

Traditional Justice: Practitioners' Perspectives

WORKING PAPERS

Paper No. 7

Engaging with Customary Justice
Systems

Erica Harper



International Development Law Organization
Organisation Internationale de Droit du Développement

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: Erica Harper

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



Universiteit Leiden
Faculty of Law
Van Vollenhoven Institute
for Law, Governance, and Development

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.

All rights reserved. This material is copyrighted but may be reproduced by any method without fee for any educational purposes, provided that the source is acknowledged. Formal permission is required for all such uses. For copying in other circumstances or for reproduction in other publications, prior written permission must be granted from the copyright owner and a fee may be charged. Requests for commercial reproduction should be directed to the International Development Law Organization.

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.

Engaging with Customary Justice Systems

Erica Harper¹

INTRODUCTION

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

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

¹ Dr Erica Harper is a Senior Rule of Advisor at the International Development Law Organization. Dr Harper has a Bachelor of Commerce and Bachelor of Laws (honours Macquarie University, Australia) and a PhD (University of Melbourne, Australia). Her areas of specialization include post-conflict judicial rehabilitation; international criminal law and transitional justice; and alternative and customary dispute resolution. Prior to joining IDLO, Dr Harper worked at the United Nations High Commissioner for Refugees (Geneva, Timor Leste and the Philippines) and various field-based NGOs. The ideas expressed in this article are drawn from a Practitioner's Manual on Programming for Customary Justice (IDLO, 2011); the author wishes to thank the various scholars and practitioners who have contributed to the development of these works, in particular Chris Morris, Deborah Isser, Johanna Cunningham, Janine Ubink, Thomas McInerney and Ilaria Bottiglierio.

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

Dubbed the ‘rule of law orthodoxy’, it is well established that the international community concentrates its legal development activities on the reform of formal justice sector institutions: the courts, legislature, police and correctional facilities.² And while legal assistance programs are expanding rapidly, assistance to customary dispute resolution processes has been largely neglected by UN agencies as well as under other multi-lateral and bi-lateral programs.³ There are three primary reasons for this, as discussed below.

i) Institutionalizing poor justice for the poor

Strengthening customary justice systems may be deemed inconsistent with broader rule of law goals. Some argue that high usage of customary processes is symptomatic of poor access to the formal system, as opposed to a normative or ethical preference for customary justice.⁴ It follows that interventions should focus on expanding the reach of courts and enhancing their efficiency. Efforts to reform or strengthen customary justice systems, by contrast, will distract and divert limited resources away from the development of the state system, while at the same time institutionalizing sub-standard justice for the poor.⁵ The result can be “a two-track system that reinforces ... unequal access to legal justice” whereby courts are reserved for the wealthy and the victims of serious crime, while the poor and victims of minor cases are forced to accept ‘secondary’ forms of justice.⁶

ii) Incompatibility with programming approaches of development agencies

Supporting or working through customary legal systems can be incompatible with the programming approach of some development agencies. Such interventions may be considered antiquated or unprincipled by lawyers schooled in more formalistic settings: work that falls more in the domain of anthropologists and social scientists than legal practitioners. Programs involving customary processes may even lie outside of some organizations’ terms of reference. As Isser explains, “... most multilateral and bilateral international actors are mandated to work through state bodies. Customary justice systems which function outside of, or as an alternative to, the state, are often seen as incompatible with this mission”.⁷

Other agencies find it unacceptable to engage with systems that tolerate discriminatory treatment or fail to uphold international legal standards. For example, the United Kingdom Department for International Development’s (DFID) Policy on Non-State Justice and Security Systems (NSJS) states that working with customary systems “is not applicable in situations where NSJS violate basic human rights such that donor engagement is both inappropriate and unlikely to achieve reform”.⁸ Beyond the question

² T Thorne, *Rule of Law through Imperfect Bodies? The Informal Justice Systems of Burundi and Somalia*, Centre for Humanitarian Dialogue Policy Paper (2005) 1.

³ E Wojkowska, *Doing Justice: Informal systems can contribute*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, (2006) 5.

⁴ C Nyamu-Musembi, *Review of Experience in Engaging with ‘Non-State’ Justice Systems in East Africa*, Commissioned by Governance Division, DFID (UK) (2003) 6-7; International Council on Human Rights, *Plural Legal Orders and Human Rights (DRAFT for consultation)*, (2009) 40.

