

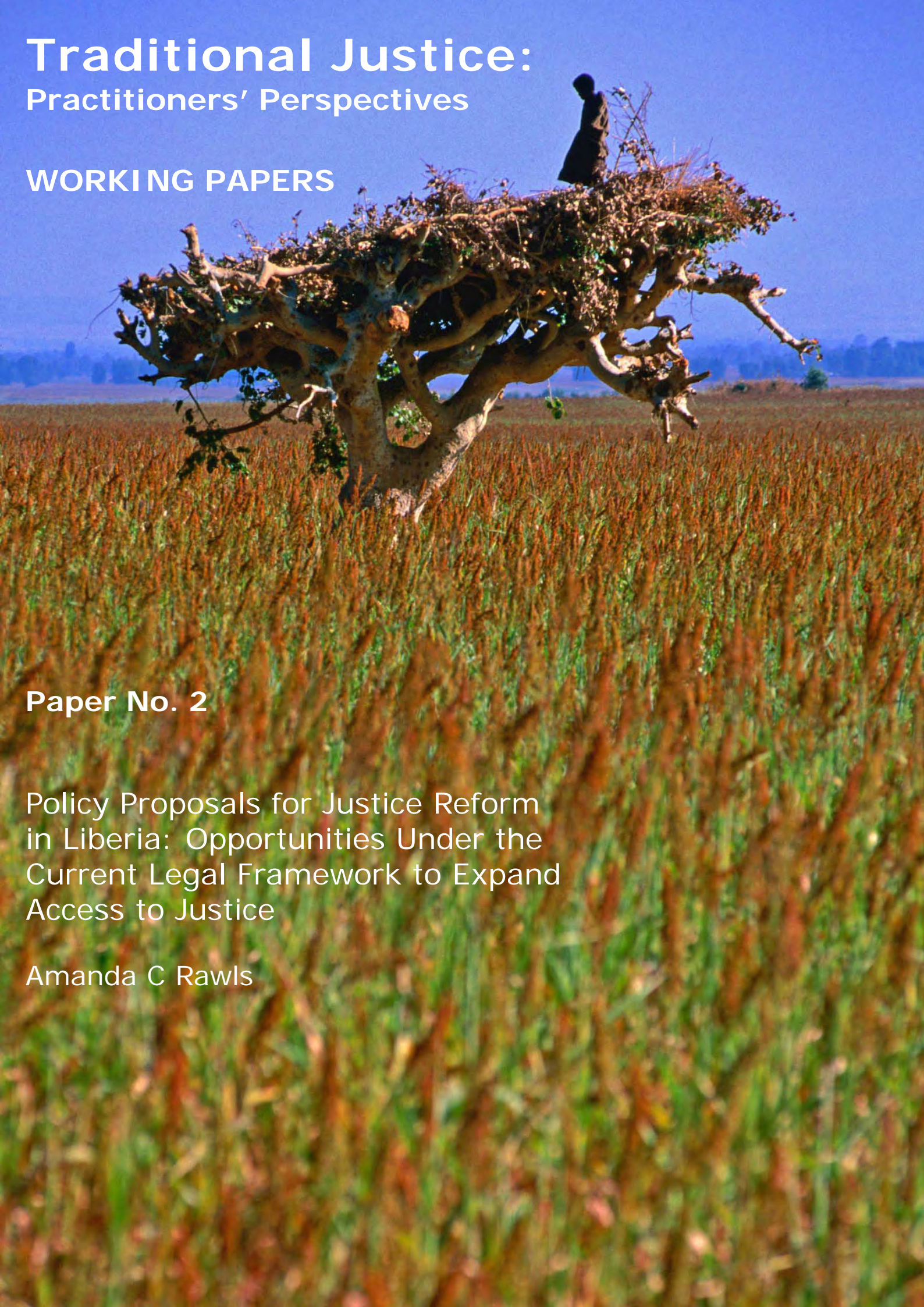
Traditional Justice: Practitioners' Perspectives

WORKING PAPERS

Paper No. 2

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

Amanda C Rawls



International Development Law Organization (IDLO)

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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.

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

Amanda C Rawls¹

EXECUTIVE SUMMARY

This article examines policy decisions currently under consideration in Liberia regarding the interaction between customary and statutory law and justice mechanisms. Specifically, it looks at how a participatory national consultative process is contributing to the development of policy options, and how the realpolitik of maintaining post-conflict peace while establishing internationally acceptable legal standards, informs the government participation in the policy debate. Finally, it explores three concrete policy proposals advanced in a National Conference on Enhancing Access to Justice, held April 15-17, 2010 in Liberia, each of which could be implemented under the existing legal framework and has the possibility of providing more acceptable justice outcomes for the Liberian people. The article looks at how the conference process led to each proposal, how each conforms to the political imperatives of the nation's Ministry of Justice, what challenges the Government might face in implementation, and what prospects each proposed policy has for advancing the development goal of enhancing access to justice.

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1. Introduction

In November 2009, the United States Institute of Peace (USIP) published the results of an extensive field research project, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*.² This work was part of a USIP and George Washington University (GWU) project that aims at assisting the Liberian Government and its international partners “to develop evidence-based policy options for expanding the rule of law and consolidating peace over the next decade in Liberia in ways that account for the rule of informal legal systems and grassroots understandings of justice.”³

Over the period of ten months, the USIP study involved interviews with over 130 different individuals, with over 35 focus groups in three of Liberia’s 15 counties. It was driven by questions of how average Liberians view their justice options: Where do Liberians go to resolve their disputes? To what extent is customary law practiced today, and how has it changed since before the civil war?⁴ To what extent do the various dispute resolution fora produce satisfactory justice in the eyes of Liberians?⁵ The study asked these and related questions as a means of constructing an evidence base from which to examine key policy questions facing Liberia regarding the types of justice reform strategies that might improve the Liberian experience of justice, ways that justice reform might bridge the gap between the customary and formal systems, and the longer-term trade-offs relating to the role of customary justice in the formal system.⁶

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

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

The baseline findings confirm the existence of a dual legal system, with a basis in the Liberian Constitution and statutory law. They identify internal inconsistencies, including statutes and regulations that conflict with each other and with the Constitution,

² D Isser, S Lubkemann and S N’Tow, ‘Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options’ (2009) United States Institute of Peace <<http://www.usip.org/resources/looking-justice-liberian-experiences-and-perceptions-local-justice-options>> at 7 January 2011.

