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Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor

Ewa Wojkowska &
Johanna Cunningham

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

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This project involves the preparation of a series of qualitative and quantitative empirical articles culminating in an edited volume on approaches to integrating justice and development in ways that benefit the poor and other disadvantaged populations.

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JUSTICE REFORM'S NEW FRONTIER: ENGAGING WITH CUSTOMARY SYSTEMS TO LEGALLY EMPOWER THE POOR

Ewa Wojkowska and Johanna Cunningham[1]

Executive Summary

As the links between poverty and exclusion from justice become increasingly clear, so does the need to redirect justice reform programmes to better serve the 'bottom four billion' - the people identified by the Commission on Legal Empowerment of the Poor as being excluded from the protection and opportunities of the rule of law. Development agencies are showing modest interest in legal empowerment initiatives and some are beginning to look at using a rights-based approach to justice reform that focuses on experiences of the users – ordinary and often impoverished individuals. Such an approach prioritizes increasing access and awareness, enabling choice and voice, and delivering effective and non-discriminatory remedies for grievances for the users of the law and legal mechanisms. This paper argues that any such attempt to do so should also engage with customary justice systems, recognizing that they are currently the prominent space in which poor and disadvantaged groups seek and receive remedy for their grievances.

This paper adopts the position that access to justice is the foundation of legal empowerment. It then follows, that activities which seek to legally empower the poor to better enable them to access better justice should also be located in the forums they most often use. The effective, efficient and just functioning of customary justice systems has the potential to greatly contribute to the legal empowerment of poor communities; engagement with customary justice systems must therefore focus on promoting their positive aspects while simultaneously addressing their shortcomings.

The paper will discuss the salient characteristics of these systems as enablers of, or barriers to, legal empowerment of the poor. Through a case study on adat systems in Aceh, Indonesia, it will contextualize the opportunities and challenges of working with customary justice. Finally, several considerations, recommendations and lessons learned will be outlined to mark the way forward towards understanding and engaging with these systems to enhance legal empowerment of the poor and disadvantaged.

[1] Ewa Wojkowska is an access to justice practitioner currently working with the UNDP Bureau for Development Policy in New York who has worked on access to justice initiatives in Timor Leste, Indonesia, Sierra Leone, Thailand and Lao PDR. She has extensive experience in assessment, design and implementation of projects to improve access to justice for poor and disadvantaged people through formal and customary justice mechanisms. Ewa has worked for several non-governmental organizations (NGOs), a United Nations peacekeeping mission, UNDP, the Office of the High Commissioner for Human Rights (OHCHR), Amnesty International and the World Bank.
Johanna Cunningham is a legal empowerment consultant with UNDP, based in Bangkok. She holds a Masters degree in International Law from the University of Melbourne and has worked in Indonesia, Viet Nam and the United States on legal empowerment of the poor and capacity development for basic service delivery.

Introduction

The links between poverty and justice are becoming increasingly clear. The high-profile global study by the Commission on Legal Empowerment of the Poor recently gained support of world leaders, economists, chief justices and development agencies under the premise that four billion people are unlikely to escape poverty because they are excluded from opportunities and protections stemming from the rule of law.[2] In a powerful cycle, groups that experience discrimination and exclusion from the protection of the rule of law are also more likely to fall victim to a range of other social, economic, political and criminal injustices. Even relatively minor disputes and conflicts can go (and grow) unresolved, negatively affecting livelihoods, and economic and social development.

To date, however, justice reform has been largely unsuccessful in including and empowering the global majority to access the protection and opportunities of the rule of law. Programmes have remained almost solidly focused on state-centered initiatives, with billions of dollars spent on attempts to stimulate the efficient and effective functioning of state courts. The presumption is that modernized systems of case management, newer buildings and facilities, and business-friendly laws will have a trickle-down effect that will inevitably facilitate better governance, more effective rule of law, better access to justice and economic development. These factors in turn contribute to poverty alleviation and increased opportunities. However, this "inevitable" causality has recently been challenged, and a distinct lack of evidence has been highlighted on the positive effects that this top-down rule of law orthodoxy actually has on poverty alleviation and majority access to justice.[3]

One pertinent, yet often overlooked reason for the limited impact of rule of law orthodoxy on poverty reduction for the bottom four billion is that most poor people do not experience justice in expensive courthouses under the ruling of a well-trained judge. In many countries, the overwhelming majority use – and often prefer – informal or customary mechanisms.