⁵ E Wojkowska, above n 3, 14.

⁶ R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Blackwell (2002) 37–38.

⁷ D Isser, ‘Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries’ (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 13).

⁸ United Kingdom Department for International Development (DFID), *Non-State Justice and Security Systems* (May 2004), 4. Note that despite this, DFID’s policy on safety, security and access to justice recognizes the

of whether to engage at all, that aspects of customary justice processes may be inconsistent with international standards has implications for the question of 'how' to engage. As will be discussed, this presents a particular dilemma for United Nations agencies, which are required to operate within a normative framework of human rights, international law and internationally accepted criminal justice standards.⁹

iii) Interface with the formal legal system

Finally, some argue that strengthening the customary system can result in a competing and overlapping set of laws which, while giving choice, can "obstruct claim-holders' access to justice and impede effective handling of grievances".¹⁰ This may create confusion or promote instability.¹¹ It can also encourage forum shopping and, in turn, facilitate manipulation of the system by more powerful, wealthy or more informed disputants.¹² Pluralism offers such groups the option of ignoring customary norms and asserting their right to refer disputes to the formal legal system in an attempt to avoid traditional responsibilities, to 'get a better deal' or when seeking revenge.

2. The case for engagement with customary justice systems

Despite the arguments cautioning a partnership with customary justice systems, there is growing support for the position that, while there are certainly challenges to be overcome, engagement with them is an essential ingredient for ensuring access to justice for disadvantaged populations, and should be prioritized by development agencies implementing programs of justice sector assistance or reform.

2.1 Lack of appropriate options in some contexts

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

importance of traditional and informal systems as complements to formal state systems. It notes that non-state justice and security systems address issues that are of deep concern to the poor, including personal security and local crime, protection of land, property and livestock, and resolution of family and community disputes, and that they need reform in order to become fairer and more effective.

⁹ UNSC, 'Justice and the Rule of Law: The United Nations Role' 4835th Meeting of the Security Council (30 September 2003) UN Doc S/PV.4835, 6; UNSC 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616 [10]; UNSC 'On Justice and the Rule of Law: The United Nations' Role' 4833rd Meeting of the Security Council (24 September 2003) UN Doc S/PV.4833 3; UNSC, 'On Justice and the Rule of Law: The United Nations Role' 5052nd Meeting of the Security Council (6 October 2004) UN Doc S/PV.5052 (Resumption 1), 14.

¹⁰ UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with BRR Agency for Rehabilitation and Reconstruction, BAPPENAS, UNSYIAH, IAIN, IDLO and the World Bank (2006) 11.

¹¹ T Hohe and R Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor*, paper prepared for the United States Institute of Peace (2006) 68.

¹² International Council on Human Rights, *Plural Legal Orders and Human Rights (DRAFT for consultation)* (2009) 73-4.

In other situations, engagement with the state justice system might be considered inappropriate, for example, where the state is a known conspirator in the perpetration of rights violations, or unlikely to yield effective results, such as where corruption is endemic or there is little or no state support for reform. There may also be scope for reform at the customary level that does not exist within the formal justice sector. As will be discussed, the dynamic nature of customary justice systems allows them to grow and adapt to social and economic imperatives in interesting ways, opening up fertile ground for certain types of normative reforms.¹³

2.2 Heightening protections for marginalized groups

A further basis for engagement is that customary justice systems are simply too important to ignore. As the cornerstone of dispute resolution for the poor and disadvantaged in developing countries,¹⁴ how these mechanisms operate has a critical impact on livelihoods, security and order. Moreover, the 'bread and butter' work of customary fora — disputes involving access to land and productive resources, property, marriage, succession, and criminal offences such as rape — have important social and economic implications for those involved. Where customary justice is fair and rights respecting, it can support the marginalized and promote stability; where it is discriminatory and nepotistic, the results can be inequality, disenfranchisement and heightened potential for conflict.¹⁵