³ Ibid 13. There is ongoing debate over use of the terms “formal”, “informal”, “customary” and “traditional” in reference to legal systems and access to justice globally. This concern stems primarily from a fear that “formal” implies something of greater value. For purposes of this article, no such judgment is intended; “formal” will be used to delineate the legal system based on the Liberian Constitution, statutes and common law founded on the United States legal system and falling under the Ministry of Justice, while “informal” and “customary” will be used interchangeably to indicate the justice provided by the hierarchy of chiefs under the Ministry of Internal Affairs. Liberia’s pluralist justice system includes additional actors providing informal justice, such as elders, leaders of sodalities, and persons of wealth and influence; they will not be addressed in depth here.

⁴ Liberians generally refer to the “14-year civil war,” meaning the period from 1989-2003.

⁵ Ibid 21.

⁶ Ibid.

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

The most interesting empirical finding regards the preferences of many Liberians for the type of justice meted out by the customary system: the USIP study found that, even if the formal system were to operate fairly, free from corruption and in a timely manner, the average Liberian would still prefer the customary system. The customary system is perceived as more holistic, taking account of the underlying causes of a dispute and seeking to repair the tear in the social fabric, whereas the formal system is seen as overly adversarial, retributive, and narrow in its focus on the specific case at issue. A resulting concern raised in the study is that, in seeking to promote and extend the formal justice system to all Liberians — motivated by a desire to expand access to justice and build trust in the formal system — the Government risks sparking the opposite effect, causing Liberians to feel that their access to *acceptable* justice is diminishing.⁷

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

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

- How can justice be improved at the local level?
- As Liberia considers the future of its justice system and the dual system in particular, how can it move toward a system that inclusively reflects the values of the Liberian people?⁸

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

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

⁷ Ibid 73–77.

⁸ Findings of the LWG presented in Monrovia, Liberia, 9–10 December 2009.

2. The Justice Ministry's approach

The process recommendations of the LWG echoed recommendations for successful policy-making in the concluding chapter of the USIP report, both of which were taken to heart by the Liberian Ministry of Justice. The USIP report recommended a consultative process “explicitly engineered ‘to identify and listen’ to local ideas and solutions rather than telling [local stakeholders] what those are”.⁹ This was not just to boost local ownership of the reform process, but grew out of the recognition that rural communities and traditional leaders have the potential to be sources of innovation and drivers of social change.¹⁰

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

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

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

2.1 The consultative process

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

Four regional consultations were held — one in Monrovia involving primarily government representatives from a wide range of ministries and agencies, and one in each of Bong, Bomi and Grand Gedeh counties. Each of these latter consultations included proportionate representation from the magistrate judges,¹¹ traditional leaders, women's

⁹ Isser et al, above n 2, 92.

¹⁰ Ibid.

¹¹ Liberia's judiciary has three levels. Magisterial courts are the courts of first instance throughout the country. Magistrate judges are required by law to hold a law degree, but of the approximately 350 serving magistrates, only 12 have any formal legal training. Magisterial jurisdiction over criminal matters is extremely limited, with most cases requiring referral to a circuit court. Above the magisterial courts are 20 circuit courts — a dedicated

group representatives, and civil society organizations in a regional grouping of five counties so that, by the end of the process, representatives from all 15 of Liberia's counties had had the opportunity to react to the findings of the LWG and to contribute their own thoughts, experiences and opinions.

2.1.1 The value of the consultative process

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

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

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

2.1.2 Common themes across consultations

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

When the National Conference was convened in April, most of the traditional and civil society participants from the counties outside of Montserrado and a number of the high-level government attendees had previously participated in regional consultations. This iterative process meant that it was possible, at the National Conference, for facilitators to present to participants the concerns that they had already raised, and then to ask them

civil law court and five dedicated criminal courts in Montserrado County, each handling different types of crimes, and one general circuit court in each of the remaining 14 counties. There are five additional specialized courts located in Montserrado County, handling probate, debt, labor disputes, traffic violations and juvenile issues. The judiciary is headed by a Supreme Court of five justices, with jurisdiction over constitutional issues and appellate jurisdiction over all cases.

to focus on concrete proposals for how they could be better addressed. It is typically easier to cite problems than to envision solutions; since participants were now coming together for the second or third time, it was essential to move away from the list of grievances to concentrate on concrete recommendations.

2.2 Government priorities

The considerations of social scientists and rule of law practitioners studying the Liberian dual justice system informed the questions posed to participants in the regional consultations, and thus inevitably shaped the responses. However, these priorities potentially differ from those of the Government, which is ultimately responsible for initiating legal reform and ensuring access to justice. Academics and outside observers often have more freedom to consider ideal alternative justice systems for Liberia, to recommend interim reforms that respond to the demands of the public but compromise on international commitments, or to simply caution that justice reform requires generations rather than years to have demonstrable success.¹²

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

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

- A preference for building trust in the formal legal system and using law and policy to change beliefs and behaviors. This is fueled partly by an awareness of the significance of international opinion, manifested in the human rights discourse;¹³
- An urgent need to establish and maintain a government monopoly on the use of force, which would be evidenced by a decrease in mob violence and an effective response to violent crime. This creates pressure for policy options that provide fast results; and
- Acceptance of the need to balance the power of government branches, ministries, agencies and individuals with a stake in the structure of the justice system. This realpolitik serves as an often unspoken constraint on any policy options that might shift power from one part of the government to another.

