Traditional Justice:
Practitioners' Perspectives

WORKING PAPERS

Paper No. 4

Customary Legal Empowerment: Towards a More Critical Approach

Ross Clarke

'TRADITIONAL JUSTICE: PRACTITIONERS' PERSPECTIVES' WORKING PAPER SERIES

International Development Law Organization (IDLO)

IDLO is an intergovernmental organization that promotes legal, regulatory and institutional reform to advance economic and social development in transitional and developing countries.

Founded in 1983 and one of the leaders in rule of law assistance, IDLO's comprehensive approach achieves enduring results by mobilizing stakeholders at all levels of society to drive institutional change. Because IDLO wields no political agenda and has deep expertise in different legal systems and emerging global issues, people and interest groups of diverse backgrounds trust IDLO. It has direct access to government leaders, institutions and multilateral organizations in developing countries, including lawyers, jurists, policymakers, advocates, academics and civil society representatives.

Among its activities, IDLO conducts timely, focused and comprehensive research in areas related to sustainable development in the legal, regulatory, and justice sectors. Through such research, IDLO seeks to contribute to existing practice and scholarship on priority legal issues, and to serve as a conduit for the global exchange of ideas, best practices and lessons learned.

IDLO produces a variety of professional legal tools covering interdisciplinary thematic and regional issues; these include book series, country studies, research reports, policy papers, training handbooks, glossaries and benchbooks. Research for these publications is conducted independently with the support of its country offices and in cooperation with international and national partner organizations.

Author: Ross Clarke

Published by:

International Development Law Organization in conjunction with the Van Vollenhoven Institute, Leiden University.

International Development Law Organization
Viale Vaticano, 106
00165 Rome, Italy
Tel: +39 06 4040 3200
Fax: +39 06 4040 3232
Email: idlo@idlo.int
www.idlo.int

DISCLAIMER

IDLO's publications are intended to expand legal knowledge, disseminate diverse viewpoints and spark discussion on issues related to law and development. The views expressed in this publication are the views of the authors and do not necessarily reflect the views or policies of IDLO or its Member States. IDLO does not guarantee the accuracy of the data included in this publication and accepts no responsibility for any consequence of its use. IDLO welcomes any feedback or comments regarding the information contained in the publication.

ABOUT THE PROGRAM

The *Traditional Justice: Practitioners' Perspectives* online series is part of a broader research program featuring research 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 and the legal empowerment of poor and marginalized populations. Articles in the series discuss 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.

The project is implemented in partnership with the Van Vollenhoven Institute for Law, Governance and Development of Leiden University (http://law.leiden.edu/organization/metajuridica/vvi/), and it will culminate in the publication of an edited volume on the relationship between traditional justice and legal empowerment. The volume, featuring articles by some ten leading authors, country specialists and practitioners working in the areas of traditional justice and legal empowerment, will be the third in IDLO's book series *Lessons Learned: Narrative Accounts of Legal Reform in Developing and Transition Countries*. Consistent with the thrust of the series, IDLO's traditional justice book and online papers seek to identify successes, challenges and lessons springing from the integration of law and development.

DONOR SUPPORT

This publication is based on research funded by the Bill & Melinda Gates Foundation (http://www.gatesfoundation.org). The findings and conclusions contained within are those of the authors and do not necessarily reflect the positions or policies of the Bill & Melinda Gates Foundation.

Customary Legal Empowerment: Towards a More Critical Approach

Ross Clarke[1]

ABSTRACT

Justice sector reform policies now recognize the need to operate at a community level, using the law to empower disadvantaged groups to exercise their rights and protect their interests. Termed "legal empowerment", this approach increasingly seeks to engage with customary justice systems to achieve its objectives. Tracking the rise of customary law in justice sector reform, this chapter concludes that fundamental conceptual issues regarding sovereignty, jurisdiction, accountability and the political function of law are overlooked in contemporary legal empowerment policy and practice. Two case studies of legal empowerment projects highlight the superficial engagement with customary justice systems and lead to several practical strategies to achieve more effective, conceptually grounded customary legal empowerment.

[1] 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 organisations such the United Nations Development Programme, the International Center for Transitional Justice, the International Development Law Organization and Avocats Sans Frontieres. 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 paper are the author's own and cannot be attributed to organizations he is associated with.

1. Background

After decades of marginalizing customary justice systems (CJS)[2] 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.[3] 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.[4] It further demonstrates that engagement with CJS has, to a limited extent, entered mainstream legal development and rule of law programming.

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 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

[2] 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.

[3] 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).

[4] S Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative,* Carnegie Endowment for International Peace Rule of Law Series No. 41 (2003).

consequences of current approaches, the case is made for a more nuanced and theoretically grounded engagement with CJS.