A related rationale concerns the human rights protections offered to users of customary justice systems. Since customary fora operate outside of state regulation and without formal accountability mechanisms, users are more vulnerable to nepotism, discrimination and sanctions that violate accepted human rights standards. It is well established that women and minority groups are among those most disadvantaged and least protected under customary dispute resolution. Further, those whose livelihoods are dependent upon customary land holdings or whose marital rights derive from a customary union, have little or no recourse or state protection. Ignoring these realities, or (worse) using them as grounds for non-involvement will not correct the violations that can occur through the operation of customary legal systems. Instead, it is the number of people who have no choice but to rely upon such systems that makes the case for active involvement compelling.¹⁶

2.3 Delivering access to justice for all

Perhaps the most salient argument presented in support of engagement is that if the objective is to make justice accessible for all, this is unlikely to be achieved in the short-term without customary justice systems forming part of the solution. In most developing countries, the state cannot provide accessible justice services to the entire population, and nor is it the most efficient provider of such services. In the context of competing development imperatives, expanding the reach of state courts may have little economic appeal *vis-à-vis* making the best use of existing grassroots mechanisms.¹⁷ Further, a decentralization of legal services to, *inter alia*, customary systems may be a cost-effective means of reaching more beneficiaries and heightening the efficiency of the formal sector.¹⁸

¹³ World Bank Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, Social Development Unit, Justice for the Poor Program (2008) 44; International Council on Human Rights, above n 12, 43.

¹⁴ Wojkowska, above n 3, 5.

¹⁵ World Bank Indonesia, above n 13, 61-62.

¹⁶ Thorne, above n 2, 7.

¹⁷ D Pimentel, 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan', United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 42.

¹⁸ International Council on Human Rights, above n 12, 78.

The limitations of state justice systems can be contrasted to the scope of work that customary justice systems can and do handle.¹⁹ While noting that precise calculations are difficult, Golub purports that “one can reasonably conclude that perhaps 90 percent or more of the law-orientated problems involving the poor are handled outside of the courts in much of the developing world”.²⁰ Whether this is voluntary or due to limited access to the state system is largely irrelevant. A large body of justice is being meted out through customary systems, with the implication that far-reaching reforms can be made through engagement with such fora. When seen in this light, enhanced access to the customary system becomes a tool for women, the poor, the marginalized and other vulnerable groups to uphold their rights.

2.4 Strengthening the rule of law

Finally, even if they are not the object of reform, expanding approaches to include customary systems may have positive spillover effects. Effective formal justice sector reform, for example, may to some extent lie in understanding what occurs at the customary level. Customary justice systems exhibit remarkable resilience, outlasting changes in government, conflict, natural disaster and state-based attempts to abolish them.²¹ They are also popular. Customary processes are often perceived as fair, cheap and efficient, are steeped in local legitimacy and authority, and respond to the social, legal and material needs of the populace in a way that the formal system is unable to do. While neither resilience nor popularity is a valid ground for engagement per se (asserted preference does not necessarily indicate that customary outcomes are beneficial for all users), such features demonstrate a level of effectiveness and a connection to the people that use them. Understanding how and why this is the case may provide some of the answers to developing a rule of law culture and making the formal justice system more attractive.

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

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

But partnering with customary justice systems raises new and important concerns. Principally, how can a decentralization of legal services be supported while ensuring that this does not equate to a formalization of inequitable or rights-abrogating practices that occur at the customary level?²² A further concern relates to how programming objectives can best be achieved given the normative frameworks within which many international development organizations operate. As discussed, United Nations agencies (and others) are obligated to uphold human rights in all aspects of their work. At the same time, it is clear that where customary norms do not align with international human rights standards, there are often complex rationales in play, touching upon issues such as

¹⁹ Ibid 41.

²⁰ S Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Endowment for International Peace, Democracy and Rule of Law Project No. 41 (2003) 16.

²¹ International Council on Human Rights, above n 12, 9-10; Penal Reform International, *Access to Justice in sub-Saharan Africa: The role of traditional and informal justice systems*, (2000) 1.

²² International Council on Human Rights, above n 12, 71-2, 78.

culture, socio-economics and security. In such contexts, approaches that concentrate on bringing customary systems into alignment with international norms might be, at best, ineffective and, at worst, harmful.