2.2.1 Preference for the formal legal system

Ownership is one of the bedrock principles of international development. This is apparent not only in multilateral agreements like the Paris Declaration on Aid Effectiveness,¹⁴ but

¹² See, for example, D Isser, *Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries*, Discussion Paper for the Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference, 17–18 November 2009.

¹³ The phrase “human rights” seems to have taken on a negative connotation for the majority of Liberians, who associate the term with outsiders interfering in child rearing, gender relations, and punishment of offenders. It is extremely common for participants in community meetings on justice issues to assert, for example, that “child rights” are the cause of disrespect, juvenile delinquency and social unrest. When government officials promote human rights, it is therefore very unlikely that the Liberian public is their intended audience.

¹⁴ The Paris Declaration on Aid Effectiveness (2005) attempts to guide the relationship between countries that are aid donors and countries that are aid recipients by identifying five key “partnership commitments”. The first

also in the rhetoric that bilateral donors, NGOs and the United Nations use in public discussions of their programs.¹⁵ This is not just an ethical position taken by the donor community — it is a reflection of the belief that locally designed and “owned” initiatives are more likely to respond to the needs and preferences of the community and thus more likely to be effective in meeting their goals.

The field research findings discussed in the introduction are not unique to Liberia — a number of developing and post-conflict states experience a similar preference of their population for customary justice options over the formal system.¹⁶ Given this expressed preference, access to justice and rule of law initiatives risk failing the ownership test when they appear to impose value systems together with legal reforms.¹⁷ More than other sectors that receive substantial international development assistance, such as public health, economic growth and infrastructure development, the justice sector is closely tied to a society’s conscience. The operation of the justice system and the alternatives that individuals seek reflect interpretations and beliefs about power, politics, gender relations, family structures, religion, the role of the state and countless other aspects of society.

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

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

is ownership; the outcome of the Paris Declaration is that all donor assistance must be in support of developing country strategic plans. See, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (2005/2008) <<http://www.oecd.org/dataoecd/11/41/34428351.pdf>>.

¹⁵ See, for example, the United Nations Development Programme’s (UNDP) justification for their rule of law work in Liberia at <<http://www.lr.undp.org/rol.htm>> at 7 January 2011; USAID Liberia’s matrix demonstrating how programs align with Liberia’s Poverty Reduction Strategy (PRS) at <<http://liberia.usaid.gov/node/189>>; and The Carter Center’s description of their Rule of Law portfolio in Liberia as a response to the PRS at <http://www.cartercenter.org/peace/conflict_resolution/liberia-homepage.html>.

¹⁶ See for example *Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* (Conference Packet for a Conference hosted by United States Institute of Peace, George Washington University, World Bank, Washington DC, 17–18 November 2009) (providing case studies from Sierra Leone, Afghanistan, Sudan, Liberia and others).

¹⁷ See for example D Pimentel, ‘Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan’ (summary for USIP, GWU and World Bank Conference Agenda, Washington DC, 17–18 November 2009) (cautioning that Rule of Law initiatives consisting of “attempts to import foreign (usually Western) legal concepts and structures” will fail because of their neo-colonial overtones); M Mutua (ed), *Human Rights NGOs in East Africa: Political and Normative Tensions*, University of Pennsylvania Press (2009) (exploring the legitimacy of international human rights organizations in East Africa); B Ibhawoh, *Stronger than the Maxim Gun: Law, Human Rights, and British Colonial Hegemony in Nigeria* (2002).

crimes of witchcraft and evidence collection by ‘supernatural coercion’ are expected to cease as a more objective and rigorous formal system spreads.¹⁸

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

Outside researchers caution that this elevation of the formal system is based on an idealized version of what that system could be, not a realistic perception of what it is.¹⁹ Irrespective of the truth of this observation, the belief in the ultimate primacy of the formal system — even if an ideal to be attained in the future — creates a firm constraint on the justice options that the Government will wholeheartedly pursue.

2.2.2 Urgent need for change without inciting violence

Although Liberia is at peace, there is a palpable feeling of unrest in the justice sector. USIP reports that the perception of many Liberians is that crimes associated with “witchcraft” are on the rise, a contention supported by frequent stories of trial by ordeal, and “traditional detectives” or “herbalists” gathering evidence in cases of ritualistic killing.²⁰ In Monrovia as well as elsewhere in the country, incidents of mob violence ending in death are common.²¹

While it may be true that justice reform is a project of decades, not years,²² that more empirical research is needed to refine approaches, and that we cannot rush the process without jeopardizing the quality of the result, it is equally true that some visible changes must be made immediately if the Government is to increase its control, as well as public acceptance of its control, over this situation. The Ministry is further pressed to demonstrate this control while at the same time not denigrating traditional culture.

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

¹⁸ Comments by representatives from Ministries of Justice, Gender and Development, and the Law Reform Commission at the Regional Consultation for the National Conference on Enhancing Access to Justice, Monrovia, February 2010.

¹⁹ Isser et al, above n 2.

²⁰ See, for example, A A Dulleh, ‘300 ‘Witches’ Confess to Witch Doctor’, New Democrat, (Monrovia) 5 April 2010 <<http://allafrica.com/stories/201004051153.html>> at 7 January 2011; Anon, ‘“Ritualistic Killings” Pose Difficulties for Maryland’, The Analyst, (Monrovia) 6 April 2010 <<http://allafrica.com/stories/201004070937.html>> at 7 January 2011.

²¹ See, for example, B J Boima, ‘Insults Result to One Burned Alive, One Shot in the Head’ New Democrat, (Monrovia) 1 April 2010 <<http://allafrica.com/stories/201003011645.html>> at 7 January 2011; S Golafale, ‘Mob Justice – A Reality in Today’s Liberia’ Ceasefire Liberia, 23 April 2010 <<http://ceasefireliberia.com/2010/04/mob-justice-a-reality-in-todays-liberia/>> at 7 January 2010.