Development agencies are beginning to show a modest interest in including bottom-up approaches and some are beginning to look at using a rights-based approach to justice reform that focuses on empowering and improving the experiences of the users – ordinary and often impoverished individuals.

This paper takes the position that access to justice is the foundation of legal empowerment and recognizes that customary institutions are the major source of remedy of grievances for poor communities. It then follows, that activities that seek to legally empower the poor to better enable them to access 'better' justice should also be located in the forums they themselves use.

Customary justice systems are double-edged swords for justice reformers and the people they serve. While they avoid many of the burdens of the formal systems and are therefore sources of accessible, efficient and locally legitimate dispute resolution, they are also flawed by a lack of many benefits of formality. It is "a complex mix of variables that constrain these [customary justice] systems",[4] and

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[2] Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Vol. 1* (2008) 1.
[3] S Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* Carnegie Endowment for International Peace, Working Paper 41 (2003).
[4] C A Odinkalu, 'Poor Justice or Justice for the Poor' in C Sage and M Woolcock (eds) *The World Bank Legal Review Vol 2: Law, Equity, and Development* (2006) 142-143.

one which often combines to maintain power imbalances and perpetuate discrimination and disempowerment of the disadvantaged.

Yet, the effective, efficient and just functioning of customary justice systems has the potential to greatly contribute to the legal empowerment of poor communities. This paper therefore argues that engagement with customary justice systems must focus on promoting their positive aspects while simultaneously addressing their shortcomings.

1. Defining legal empowerment and customary justice systems

1.1 What is legal empowerment?

There has been little clarity and agreement on exact definitions of legal empowerment. Focusing too much on the search for the perfect definition of this complex process and ambitious goal risks miring the discussion in English language semantics and technicalities. Despite challenges with finite definitions, legal empowerment practitioners agree that justice reform must focus more on the 'users' of law and legal mechanisms.

For the purposes of this paper and in the context of customary justice, legal empowerment of the individual and the community is fundamentally about access and power. Legally empowered community members have the confidence and capacity to intellectually, financially and physically *access* the law and legal services. They choose the system with which they feel most comfortable to take their grievances. They receive just remedies in line with national laws and not in contravention of international *human rights standards*. Community members know of other opportunities for *recourse* beyond customary law systems, should the 'remedy' they receive violate these laws or their dignity. Legally empowered citizens feel sufficiently secure and capable of expressing their *voice*, using their freedom of association and their rights to *challenge power imbalances and improve their social and economic development.*

1.2 What are customary justice systems?

There has been much debate on the correct terminology and categorization of customary justice systems, sometimes also labeled as informal, traditional, or non-state justice systems. This issue shall be addressed briefly here since it encapsulates some of the challenges practitioners face when engaging with such varied and complex institutions.

The International Council on Human Rights Policy chooses the term "non-state legal orders" to indicate that "these are norms and institutions that tend to draw moral authority more from contemporary or traditional cultural, or customary or religious beliefs, ideas and practices, and less from the political authority of the state. They are 'law' to the extent that people who are subject to them, voluntarily or otherwise, consider them to be the authority of the law".[5] In this manner, customary justice systems, regardless of structure or origin, hold an authoritative status through popular consent or deference.

Customary justice system proceedings may involve mediation or arbitration by a person or people with standing in the community – a village head, elder, religious leader or other community figure. This division between mediation and

[5] International Council on Human Rights Policy, *Plural Legal Orders and Human Rights,* draft report (2009), 34.

arbitration, however, is not always clear-cut in practice, as resolution may often be a blend of the two and can vary tremendously according to the society, community, and sometimes even the specific dispute at hand.

