taro barter, also existed in Melanesia.
- 37 Ibid.
- 38 Translated from Solomon Islands Pijin.
- 39 Ibid.; E. Hviding, 'Disentangling the *Butubutu* of New Georgia: Cognatic Kinship in Thought and Action' in Hoëm and Roalkvam (eds), *Oceanic Socialities and Cultural Forms Ethnographies of Experience* (2002) 71.
- 40 Bird, above n 30.
- 41 Ibid; Hviding, above n 28.
- 42 Interviews, see also Bird, above n 30. See further B.T. Somerville, 'Ethnographical Notes in New Georgia, Solomon Islands', (1897) 26, *The Journal of the Anthropological Institute of Great Britain and Islands* 357; J.A. Bennett, *Wealth of the Solomons: a History of a Pacific Archipelago, 1800-1978* (1987).
- 43 Hviding, above n 39.
- 44 Ibid; Hviding, above n 28.
- 45 Hviding, above n 28; D. Miller, 'An Organizational Approach to Exchange Media: an Example from the Western Solomons' (1978) 11 *Mankind* 288.
- 46 See Bird, above n 30; W.G. Liligeto, *Babata, our Land, Our Tribe, Our People: A Historical Account and Cultural Materials of Butubutu Babata, Marovo* (2006); J.F. Goldie 'The People of New Georgia, their Manners and Customs and Religious Beliefs' (1909) 22 *Proceedings of the Royal Geographical Society* 23; Hviding, above n 28; Somerville, above n 42. See also A.M.

Hocart, 'Warfare in Eddystone in Solomon Islands' (1931) 61 *The Journal of the Anthropological Institute of Great Britain and Ireland* 301.

- 47 Bird, above n 30.
- 48 Liligeto, above n 46, 50.
- 49 See Hviding, 'Indigenous Essentialism? "Simplifying" Customary Land Ownership in New Georgia, Solomon Islands' (1993) 149(4) *Bijdragen tot de taal - land - en volkenkunde* 802.
- 50 Ibid.
- 51 Ibid; J. McKinnon, 'Tomahawks, turtles and traders: a reconstruction in the circular causation of warfare in the New Georgia Group' (1975) 45 *Oceania* 215.
- 52 A. Cheyne, *Trading Voyages of Andrew Cheyne, 1841-44* (1971); McKinnon, above n 51.
- 53 McKinnon, above n 51, 296.
- 54 Bennett, above n 42.
- 55 Ibid; Hviding, above n 28.
- 56 See Bennett, above n 42. Hviding, above n 28; Hocart, writing about Simbo, refers to a chief who said, "No one is mighty now, they are all alike, they all have money, they cannot go head-hunting, they all 'stop nothing'": A.M. Hocart, 'Cult of the Dead on Eddystone' (1922) *Journal of the Royal Anthropological Institute* 52, 71-112, 259-305.
- 57 Bird, above n 30. The arrival of Christian missionaries in Marovo appears to have been associated with a rapid decline of old rituals and ceremonial activities. This may have been due to the authority and reputation of Ishmael Ngatu, who participated in the last headhunting raid in 1908, after which he converted to Methodism and established the first mission in Marovo in 1914.
- 58 The Methodist Mission produced a number of books of hymns, catechisms, prayers and liturgies in the Roviana language, some of which continue to be used today by the United Church of Solomon Islands.
- 59 As far as the author is aware, there are no recognized *siamas* on the Bareke Peninsula or Marovo Lagoon today. Hviding and Bayliss-Smith assert that the role has completely disappeared: Hviding and Bayliss-Smith, above n 35.
- 60 Ibid.
- 61 See, for example, the language used by the *bangara* Sagende before the Phillips Commission: *Report of the Lands Commission: Native Claim No. 26 Respecting Land at Telina Island, Marovo Lagoon, Claimed by the Australasian Conference Association Ltd*, 18 June 1924.
- 62 Bennett, above n 42.
- 63 Evidence given by Sagende to the Phillips Commission: *Report of the Lands Commission: Native Claim No. 26 Respecting Land at Telina Island, Marovo Lagoon, claimed by the Australasian Conference Association Ltd*, 18 June 1924. Gatukai is the island at the southernmost

point of Marovo Lagoon, and Ramata is in the far north.