²² Isser, above n 12.

laws are rooted in the values and beliefs of a people and therefore the enactment of any legislation must take into account socio-cultural realities; we cannot continue to ignore the desire of our people to have customs and traditions recognized by the formal justice system, but we must do so being mindful that it is imperative to apply rules and principles that are fair and just, and show respect for human dignity.²³

2.2.3 Balancing power within the Government

Power and control inevitably play a part in any official Liberian Government position on justice reform. The hierarchy of traditional chiefs falls under the Ministry of Internal Affairs, while the training and supervision of prosecutors and police officers falls under the Ministry of Justice. Traditional chiefs, as part of the Ministry of Internal Affairs, fall under the executive branch of the Government, while the magistrate judges fall under the Judiciary. These divisions, though mundane, are significant when discussion of justice reform turns to two often proposed options. These options include: the abolition of the Hinterland Regulations²⁴, which grant original jurisdiction to traditional chiefs over petty criminal matters in the absence of a magistrate judge (strongly resisted by the Ministry of Internal Affairs, which would lose one basis of its claim to legitimacy in its exercise of judicial powers, and rejected by the Judiciary, which sees no room for flexibility in the separation of powers); or permitting traditional chiefs to detain suspects (challenged by the Ministry of Justice, which wishes to maintain a firm monopoly on exercise of police powers).

The Law Reform Commission, established in June 2009 by Executive Order,²⁵ provides one way to avoid the worst of these power struggles. The Commission mandate includes the directive to “[s]upervise the law reform process of the country and serve as the coordinating arm of the Government for various law reforms desired or being undertaken by various ministries, agencies, political sub-divisions, authorities, public corporations and other institutions of the Government.”²⁶ Its independence from the Justice Ministry gives it some freedom to make decisions that take into account a balance of power with the Ministry of Internal Affairs and the Judiciary, although the Chair of the Law Reform Commission of Liberia (LRC), Philip Banks, is a former Justice Minister. Much of the success of justice reform in Liberia may depend on the ability of the Law Reform Commission to play this mediator role wisely. As of mid-September 2010, the future of the Law Reform Commission was uncertain to some extent; the Liberian Legislature had not yet passed the Act that would have created the LRC as an institution under law, citing the high cost of operations, and the Executive Order provisionally authorizing the LRC technically expired on 10 June 2010. If the Legislature adjourns before the Act is passed (it was scheduled to adjourn for a six-month recess at the end of August), it is likely that the LRC will be reauthorized by a renewal of the Executive Order during the legislative

²³ C P Tah, (speech delivered at the opening of the National Conference on Enhancing Access to Justice, Gbarnga, Liberia, 15 April 2010).

²⁴ The Hinterland Regulations were developed in 1905 as a secondary formal legal structure governing the indigenous population of Liberia, and their existence is often the basis for the assertion that Liberia has a dual legal system. They were to be administered by the hierarchy of chiefs falling under the Ministry of Internal Affairs, and did not apply to Liberians of American descent. While the Hinterland Regulations were applied by arguably traditional leaders (the national hierarchy of chiefs is itself a construct of the formal system and not an accurate reflection of traditional leadership structures) and applied to indigenous people, they do not constitute “customary” justice as the term is typically used. Section 2.3 contains a more detailed discussion of their origins and current status.

²⁵ See Executive Order Number 20, Establishing a Law Reform Commission, Monrovia, 11 June 2009 <http://www.emansion.gov.lr/doc/EXECUTIVE_ORDER_20_ESTABLISHMENT_OF_LAW_REFORM_COMMISSION.pdf> at 5 January 2011.

²⁶ Ibid 2.

recess. But without legislative approval, however, its funding and therefore its operations are in danger of being sharply curtailed.²⁷

2.3 Public opinion: the National Conference on Enhancing Access to Justice

The three-day National Conference on “Enhancing Access to Justice: A review of Our Customary and Statutory Systems” was co-hosted by the Ministry of Justice, Ministry of Internal Affairs, and the Supreme Court in Gbarnga, Bong County, 15-17 April 2010. The Conference brought together over 100 traditional leaders, civil society representatives, and government officials from all 15 counties of Liberia, with the aim of drafting a set of recommendations to present to Liberia’s LRC and other stakeholders. The recommendations will cover how both the formal and customary systems and their interaction could be strengthened. President Ellen Johnson Sirleaf presided over the opening of the Conference, indicating to the participants that there are some elements of the traditional system that must be preserved, respected and used respectfully, decrying corruption in the formal system, citing Liberia’s international legal obligations, and asking participants to seek an answer to the question of whether the Rule of Law can be made applicable to traditional systems?²⁸

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

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

This was possible both because they felt that their complaints had been heard (and that the Conference agenda was designed around these complaints), and because the Plenary was divided into smaller subgroups for one full day of the program, each with a different, narrowly tailored question to discuss. Facilitators, armed with documentation of the complaints previously raised, worked diligently to keep the participants in each group focused on solutions rather than problems. The groups concentrated on the following questions:

1. How can both the customary and statutory justice systems better reflect Liberian values of justice? This included discussion of both how the formal system could incorporate more elements of restorative justice, and how the customary system could better protect constitutional rights.
2. How can we change the way the two justice systems interact to better address issues of customary beliefs and practices that the formal system finds problematic? This included substantial discussion of how *trial by ordeal* should be addressed.
3. How could the Government reform both the formal and the customary justice system to increase access to justice? This included discussion on who the

²⁷ Observers theorize that refusal to pass the LRC Act was not a reflection on the LRC Act itself, but rather political retaliation against presidential pressure related to the controversial Threshold Bill to redraw legislative districts; this suggests that the LRC Act will ultimately succeed.

²⁸ H E Ellen Johnson Sirleaf (Remarks to the National Conference on Enhancing Access to Justice, Gbarnga, Liberia, 15 April 2010).

Government should work with to enhance access to justice nationwide, how the formal justice system could be made more accessible in rural areas, and how the judiciary law could be changed to increase access to justice.

4. How can the statutory legal system be made fairer? This included significant discussion on how the Government can best combat corruption.