1.1 Methodology and structure

This article 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 article 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

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.[5] 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.[6]

Central to the law and development approach was the imposition of Western laws with minimal consideration as to their suitability for post-colonial contexts.[7] 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

[5] 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.
[6] B Bryde, *The Politics and Sociology of African Legal Development* (1976).
[7] Ibid.

for western-style legal frameworks.[8] 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.[9] 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.[10] 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.[11]

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.[12] 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.[13] 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.[14] 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.

---

[8] Ibid.
[9] T Carothers, 'The Rule of Law Revival' (1998) 77(95) *Foreign Affairs* 9.
[10] Golub, above n 4.
[11] Ibid.
[12] 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.
[13] R Brooks, 'The New Imperialism: Violence, Norms and the 'Rule of Law'' (2003) 101(7) *Michigan Law Review* 2275.
[14] Chirayath et al, above n 12.

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".[15] 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.[16] 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.[17]

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."[18] 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.[19] 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.[20] He further claims that:

---

[15] Golub, above n 4.
[16] S Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for DFID (2003).
[17] CLEP, above n 3, 27.
[18] 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> at 3 November 2010.
[19] B Connolly, 'Non-state Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38(2) *Connecticut Law Review* 269.
[20] Golub, above n 4, 3.

> 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.[21]

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".[22] 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.[23] 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".[24] 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.[25] 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

---

[21] Ibid 16.
[22] 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.
[23] M Stephens, 'The Commission on Legal Empowerment of the Poor: A Missed Opportunity' (2009) 1 (132) *Hague Journal on the Rule of Law*.
[24] International Council on Human Rights Policy, *Enhancing Access to Human Rights* (2004) 72.
[25] Chirayth et al, above n 12.

Empowerment of the Poor (CLEP) in 2008.[26] 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.[27]

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.[28]

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.[29]

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,[30] 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

---

[26] CLEP, above n 3.
[27] Ibid 28.
[28] CLEP, *Making the Law Work for Everyone: Working Group Reports* (2008) 42.
[29] Ibid 43.
[30] 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.

to principles of non-discrimination and gender equality".[31] 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.[32] While according to Balik, CLEP's recommendations remain top-down, state-centered and orthodox in nature, marginalizing civil society and bottom-up initiatives.[33] 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.[34] 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."[35] 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.

The negative effects of CJS emphasized under legal empowerment policies include the lack of transparency, minimal accountability and vulnerability to elite capture.[36] 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.[37] 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-

[31] CLEP, above n 28, 45.
[32] Stevens, above n 23.
[33] D Banik, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' (2009) 1 *Hague Journal on the Rule of Law* 117, 129.
[34] Connolly, above n 19.
[35] Wojkowska, above n 3, 20.
[36] Ibid.
[37] Connolly, above n 19.

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.[38] While debate over the universalism of human rights versus cultural relativism is beyond the scope of this article, 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.[39] 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.

[38] W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006).
[39] A Renteln, *International Human Rights: Universalism versus Relativism* (1990).

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.[40] 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.[41] 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.[42] 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".[43] 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.[44] 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.[45] Up until the present, while attempts at unification and codification of customary law have taken

[40] See generally Mamdani, above n 30; P Veit, *Africa's Valuable Assets - A Reader in Natural Resource Management*, (1998) Veit 1998; Adelman, above n 30.
[41] F Von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 47 (1) *Journal of Legal Pluralism and Unofficial Law*.
[42] Connolly, above n 19.
[43] Mamdani, above n 30.
[44] Adelman, above n 30.
[45] Mamdani, above n 30.

place[46] 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.[47] 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.[48] 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.

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.[49] As a result, community leaders—possibly "decentralized despots"[50]—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.[51] 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.[52] 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

[46] 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).
[47] Veit, above n 41; Adelman, above n 30.
[48] 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 19.
[49] Connolly, above n 19.
[50] Mamdani, above n 30.
[51] Stephens, above n 23.
[52] Ibid.

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 18th 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.[53] 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.

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.

[53] A Sen, *Global Justice,* Conference Paper for World Justice Forum, Vienna 2008 (2008).

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.[54] 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.[55] 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.[56] 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.[57]

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,[58] 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.

---

[54] Connolly, above n 19.
[55] Nyamu-Musembi, above n 48.
[56] 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.
[57] Connolly, above n 19.
[58] 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*.

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.[59] 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 uncodified 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.[60] 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.[61] 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

[59] Bryde, above n 7.
[60] Connolly, above n 19.
[61] Nyamu-Musembi, above n 48.