- 64 Christian Lund makes this point in relation to Ghana: C. Lund, *Local Politics and the Dynamics of Property in Africa* (2008).
- 65 For example, Liligeto writes of Talivuru, who was a recognized source of his (coastal) tribe's history and knowledge: W.G. Liligeto, *Babata, Our Land, Our Tribe, Our People: a Historical Account and Cultural Materials of Butubutu Babata, Marovo*, Institute of Pacific Studies, the University of the South Pacific (2006).
- 66 For example, Francis Niutali, who married the well-known white trader Norman Wheatley and facilitated his purchase of land. Niutali was the only woman to appear before the 1923 Phillips Land Commission: Carter G Miriam Achi is also remembered as a "strong woman who fought about land": *Patson Dioni v Miriam Achi*, Marovo Local Court 7/85.
- 67 See, for example, *Majoria v Jino* [2003] SBHC 29; HC-CC 261 of 2002 (8 April 2003), in which P.J. Brown discusses in some detail Ngatu's role and the legal status of the records he produced.
- 68 See also Bennett, above n 42; J. Bennett, *Pacific Forest: a History of Resource Control and Contest in Solomon Islands c. 1800-1997* (2000); M. Wairiu, 'History of the Forestry Industry in Solomon Islands' (2007) 42(2) *Journal of Pacific History* 233; T.T. Kabutaulaka 'Rumble in the Jungle: Land, Culture and (un)sustainable logging in Solomon Islands' in A. Hooper (ed), *Culture and sustainable development in the Pacific* (2000), 88; T.T. Kabutaulaka, *Paths in the Jungle: Landowners, Deforestation and Forest Degradation in Solomon Islands* (n.d.) World Rainforest Movement <<http://www.wrm.org.uy/deforestation/Oceania/Solomon.html>> at 15 August 2010.
- 69 *Forestry Resource and Timber Utilisation Act 1978* [Cap 40], Part III.
- 70 Author's own observations, and also those of Hviding and Bayliss-Smith, above n 35. There are also similarities with the practices regarding mining: Hviding, above n 49.
- 71 See, for example, *Clerk v Western Customary Land Appeal Court v Attorney-General* [2003] SBHC 106; HC-CC 070 of 2003 (6 June 2003).
- 72 See also Wairiu, above n 68. Similar observations have been made elsewhere in Solomon Islands: R. Scheyvens and L. Lagisa, 'Women, Disempowerment and Resistance: an Analysis of Logging and Mining Activities in the Pacific' (1998) 19(1) *Singapore Journal of Tropical Geography* 51.
- 73 See also Bennett, above n 42; Bennett, above n 68; Wairiu, above n 68; Bird, above n 30.
- 74 See also Edvard Hviding regarding the simplification of genealogies in negotiations with a mining company: Hviding, above n 49.