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

2.3.1 Immediate outcomes of the conference

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

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

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

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

2.3.2 The post-conference process

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

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

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

2.3.3 Moving toward implementation

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

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

3. Policy proposals

"A justice system is only as good as its capacity to respond to the demands made on it."²⁹

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

²⁹ F Coleman, Association of Female Lawyers of Liberia (AFELL) (writing on traditional justice mechanisms), 'Post-Conflict Peacebuilding in Liberia – Much Remains to Be Done', Center for International Peace Operations, (report of the Third ZID/KAIPTC Seminar, Accra, Ghana, 1–3 November 2007, 56).

because it creates the possibility of honoring both the Liberian preference for the customary justice system, and the chiefs' concerns over losing power, while not violating the statutory laws that constrain justice options. These initiatives are the following:

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

3.1 Customary dispositions of criminal cases

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

There was broad consensus at the Conference that traditional leaders should have concurrent jurisdiction over minor criminal matters and civil complaints. The definition of "minor" was never specified; it is widely accepted that chiefs do not have jurisdiction over crimes in which blood is spilled, armed robbery, or rape cases in which physical violence is used, the victim is a child, or the perpetrator is a stranger. However, theft, destruction of property, criminal negligence, "less severe rape", and other non-violent crimes are generally considered within the competence of traditional chiefs, who would essentially conduct alternative dispute resolution as though they were handling civil matters. In their reasoning, conference participants echoed the findings of the USIP and LWG studies, saying that the customary justice system is faster and cheaper, and provides a resolution – generally with guilt admitted and restitution paid – that leaves both parties satisfied.³⁰

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

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

3.1.1 The separation of powers³¹

³⁰ Ibid 55 (stating that "while the more formalized Western models often allow for only one form of justice — retributive, restorative or reparative — these traditional institutions seek to combine several of these and other elements in keeping with the values of their communities").

³¹ Liberia currently operates under the 1986 Constitution, loosely patterned on the United States Constitution. It can be and has been argued that the Constitution lacks legitimacy for a large majority of the population, as it was drafted with the goal of solidifying the power of the settler minority, often at the expense of the indigenous majority. Additionally, the Constitution — drafted as it was during a period of rule by the leader of a military

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

The commissioned study found that the relationship between the customary and statutory systems is defined by the constitutional edicts concerning separation of powers, the statutory role of traditional chiefs in implementing the Hinterland Regulations, and Supreme Court decisions defining the limits on customary dispute resolution.³² These three frameworks are not internally consistent, resulting in a status quo in which nearly any act of the customary courts that is acceptable within one framework is in violation of another.

Article 3 of the Constitution mandates the separation of powers. It grants the power to take judicial action exclusively to the judiciary, and states that “no person holding office in one of these branches shall hold office in or exercise any of the powers assigned to either of the other two branches except as otherwise provided in this Constitution.”³³

While the Constitution seems unambiguously clear on this issue, Liberian statutory law is not. The Executive Law grants power to the Ministry of Internal Affairs to manage a system of traditional courts, stating that the Minister of Internal Affairs is to “manage tribal affairs and all matters arising out of tribal relationships, draft rules, regulations and procedures for tribal government and courts including fees allowable in such courts, and, administer the system of tribal courts.”³⁴ This modern delegation of authority has its origins in the Act Creating the Interior Department (now the Ministry of Internal Affairs) in 1869, 35 years before the native Liberians were granted citizenship.

The 1869 Act apparently granted the executive power to hold judicial hearings and make judicial decisions involving native Liberians — a power that was confirmed by the legislature in 1905, following the extension of Liberian citizenship to native Liberians and the expansion of government control beyond the original boundaries of 40 miles from Monrovia, with passage of an “Act Providing for the Government of Districts within the Republic, Inhabited by Aborigines”. This Act apparently established a native court system from which decisions were appealable to a statutory Quarterly Court, an organ of the Judiciary.³⁵

The Supreme Court upheld this judicial power of the Executive in 1907, with the caveat that the Executive could not infringe on the Constitution in exercising this power.³⁶ Counselor Jallah Barbu, a commissioner for the Law Reform Commission, notes that this decision is inherently contradictory, essentially granting the Executive an exception from

coup — sought to entrench the executive power rather than genuinely seeking to balance the powers of the three branches. Nonetheless, the 1986 Constitution is the law of the land in Liberia. It protects fundamental human rights, and includes some notable constraints on the role of customary justice.

³² J Dube, ‘Summary of Supreme Court of Liberia Opinions on Customary Law Matters’ (submitted to the Ministry of Justice and presented to participants at the National Conference on Enhancing Access to Justice, April 2010).

³³ *Constitution of Liberia 1986* art 3.

³⁴ *Executive Law, Ministry of Internal Affairs: Duties of the Minister*, 3 LCLR 12, s 25.2 (1972).

³⁵ See J A Barbu, ‘An Analysis of the Formal Legal Framework Governing Customary Law in the Republic of Liberia’ (submitted to the United States Institute of Peace (USIP) as part of its project, *From Current Practices of Justice to Rule of Law: Policy Options for Liberia’s First Post-Conflict Decade*, 2009, 11) (noting that the Act is unavailable, but referenced in the 1916 case of *Jedah v Boyah*, 2LLR 265).