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

3.1 Expanding participation in customary decision-making

One means of promoting downward accountability and enhancing the protection of marginalized groups is to promote their participation in dispute resolution processes. This might involve vesting such groups with leadership responsibilities, or expanding the dispute resolution 'circle' to include representatives of women, youths or other traditionally excluded groups. Proponents argue that female interpretation and application of customary law is likely to better factor in the needs of, and protections required by, all groups and that youth may be more inclined to challenge traditional norms and embrace modern notions of human rights and good governance.²³

The principal drawback of this approach is that power-holders are unlikely to give up their monopoly over dispute resolution easily; devolution of authority usually requires external intervention. To this end, some governments have introduced legislation requiring that community leaders be democratically elected. In certain cases, this has been seen as unwelcomed interference in local governance, and elections have been boycotted. Another potential outcome is that elections do not alter the profile of the leadership, either due to local-level political interference in the election or the strength of support for the existing power hierarchy.²⁴ An alternative approach is the stipulation of quotas for participation by certain groups. It is not necessarily the case, however, that appointment is followed by meaningful participation; those selected are sometimes chosen specifically because they are unlikely to question dominate norms; in other cases, prevailing social attitudes constrain appointees' freedom to act independently.²⁵ This should not be all that surprising. Customary justice systems function on the basis that decision-makers are regarded as legitimate; it is their social authority that ensures that disputants participate, enter into negotiated agreements and abide by outcomes reached. Where leaders lack legitimacy, the integrity of the system may be compromised.²⁶

While there are certainly examples of where customary mechanisms have been expanded to better reflect the composition of society, it would appear that coercive change to leadership structures is rarely an effective means of promoting the substantive participation of marginalized groups. How to get local leaders interested in diluting or devolving their authority is a key challenge. Prompting open debate at the local level on issues of participation may be one entry point; when election or

²³ R E Manning, *The Landscape of Local Authority in Sierra Leone: How 'Traditional' and 'Modern' Justice Systems Interact*, Justice and Development Working Paper Series 1(1) (2009) 12.

²⁴ Penal Reform International, above n 21, 141; C Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, commissioned by Governance Division, DFID (UK) (2003) 4.

²⁵ Wojkowska, above n 3, 41.

²⁶ Penal Reform International, above n 21, 141.

appointment is the strategy adopted, incremental reforms, such as installing women and youths in advisory roles rather than as decision-makers as a first step, may have greater impact over the longer term.²⁷

3.2 Codification of customary law

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

Projects of codification, however, have had limited success. Customary laws are less rule frameworks than sets of principles tailored to specific contexts and malleable in changing circumstances. As such, they do not lend themselves easily to codification. Moreover, the effectiveness of customary systems is premised upon their capacity to facilitate negotiated solutions, a feature that may be extinguished through codification.²⁸

Codification also poses practical difficulties. Customary systems are dynamic and may exhibit wide variation over small areas. Written codes may quickly become obsolete and risk locking diverse groups into a single interpretation of norms.²⁹ Even if codification could capture one system adequately, customary law is almost always internally contested. Codification thus raises the question of whose version of customary law is to be adopted. The obvious risk is that the norms presented discriminate against weaker groups and overlook important needs.³⁰

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

An increasingly popular alternative to codification is self-statements or ascertainties of customary law. These are written documents that describe (but usually not prescribe) key customary law principles.³¹ They are produced and used by communities to guide dispute resolution; as rules are not fixed, such processes avoid a crystallization of laws and the associated loss in flexibility. While there is no set procedure for ascertainties, a main feature is that processes are participatory and that principles are adopted with a level of group consensus.

In summary, codification may be a suitable means of enhancing predictability and protections in specific contexts, such as where there is a relationship between customary and statutory courts, where large population shifts have brought unfamiliar groups into close proximity, and where communities are no longer homogenous, and traditional means of communicating knowledge have broken down.³² Codification may also be

²⁷ Ibid 143.

²⁸ UNDP A2J, *Programming for Justice: Access to All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 103.

²⁹ M Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 151).

³⁰ Ibid; see also World Bank Indonesia, above n 13, 26-7.

³¹ The case of northern Namibia, discussed by Ubink in this collection, shows that some self-statements are in fact binding.