- <sup>75</sup> Cf, in relation to Ghana: Lund, above n 65.
- <sup>76</sup> M.A. Bathgate, *Matriliney and Coconut Palms* (1993).
- <sup>77</sup> Dr. Gordon Nanau (personal communication). See also T.T. Kabutaulaka, *Footprints in the Tasimauri sea: a biography of Domeniko Alebua* (2002).
- <sup>78</sup> Ruth Maetala has made similar observations in relation to the roles of men and women in decision-making on Isabel: Maetala, above n 5, 41.
- <sup>79</sup> Solomon Islands Pijin for "Who can / may talk?"
- <sup>80</sup> M. Bellam, 'The Colonial City: Honiara, A Pacific Islands Case Study' (1970) *Pacific Viewpoint* 66.
- <sup>81</sup> D. Storey, 'The Peri-Urban Pacific: from Exclusive to Inclusive Cities' (2003) 44(3) *Asia Pacific Viewpoint* 259.
- <sup>82</sup> It is often unclear whether these transactions have been made on behalf of the tribe, on behalf of a family, or on a one-to-one basis. Details of some of these transactions can be found in *Kurilau and Usa v Tada and Ors* CMC-LA 1 of 1988 (CD/CLAC/6/88) (7 September 1988), and *Tada v Usa* [1996] SBHC 7; HC-CC 207 of 1994 (12 February 1996).
- <sup>83</sup> See also Maetala, above n 5.
- <sup>84</sup> The language of the *Land and Titles Act 1996* [Cap 133] refers to "ownership": see *Land and Titles Act 1996* [Cap 133] Part V.
- <sup>85</sup> *Land and Titles Act 1996* [Cap 133] s 195(1).
- <sup>86</sup> See, for example, the then Chief Justice Muria's comments in *Kasa v Biku* [2004] SBHC 62; HC-CC 126 of 1999 (14 January 2000).
- <sup>87</sup> Confidential interviews with various individuals in Kakabona, 2008 and 2009.
- <sup>88</sup> See Maetala, above n 5.
- <sup>89</sup> Kongulae is also spelled Kongulai. Many of the names of places in Solomon Islands have a number of accepted spellings.
- <sup>90</sup> See Maetala, above n 5 (citing a personal interview).
- <sup>91</sup> According to many informants in Kakabona, this information has traditionally been taught to boys by their maternal uncles.
- <sup>92</sup> See further R. Monson, 'Identity and Ethics, or, Trying to Avoid being a Patronising White Lawyer' (2009) 1 *Ex Plus Ultra* 87. The views expressed here are those of the author, and do not represent those of any other individuals or organisations involved in the workshop.
- <sup>93</sup> Personal communication with Paula Arahuri 10 March 2010.
- <sup>94</sup> See Maetala, above n 5.
- <sup>95</sup> See also D. Gay (ed), *Solomon Islands Diagnostic Trade Integration Study, 2009 Report* Ministry of Foreign Affairs and Trade (2009); and Wairiu, above n 68.
- <sup>96</sup> J.A. Tuhaika, 'State-owned Enterprises and the Principal-Agent Problems: a Case Study of Solomon Islands Water Authority' (2007) 22(2) *Pacific Economic Bulletin* 131, 132.
- <sup>97</sup> Similar observations have been made in relation to the distribution of logging royalties: see D. Gay (ed), *Solomon Islands Diagnostic Trade Integration Study, Ministry of Foreign Affairs and External Trade* (2009); Scheyvens and Lagisa, above n 72.
- <sup>98</sup> B. Powell et al, *Updated Report on Initial Consultations for Kongulai Catchment, Guadalcanal Province, Solomon Islands* (2007) <[http://www.watercentre.org/resources/publications/reports/Powell et al -2007- Initial Consultations for Kongulai Catchment - Solomon Is..pdf](http://www.watercentre.org/resources/publications/reports/Powell%20et%20al%202007%20Initial%20Consultations%20for%20Kongulai%20Catchment%20-%20Solomon%20Is.pdf)> at 10 June 2010.
- <sup>99</sup> See also Fletcher, Hickie and Webb, *Risky Business*, Jubilee Australia (2009).
- <sup>100</sup> Solomon Islands Pijin for "how women can / may talk".
- <sup>101</sup> See in particular M. Allen, *Greed and Grievance in the Conflict in Solomon Islands, 1998-2003*, PhD Thesis, Australian National University (2007).
- <sup>102</sup> See Fitzpatrick and Monson, 'Balancing Rights and Norms: Property Programming in East Timor, the Solomon Islands, and Bougainville' in S. Leckie, *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations* (2009), 103.
- <sup>103</sup> See for example, Wairiu, above n 68; Liloqla and Pollard, *Understanding Conflict in Solomon Islands: A Practical Means to Peacemaking* State, Society and Governance in Melanesia Discussion Paper 00/7 (2000); Fitzpatrick and Monson, above n 102.
- <sup>104</sup> Confidential interviews in Honiara and surrounding areas, 2008 and 2009.
- <sup>105</sup> See for example Liloqla and Pollard, above n 103.
- <sup>106</sup> See also P.E. Peters, 'Inequality and Social Conflict Over Land in Africa' (2004) 4(3) *Journal of Agrarian Change* 269.
- <sup>107</sup> Susan Hirsch has observed that, while legal anthropologists have paid a great deal of attention to gender relations, there has been very little engagement with the debates over feminist method that have shaped the study of gender in other disciplines: S.F. Hirsch, 'Feminist Participatory Research on Legal Consciousness' in Starr and Goodale (eds), *Practising Ethnography in Law: New Dialogues, Enduring Methods* (2002), 13.
- <sup>108</sup> See also Monson, above n 92.













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