³⁶ *Gray v Beverly* (1907) 1 LLR 500 (The Court notes: “The Act created an Interior Department and provided for the appointment of a Secretary of Interior as its head, upon whom was conferred very broad duties and authority in relation to matters affecting the aborigines of the country”, but the actual text of the 1869 Act is currently unavailable); see also, Barbu, above n 35, 7.

the separation of powers clause of the Constitution only when the subject matter is purely “native” Liberian.³⁷

The Liberian Supreme Court has maintained this contradiction in its decisions on the jurisdiction of customary courts. In cases arising from the practice of trial by ordeal in the customary courts, the Supreme Court issued rulings curtailing their use of specific practices, without questioning their jurisdiction over the subject matter of the case, thus effectively acknowledging the existence, legitimacy and jurisdiction of customary courts.³⁸ However, at the same time, the Court has repeatedly held that customary courts have no legal grounds to hear cases over which the Judiciary has jurisdiction. Since under the Constitution the judiciary has jurisdiction over *all* legal disputes, the customary courts are left with jurisdiction only over matters that have no cause of action – for example, insult or violation of a local regulation such as a non-member of a secret society viewing society activities.³⁹

Over the years, in a few individual cases, the judiciary has attempted to carve out specific jurisdiction for chiefs, for example, by conceding that they could act in both a judiciary and an executive capacity, provided they did not act in both capacities at the same time.⁴⁰ However, for the most part, Supreme Court decisions have chipped away at the power of the customary courts. They have found that the executive branch (which includes all customary court judges) is not entitled to have the power to impose an enforceable punishment, such as a prison term or a fine.⁴¹ They have found that jurisdiction of customary courts cannot be created by the consent of the parties.⁴² Further, they have held that, despite clear local government law to the contrary, proceedings held before a customary court and reviewed by the county superintendent are void (rather than appealable to the judiciary).⁴³ In this last case, however, the Court offered a potential resolution when it determined that customary courts were to be understood as administrative tribunals, provided for under Article 65 of the Constitution.

Article 65 states that:

The Judicial Power of the Republic shall be vested in a Supreme Court and such subordinate courts as the legislature may from time to time establish. The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature. Judgments of the Supreme Court shall be final and binding and shall not be subject to appeal or review by any other branch of government. *Nothing in this Article shall prohibit administrative consideration of the justiciable matter prior to review by a court of competent jurisdiction.*⁴⁴

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

The second of these questions is addressed below, in section 2.3 on documenting customary law. The first question impacts directly on the judicial role that could be

³⁷ Barbu, above n 35, 27.

³⁸ Ibid 12 (citing *Jedah v Horace* (1916) 1 LLR 265; *Karpeh, Manning, and Odei v Verdier* (1963) 15 LLR 285.

³⁹ *Jedah v Horace* (1916) 1 LLR 265; *Karmo v Morris* (1919) V2 LLR 317; *Posum v Pardee* (1935) 4 LLR 299; *Ayad v Dennis* (1974) 23 LLR 165; *Jitco v Sesay* (1990) 36 LLR 695; *In Re Broderick* (2000) 40 LLR 263. Case summaries taken from Dube, above n 32 (unless otherwise stated).

⁴⁰ *Odel v Verdier* (1963) 15 LLR 285. This solution to the separation of powers problem does not have support from the current Justice Minister.

⁴¹ *Ayad v Dennis* (1974) 23 LLR 165.

⁴² *Nah v Judge Topor* (1998) 39 LLR 144.

⁴³ *Posum v Pardee* (1935) 4 LLR 299.

⁴⁴ *Constitution of Liberia 1986*, Art. 65 (Emphasis added).

carved out for traditional chiefs under the current statutory legal framework. The Supreme Court addressed the scope for action of traditional chiefs under Article 65, holding that hearings conducted before Executive Branch officials are subject to judicial review, and should be treated as hearings before administrative tribunals.⁴⁵ This was later supported in the Court's decision that clan and paramount chief courts can undertake administrative considerations of the facts of a case without violating Article 3, provided that parties retain access to the formal courts.⁴⁶

3.1.2 Customary dispute resolution as an administrative consideration in criminal matters

Liberia is in the process of finalizing a policy on plea negotiations for implementation in Circuit Courts.⁴⁷ While recognizing that plea negotiations are susceptible to corruption and misuse, the Justice Ministry is seeking to implement the plea negotiation legislation that has been on the books since at least 1973,⁴⁸ and to train the county attorneys (prosecutors operating in the Circuit Courts, which hear more serious criminal matters) to begin developing plea agreements. It is hoped that these agreements will combat the problem of prolonged pre-trial detention by enabling courts to process a larger volume of cases more quickly. It is also hoped that it will serve to reduce the overall prison population, by reducing the amount of time the average arrestee spends incarcerated — both pre- and post-conviction.

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

Permitting administrative review of criminal matters by traditional chiefs and using its outcome to structure plea agreements differs from ongoing projects to expand Alternative Dispute Resolution (ADR), because it considers customary resolution of disputes as a stage of the formal legal process, rather than an alternative to it. Because customary adjudication generally involves both a guilty plea and an agreement on restitution in addition to reconciliation of the parties,⁴⁹ it would function similarly to a plea negotiation, although without the requirements on evidence and standards of proof that a formal plea negotiation would entail. This process has been described by Counselor Felicia Coleman, now Chief Prosecutor for the Sexual and Gender-based Crimes Unit of the Ministry of Justice, as follows:

Social and family pressures of any and every kind are brought to bear on the disputing parties to shift ground, to accept, to compromise, and to settle the

⁴⁵ *Koryon v Korvayan* (1982) 30 LLR 246.

⁴⁶ *Insurance Company of North America v Bhatti and Sons Inc.* (1988) 35 LLR 191.

⁴⁷ Permitting plea negotiations would create prosecutorial discretion in criminal courts, such that a prosecutor could offer to charge a defendant with a less serious crime in exchange for that defendant agreeing to plead guilty to the lesser charge. This would speed up the processing of criminal matters by reducing the number of trials, and could reduce crowding in the prisons by reducing the volume of pre-trial detainees as well as decreasing average sentences. Negotiations can result in a defendant agreeing to perform community service or compensate the victim of his or her crime in lieu of imprisonment. Plea negotiations are only being considered in circuit courts because most criminal charges leading to imprisonment in Liberia are above the trial jurisdiction of a magistrate judge.