³² A Akechak Jok et al, *A Study of Customary Law in Contemporary Southern Sudan*, commissioned by World Vision International and The South Sudan Secretariat of Legal and Constitutional Affairs (2004) 22-3; M O Hinz, 'The Ascertainment of Customary Law: What is it and what is it for?' (United States Institute of Peace,

successful in contexts where customary rules lend themselves naturally to codification, for example where rules are not disputed and have remained constant over long periods. In other situations, self-recording may be more appropriate. Under either method, the principal risk is that the version of customary law adopted – whether it is popularly accepted or contested – reflects discriminatory attitudes or power imbalances. In such circumstances, codification or ascertainment may formalize such norms, entrenching poor justice for the poor and marginalized. However, where adequate safeguards are in place, such as participatory processes and mechanisms for endorsement of the principles adopted, both can be simple ways for all community members to gain better knowledge about customary law and participate in its evolution.

3.3 Eliminating harmful customary practices

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

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

A further example relates to the limited inheritance and property ownership rights granted to women under some customary systems. While such rules are clearly discriminatory, there may be security-related or social rationale for keeping land within male lineages. In Somalia, the size and strength of the clan is the basic unit of security. Key to the clan’s strength is its wealth, including property holdings. As women may marry outside of their own tribe (or may be traded as part of compensation agreements), it is considered contrary to clan interests to permit them to own or inherit property, as to do so would dilute the group’s collective strength and defensive power.³³

This is not to suggest that such practices are justifiable or should be sustained, simply that in situations of generalized discrimination, poverty and limited (or non-existent)

George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 136).

³³ J Gundel, “The predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia”, Danish Refugee Council and Oxfam-Novib (2006) 9, 12; D J Gerstle, ‘Under the Acacia Tree: Solving Legal Dilemmas for Children in Somalia’ UNDP (2007) 40-41; A Le Sage, “Stateless Justice in Somalia – Formal and Informal Rule of Law Initiatives.” Centre for Humanitarian Dialogue (2005) 34-5.

social security, the importance of basic safeguards including financial, social and security protections, must be taken into account when developing customary reform strategies.

The limitations of the above approaches to reforming customary law have led development practitioners to experiment with a range of bottom-up strategies, including exploring ways to promote self-regulation or internally-generated reforms. Two characteristics of many customary justice systems suggest that such approaches are promising. First, their dynamism and flexibility: while this is often presented as an entry point for discrimination and abuse, such fluidity also makes customary systems capable of modernization and change, thus opening up inroads for progressive reforms.³⁴ Second, while customary leaders are often among those who benefit from discriminatory norms and maintenance of the status quo, they also have incentives to be responsive to changing community expectations as their ability to maintain order and social harmony is closely linked to their authority.³⁵ Whether this makes them the gatekeepers to rights protection, or potential agents of reform, they are clearly important partners in any strategy to improve the quality of customary adjudication. Building upon this, the next section discusses a range of approaches that aim to support the legal empowerment of users and encourage the self-reform of customary justice systems.

4. Expanding access to alternate dispute resolution fora

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

4.1 NGO-led alternative dispute resolution

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

³⁴ International Council on Human Rights, above n 12, 43; L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006: Equity and Development (2005) 2.

³⁵ T Mennen, 'Putting Theory into Practice – Improving Customary Justice' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 140).

Bangladesh: Mardaripur Case study

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

Criminal cases, including rape and murder, as well as complex land cases are not mediated, but are referred to the formal legal system; Madaripur provides assistance through its legal aid division where required. Where mediation is successful, the agreement is recorded and signed by the parties. If mediation is not successful, the dispute is referred to a higher level in the Madaripur structure for further mediation. Disputes that still cannot be resolved are referred to the courts, again with legal aid assistance if required. Madaripur mediates approximately 5,000 disputes annually across 487 committees. Of these disputes, between 66 and 88 percent are said to be successfully settled without going to court. Although mediation is voluntary and decisions are not enforceable, rates of compliance are also high. There may be several reasons for this, such as the perceptions of officialdom and authority attached to NGO-mediated and/or written decisions; post-agreement monitoring of the decision; or, most likely, parties' knowledge that if an agreement is not reached or abided by, the complainant has a very real option of litigation.³⁶