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.[62] 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.[63] 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.[64] 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

[62] Mamdani, above n 30.
[63] Nyamu-Musembi, above n 48.
[64] Ibid.

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.

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.[65] 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.[66] 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.[67] In the post-colonial era, few countries took an abolitionist approach, recognizing that integration is a far more effective and realistic strategy.[68] 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.[69] 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

[65] 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.*
[66] Nyamu-Musembi, above n 48.
[67] CLEP, above n 3.
[68] Connolly, above n 19.
[69] R Schiller, 'The Draft Legislation and Customary Law' (1969) *5 East African Law Journal*.

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.[70]

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.[71] 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.[72] 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.[73] 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.[74] 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.[75] 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.

---

[70] Ibid.
[71] R Tanner, 'The Codification of Customary Law in Tanzania' (1966) 2 (1) *East African Law Journal*.
[72] 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).
[73] 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*.
[74] K Deininger, *Land Policies for Growth and Poverty Reduction* (2003).
[75] See generally Chirayath et al, above n 12; Wojkowska, above n 3.

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.[76] 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 Frontieres (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.[77] 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.[78] 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.

[76] A Bryman, *Social Science Research Methods* (2001).
[77] Ibid.
[78] H Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24 (171) *University of New South Wales Law Journal*.

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.[79] 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.[80] 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.[81] 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.[82] CJS were therefore used for conflict-related reconciliation processes[83] and land and property disputes,[84] but did not receive broader recognition. Accordingly, given the power vacuum resulting from rapid Indonesian withdrawal and the United Nation's 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.[85] 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.[86]

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

---

[79] Judicial System Monitoring Programme (JSMP), *Overview of the Courts in East Timor in 2004* (2004).
[80] K Taylor-Leech, The Ecology of Language Planning in Timor-Leste: A Study of Language Policy, Planning and Practices in Identity Construction (2007).
[81] 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.
[82] Ibid.
[83] JSMP, above n 79.
[84] L Yoder, *Custom and Conflict: The Uses and Limitations of Traditional Systems in Addressing Rural Land Disputes in East Timor* (2003).
[85] Hohe and Nixon, above n 81.
[86] L Grenfell, 'Legal Pluralism and the Rule of Law in Timor Leste' (2006) 19 (305) Leiden Journal of International Law.

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.[87] 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".[88] 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".[89] 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.[90] 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

[87] R Perry, Engaging with Customary Systems of Law as a Means of Promoting the Rule of Law in Post-Conflict States (2009).
[88] Howe and Nixon, above n 81, 24.
[89] 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.
[90] Ibid 44.

> 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.[91]

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.[92]

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

[91] Ibid 26.
[92] Ibid.

basis for extensive provincial autonomy for the Acehnese 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 Acehnese *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, Acehnese officials emphasized engagement with CJS as a means to achieve greater legal empowerment.

4.2.2 Government policy on CJS

Unlike Timor-Leste, the end of conflict in Aceh facilitated a widespread revival of Acehnese culture, tradition and custom. The increasing levels of autonomy and end of hostilities allowed the Acehnese administration to institute new laws regarding religious life, *shariah* law, traditional authority structures and customary law. Indeed, for the Acehnese, embracing *adat*[93] or customary law is a direct expression of Acehnese nationalism and harked back to the 17th century Acehnese Sultanate of Iskandar Muda, where Aceh was a dominant, wealthy regional power free from external subjugation.[94] As the central government attempted to suppress Acehnese *adat* throughout the separatist conflict, post-conflict policy sought to reinstate Acehnese customary law as a central normative framework, thereby marginalizing the influence of national law. Engaging with CJS has therefore been readily embraced by the Acehnese 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*[95] 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*,[96] 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

[93] *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.
[94] E Drexler, *Aceh, Indonesia: Securing the Insecure State* (2008).
[95] *Qanun* are regulations issued by the Acehnese provincial parliament. They were formerly known as Regional Regulations, yet under provincial autonomy, *Qanun*, an Acehnese term related to canon law, was adopted. While formerly denoting religious authority, *Qanun* as currently used means a Regional Regulation.
[96] The *mukim* is a distinct Acehnese 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).

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".[97] 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.

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.

[97] Memorandum of Understanding between the Acehnese Governor and Chief of Police on the implementation of *adat,* on file with the author.

- 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),[98] 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.

[98] 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.

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.[99] 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.[100] 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 unconducive 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.

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

[99] UNDP, above n 98.
[100] Ibid.

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 article 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.[101]

Wherever superficial engagement with CJS is perpetuated and projects suffer accordingly, government 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

[101] CLEP, above n 3.

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.[102] 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.[103]

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

[102] Chirayath et al, above n 12.
[103] Nyamu-Musembi, above n 48.

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.