⁴⁸ *Criminal Procedure Code*, 1 LCLR §2:16.5

⁴⁹ See Coleman, above n 29, 60 (stating "Traditions and customs count compensation as a precondition for their reconciliation ceremonies. This is echoed in claims that "forgiveness comes after the payment of damages", and calls for 'reconciliation through disbursement').

dispute. The common element of these various models of traditional dispute settlement in Liberia is the emphasis on peaceful settlement, compromise, and agreement where communal interests outweigh individual rights and interest... The community acts as a monitoring and arbitrating presence providing an arena for private feeling to be vented in a public manner and acting as a safety measure and a sanctioning device to the confronting parties.⁵⁰

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

An addendum to this initiative would be the use of the same traditional chiefs to post bail for suspects who agree to customary dispositions of their cases, pending judicial review. This approach was recently piloted by the Ministry of Justice and the Liberian Judiciary, following unrest in Lofa County. Nine suspects accused of inciting violence were released on the word of traditional leadership in Lofa, who agreed to ensure that the suspects returned for their court appearances.⁵¹ This agreement was reached in order to prevent the detention of the suspects from serving as a flash point for further unrest, and if successful, it will serve as a model for future agreements using traditional leadership in the formal legal structure.

3.1.3 Challenges to overcome

Three significant concerns arise:

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

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

In the second point, transportation logistics are one of the most difficult hurdles to overcome in the disposing of criminal cases. In response to this challenge, a Sitting Program was established inside the Monrovia Central Prison to bring Magistrate Judges in once a week to dispose of detainee cases and avoid the difficulties of transporting the

⁵⁰ Ibid 59.

⁵¹ See ‘Four Dead in Religious Clashes in Liberia: Official’, AFP, 27 February 2010, <<http://www.google.com/hostednews/afp/article/ALeqM5jwcBPvPIQdkWURQ3VJqaZohaGmrg>> at 5 January 2011; ‘Justice Ja’neh Ordered Me to Release Lofa Rioters’, New Democrat, (Monrovia) 18 May 2010, <<http://allafrica.com/stories/201005180862.html>> at 5 January 2011.

detainees to the court. A similar program for traditional chiefs would not be practical, as customary dispute resolution requires the presence of the accuser and possibly other members of the community. This suggests that the appropriate time for pre-trial conference would be after arrest but prior to commitment of the suspect to a prison facility, when a magistrate judge can grant release under supervision of the traditional authority. Prosecution can then request a hearing following the negotiated settlement by the traditional chief.

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

3.2 Expanding our understanding of oath-taking

The most animated discussion at the National Conference was on the controversial subject of the practice of trial by ordeal, generally referred to in Liberia as *sassywood*. It is common, in Liberia's customary justice, for suspects or defendants to be asked — or to request — to perform an act or submit to a test to prove their innocence or establish their guilt. A great deal has been written on the practice of trial by ordeal; a catalogue of the most common types can be found in the USIP study.⁵² The following description will therefore be brief.

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

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

3.2.1 A brief history of trial by ordeal under Liberian law

In 1916, the Supreme Court of Liberia outlawed trial by ordeal that results in death, and declared that, in such cases, those who administer the ordeal can be tried for murder.⁵³ In 1940, the Supreme Court upheld this decision and declared all forms of trial by ordeal

⁵² Isser et al, above n 2, 60–61 (This study provides an excellent catalogue of rural Liberian views on different forms of trial by ordeal.)

⁵³ *Jedah v Horace* (1916) 2 LLR 63.

to be unconstitutional and in violation of Liberia's organic law. Specifically, the Court found that the practice violated Article 21(h) of the Constitution, granting the right not to be compelled to give evidence against oneself.⁵⁴ This decision was upheld in 2005.⁵⁵ Seeking to explain the judiciary position on trial by ordeal at the National Conference, Justice Minister Tah stated:

The rationale for the position of the Court stemmed from the fact that the accused in a trial by ordeal is denied many fundamental legal rights guaranteed a criminal defendant during trial, such as the right to legal representation, the right to due process of law, the right to protection against self-incrimination or coerced confession, the right to a jury trial, the right to an appeal, the right to protection against cruel and unusual punishment, and so forth.⁵⁶

Both jurisprudence and the Justice Minister's position are contradicted by the Hinterland Regulations (2001), which permit non-dangerous trial by ordeal.⁵⁷

Irrespective of the law, many forms of trial by ordeal continue to be practised throughout the country. The explanation commonly given is that there is no other equally reliable method of determining guilt or innocence, particularly in cases of witchcraft.⁵⁸ Attempts to regulate or curtail trial by ordeal can backfire; the perception of many Liberians is that, as a result of the ban on trial by ordeal, witchcraft is on the rise.⁵⁹ Public frustration with the ban is high, and reliance on "traditional detectives" using supernatural methods of evidence collection is strong.⁶⁰ It is not difficult to understand the root of this frustration — imagine the reaction in the United States or France if a rule were imposed banning the use of DNA evidence or fingerprints, simply because the legal establishment did not believe in such methods of evidence collection.

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

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

⁵⁴ *Tenteah v Republic of Liberia* (1940) 7 LLR 63.

⁵⁵ Tah, above n 23.

⁵⁶ Ibid.

⁵⁷ *Hinterland Regulations Revised 2001* art 73 (stating "Ordeals, however, of a minor nature and which do not endanger the life of the individual, shall be allowed and is hereby authorized." This Article then provides for the Certification of Ordeal Doctors by the Ministry of Internal Affairs, and to lay out the procedures for re-trial if requested by a party deemed guilty by the initial ordeal).

⁵⁸ Comments by participants in Regional Consultative Meetings in Bomi and Bong Counties, February and March 2010; see also Coleman, above n 29, 60.

⁵⁹ See Isser et al, above n 2, 60–65.

⁶⁰ See, for example, 'Free Legal Services for Yancy, Morias, Others', *The Daily Observer* (Monrovia), 2 April 2010, <<http://www.liberianobserver.com/node/5555>> at 5 January 2011 (citing the Minister of Justice explaining that "in Liberia's criminal justice system, evidence produced by a 'witch doctor' could not be accepted for prosecution of any suspects in criminal matters such as murder").