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

A further challenge is how to balance the need to distinguish the justice provided from that which is available through customary fora, with the need for the forum to establish itself as a legitimate and credible option for disputants. Phrased another way: while the objective of NGO-facilitated mediation is to better protect marginalized groups from discrimination and corruption, a forum that offers solutions that are too dissimilar from social and gender norms risks being rejected or boycotted.³⁷ Madaripur's response to this was a subtle and progressive realization of norm modification; modalities included providing education to local mediators and disputants, the gradual introduction of women mediators, and encouraging female participation in dispute resolution, both as committee members and as disputants. Processes were still male dominated, but advancements were made. Women mediators mitigated some of the discrimination against women through both their interpretation of customary law, and the existence of Madaripur provided women with more options for upholding their rights.³⁸ While this may seem like a logical approach, where this balance is struck is not always clear and may

³⁶ USAID, *Alternative Dispute Resolution Practitioners' Guide*, Center for Democracy and Governance (1998) Appendix A-D, 1; S Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for the United Kingdom Department for International Development (2003) 10-12, 28; L Hasle, *Too Poor for Rights? Access to Justice for Poor Women in Bangladesh: A case study*, MSC Human Rights (2003/04) 11-13, 20.

³⁷ Hasle, above n 35, 24.

³⁸ USAID, above n 35, Appendix B, 8; L Hasle, *Too poor for rights? Access to Justice for Poor Women in Bangladesh: A case study*, MSC Human Rights (2003/04) 23-4, 32-3.

involve some trial and error; moreover, such change models are slow and significant developments are unlikely to be seen for many years.

The NGO-mediation model also raises some questions. Mediation led by Madaripur appeared to enjoy high rates of both obtaining a solution and compliance. Given that mediation was voluntary and that respondent parties may have been able to get a more advantageous solution through traditional *shalish* (where they could have taken advantage of discriminatory gender norms, power biases and corrupt practices), it is reasonable to connect this to the threat of litigation. On the one hand, where the NGO offering the mediation service upholds human rights standards, provides procedural protections and processes are not affected by elite capture, this could be seen as an effective means of leveling the playing field. On the other, in contexts where the formal justice system is expensive, intimidating and/or corrupt — a place to be avoided by both the innocent and the guilty — the threat of litigation enjoyed by the NGO-assisted party may be seen as giving them an unfair advantage over their opponent.³⁹

4.2 Community-based paralegals

Paralegals are laypersons that have legal literacy skills; they usually have knowledge of substantive laws as well as skills in how to negotiate the court system.⁴⁰ Their function is to provide a bridge between the formal legal system and society, thus demystifying the law and making justice more accessible.⁴¹ Paralegals can offer a range of legal services that do not necessarily need to be provided by a lawyer, such as: advice on whether a rights violation has occurred; what are an individual's legal rights in a particular situation; how to access government or NGO legal aid; and how to file a claim in court or at an administrative tribunal. In some contexts they also provide quasi- or complementary legal services such as mediation, community legal education or advocacy work.

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

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

³⁹ Hasle, above n 35, 21-2.

⁴⁰ Open Society Institute Justice Initiative, 'From the Files: Three Justice Problems', *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (2006) 28.

⁴¹ *Ibid* 28-30.

⁴² *Ibid*.

legitimate and enforceable solutions. Third, where paralegals are connected to a legal aid service, they may be able to overcome problems of elite capture in the customary system since they have the option of litigation and high-level advocacy.⁴³

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

4.3 Enhancing access to the formal justice system

A final strategy for presenting communities with alternatives to customary justice is to enhance access to the formal justice system, either by expanding the reach of state justice services or by modifying court processes to make them more appealing to customary disputants. While the principal objective is to enhance local communities understanding of and access to state justice, a secondary benefit may be improved customary processes as a result of enhanced competition⁴⁴ and the state acting as a check and balance on customary leaders.

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

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

⁴³ Ibid 28-30.

⁴⁴ G Corradi, 'Human Rights Promotion in Post-Conflict Sierra Leone: Coming to Grips with Plurality in Customary Justice' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 108).

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

4.4 Key challenges and lessons learned

First, when assessing the value added of expanding the number of dispute resolution fora, the secondary implications this might have for the effectiveness of customary justice and broader questions of access to justice must be assessed and taken into account. Having multiple pathways to justice can weaken or corrupt the internal integrity of the customary justice system, the workability of which is dependent on its social power to command user participation and respect. When newly introduced 'options' undermine the functionality of the customary system, but are not strong enough or sufficiently accessible to replace it, access to justice may be reduced; if this creates a situation where no reliable justice options are available, the results can be increased vigilantism, violence and criminality.⁴⁵

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

Given these complex social and vested interests in play, the approaches adopted and outcomes delivered by alternate justice providers generally need to be not too far removed from customary norms. As described in the Madaripur case study, in order to encourage disputants to reject traditional *shalish* and submit their disputes to village mediation committees, decisions and modalities need to offer sufficiently better protections, while not representing too radical a shift in social convention that Committees would be 'pariahed'. The point to be emphasized is that for alternative dispute resolution fora to be voluntarily accepted and utilized, what they offer in terms of procedural protections and outcomes will generally be quite measured. Normative reform will be slow, and in the near term, those applying or supporting such reforms

⁴⁵ J Adoko and S Levine, 'How can we turn legal anarchy into harmonious pluralism? Why integration is the key to legal pluralism in Northern Uganda' (United States Institute of Peace, George Washington University and World Bank conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Washington, 17-18 November 2009, 83-4).

may need to accept that some level of harm will continue. Such a balancing of 'less harm' against 'no harm' may not be a strategy that all donors or policy-makers can endorse.

A final challenge to be addressed is the reality that customary leaders often hold a monopoly over dispute resolution and have a strong vested interest for holding onto such power. The introduction of alternative pathways to justice may thus be strongly resisted; leaders may attempt to dissuade or obstruct users from referring matters to either NGOs or the formal legal system. While this is often for self-interested reasons, for example, to preserve their capacity to extort bribes, there may also be strong social factors in play. In Indonesia, leaders actively discourage community members from approaching the formal justice system because this is perceived as a sign that they are unable to maintain order in their villages, weakening their credibility as leaders.⁴⁶

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

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

5. Conclusions

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

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

⁴⁶ UNDP, above n 10, 70-1.

disputes; or the establishment of new fora might create a competition in the provision of dispute resolution services, hence motivating internal reforms in customary legal processes.

This is by no means the only approach for facilitating the reform of customary systems. Other strategies might include linking self-regulation to formal recognition of customary fora. This has occurred in some cases where customary groups have defined their objectives, functions, structure and jurisdiction in the form of regulations, sought out human rights training or lobbied for state endorsement.⁴⁷ The conditions supporting or prompting such actions need to be better understood, as well as other steps that might encourage or provide incentives for the better observance of procedural and human rights protections in adjudication processes.

Another approach is to look within customary law and draw on positive norms as a basis for change. Somali customary law, for example, contains basic behavioral prescriptions that apply to all Somalis (*xeer dhagan*) including the protection of certain social groups: women, children, the elderly and guests;⁴⁸ in Afghanistan, *Pashtunwali* custom mandates chivalry, hospitality and personal integrity.⁴⁹ Such norms could arguably be better exploited with a view to enhancing the protection of vulnerable groups. It may also be possible to draw upon other sources of social influence to prevent harmful customary practices. In Afghanistan, the practice of forced marriage (including the customary practice of *bad*) has been condemned by some religious leaders as in violation of Islamic *shari'a*.⁵⁰ Likewise in Somalia, women's groups have grounded their resistance to female genital mutilation and denial of inheritance rights (both accepted under customary law) as inconsistent with Islamic law.⁵¹

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

⁴⁷ J Faundez, *Non-State Justice Systems in Latin America, Case Studies: Peru and Colombia*, University of Warwick (2003) 26-7.

⁴⁸ Le Sage, above n 32, 32-33.

⁴⁹ USAID, *Afghanistan Rule of Law Project: Field study of informal and customary justice in Afghanistan and recommendations on improving access to justice and relations between formal courts and informal bodies* (2005) 5.

⁵⁰ T Barfield, N Nojumi and J A Thier, *Afghanistan: State and Non-State Dispute Resolution*, Project on the Rule of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies, United States Institute of Peace and The Fletcher School, Tufts University (DRAFT) 47; USAID, above n 48, 14.

⁵¹ Gundel, above n 32, 43-4.