3.2.2 Constitutional concerns

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

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

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

3.3 Documenting customary law

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

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

3.3.1 Documentation vs. codification

The proposed policy initiative to *document* customary law should not be confused with a push to *codify* it. There are strong arguments against codification of customary law: that one strength of a customary system is its flexibility — its ability to shift based on the circumstances of a case; that customary law is living, changing as the circumstances

change; and that codification would stagnate it in time. Pragmatically, it is argued that customary law as described will vary sharply from customary law as practiced, and that because of the effort required to reliably capture it, any codification project is doomed to misrepresentation.⁶¹

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

In addition to this dual legal system, Liberia has a plural justice system. For example, a traditional zoe — a leader in the female sodality of the Sande — might be called on to settle a dispute relating to violation of rules of the Sande. This matter would be purely customary — the rules governing this society are part of neither the Hinterland Regulations, nor the Liberia Code of Laws. However, when a Paramount Chief in Nimba County is called upon to settle a land dispute between two citizens of his district, this might be called a “customary” matter, though it falls under the statutory jurisdiction of the Hinterland Regulations and is being decided by a government employee of the Ministry of Internal Affairs (the Paramount Chief), who has a statutory mandate to adjudicate customary law matters arising in his district in a tribal court.⁶²

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

3.3.2 Statutory law for the traditional people: the Hinterland Regulations

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

The original Law of the Hinterlands was enacted in 1905 and was amended in 1914 and 1949. The content of the 2001 version issued by the Ministry of Internal Affairs is apparently mostly unchanged (with some few alterations) from the 1949 version, despite the fact that most of the law had been apparently repealed in 1956 by the passing of section 600 of the Aborigines Law. The Aborigines Law was repealed in turn through its exclusion from the 1973 revision of the Liberian Code of Laws. In addition, the Law of the Hinterlands has since been republished, but it remains uncertain whether it is ‘law’.⁶³

⁶¹ The term “ascertainment” is often used to describe the attempt to uncover the customary laws or norms applying to a particular case. The term is problematic because of its colonial usage (see A N Allott, ‘The Judicial Ascertainment of Customary Law in British Africa’ (1957) 20(3) *The Modern Law Review*, 244) - since it does not precisely apply to the proposal here, it will not be used.

⁶² See also Barbu, above n 35, 4 (writing on the legal context of customary and formal justice in Liberia, explaining that discussion of the Hinterland Regulations is “not a study of the traditional indigenous African Justice systems, but rather a study of the customary legal system created by regulations and statutes”).

⁶³ A Corriveau-Bourque, ‘Confusions and Palava: The Logic of Land Encroachment in Lofa County, Liberia’, *NRC Reports 2010* (internal citations omitted) <http://www.nrc.no/arch/img.aspx?file_id=9481898> at 5 January 2011 (internal citations omitted); see also P Banks, ‘The Role of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies’, (a project of the United States Institute of Peace [USIP] and the Fletcher School of Law & Diplomacy, Tufts University, 2007) 26.

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

There are good examples of the integration of informal into formal justice systems in many parts of Liberia, where the courts of traditional chiefs are integrated into the authority and power structure of government. For example, a traditional court like the Paramount or Clan Chief's Court exercises considerable statutory jurisdiction over criminal matters, extending to powers of imprisonment not to exceed three months.⁶⁴

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

The continued validity of the Hinterland Regulations is problematic because this second legal system places judicial power in the hands of the executive branch – in which the final appeal is to the president, not the court – in violation of the separation of powers clause in Article 3 of the Constitution, discussed above. It is also problematic because the Regulations themselves define native inhabitants as second-class citizens, in violation of Article 11(c) of the Constitution, which provides for equal protection under the law for all citizens of Liberia.⁶⁵ This persistence frustrates the formal justice sector, as evidenced by the Justice Minister's comment at the National Conference that, despite "several Supreme Court decisions and the enactment of many acts of legislature rendering most of the provisions of the Hinterland Regulations illegal or obsolete, they continue to exist."⁶⁶

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

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

3.3.3 Analyzing customary law

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

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

⁶⁴ Coleman, above n 29, 58.

⁶⁵ Constitution of Liberia 1986, art 11(c).

⁶⁶ Tah, above n 23.

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

Dependent on the outcome of the documentation exercise, a future policy recommendation might be to amend statutory law to incorporate certain customary guidelines on sentencing, measuring the severity of a crime, or granting leniency. An alternative recommendation might be to certify experts on customary law in different ethnic groups and geographical regions, who could be called upon to provide interpretation and expertise in formal cases where customary law is material. In the absence of any concrete documentation on the content of customary law, it is impossible to know whether such proposals would be appropriate and in line with Liberia's legal constraints and the government's policy priorities.⁶⁷ Nevertheless, this uncertainty should not prevent researchers, Liberian legal scholars, and customary justice actors from taking the first step.

4. Maintaining momentum: next steps for justice reform

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

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

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

The first balancing act concerns justice outcomes. It revolves around the question of how to respond to the desire of most Liberians to have their disputes — including petty

⁶⁷ *Executive Law, Ministry of Internal Affairs: Duties of the Minister*, 3 LCLR Title 12, s 25.2(n) (1972). (This activity is part of the formal responsibility of the Minister of Internal Affairs, who is charged with "overseeing the collection and publication of the laws and customs of the Liberian tribes".)

criminal matters — handled by traditional leaders who dispense justice that more closely reflects their values. This desire must be balanced against the conviction of Liberian legal professionals and government leaders that “rule of law” in Liberia demands fidelity to the Constitutional principle of the separation of powers. The first proposal gives an example of this.

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

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

As Liberia’s post-war peace proves increasingly stable, international support for rule of law and access to justice initiatives is growing, with the United Nations, bilateral donors, and numerous NGOs launching campaigns in the sector. At this crucial juncture, the follow-up to the National Conference on Enhancing Access to Justice provides a perfect platform for the Liberian Government to assert and maintain control of the justice reform agenda in the country. By applying the above rationale — if not taking up the discussed policy proposals themselves — the Government will be able to direct the course of national justice reform so that it may stand a good chance of responding to the fundamental concerns of the Liberian people, respecting the basic tenets of the Liberian Constitution and generating the information necessary to make well-informed policy decisions in the future.