It must be noted that customary justice systems are dynamic and evolve as the community undergoes changes in wealth, population size, urban development and access to natural resources, among others. The state may adopt elements of customary justice, create hybrid structures, or co-opt the institutions to take advantage of their grassroots legitimacy.[6] This level of state engagement may evolve over time.

Some are reluctant to include state-sponsored or NGO-sponsored alternative dispute resolution (ADR) systems under the rubric of customary justice systems, because they are not organic - that is, outside actors play a role, as opposed to popular courts or community justice systems that have been essentially developed and controlled by the people who participate in them.[7] From an anthropological perspective, these distinctions may be relevant; however, for practitioners, the goal is to work within the framework of what is already used and found acceptable by the majority.

Similarly, some have sought to exclude religious courts from the customary justice framework. In many jurisdictions, however, the line between customary and religious law is "normatively unclear"[8] and any such effort to exclude systems of a religious nature would be overly complicated and unnecessary in the face of the goal of ensuring accessible, acceptable justice for all.

While the authors respect the above arguments, this paper is geared toward practical considerations of directing reform to target the forums through which the poor access justice. We accordingly include in our consideration of customary justice systems, state-sponsored and NGO-sponsored ADR and religion-based courts or legal orders.

2. The relationship between customary justice systems and legal empowerment

2.1 Why do the poor use customary justice systems?

Studies have shown that in some states up to 80 percent of the population use localized, informal or customary legal systems.[9] Understanding why the poor use these systems is integral to any programme design. Overall, there are both push and pull factors; attractive elements of customary systems that draw the poor towards resolving their disputes without the authority of the state, and negative elements of the formal justice system that push poor and vulnerable people out of the formal sphere.

2.1.1 Push factors

Factors that push people away from using formal systems stem largely from weakness, dysfunctionality, or both, within the system. This is particularly

[6] J Faundez, 'Should Justice Reform Projects Take Non-Justice Systems Seriously – Perspectives from Latin America' in C Sage and M Woolcock (eds) *The World Bank Legal Review Volume 2: Law, Equity, and Development* (2006) 118.
[7] D Nina and P Schwikkard, "The 'Soft Vengeance' of the People: Popular Justice, Community Justice and Legal Pluralism in South Africa" (1996) 36 *Journal of Legal Pluralism and Unofficial Law*, 74.
[8] Odinkalu, above n 4, 144.
[9] Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice* (2002), 58.

pertinent in post-conflict societies where formal justice systems have eroded over time or become de-legitimized following lengthy periods of grave human rights abuses. There is some debate as to whether the credibility and authority of customary justice systems are a consequence of weak and oppressive formal justice systems or because they simply reflect the accepted norms of the community. As the Norwegian Refugee Council points out, "[l]ikely, it is a combination of both factors, but while there is no alternative form of justice for the majority of people, the debate is largely irrelevant."[10]

Lack of judicial independence or capacity are significant push factors. Excessive delays due to overloaded and poorly operated case management systems deter people who, faced with living and working together in close circumstances, prefer to resolve disputes as quickly as possible to douse an escalation of conflict. Similarly, high levels of corruption, perceived or otherwise, discourage the poor and powerless from attempting to seek justice within the formal system. A study conducted in East Timor indicated that more than 9 out of 10 respondents claimed that they were comfortable with solving a problem through customary systems; it further found that 50 percent of the respondents thought the formal system favoured the rich and powerful, whereas only 15 percent thought similarly of informal systems.[11] The judicial process is often seen "as an accessory (if not instrument) of exclusion, domination, and exploitation of the underprivileged".[12] At times, the formal justice system is used to provide justification for forced evictions, such as those recently carried out in Cambodia,[13] further implicating it as a tool of oppressive power imbalances.

Formal courts are often physically inaccessible to poorer communities even if they would prefer to seek remedy there. Located in larger cities and urban areas, citizens of rural communities may be unable to afford the time and expense to travel to and from court. Fees for lawyers, applications and paperwork can be prohibitively high. The language of the court may be unfamiliar to those who speak only in local dialects. Even with an understanding of the national language, excessive 'legalese' in court proceedings can confuse and intimidate parties.[14] Similarly, a general lack of awareness of the formal system as an alternative to customary systems may prevent the poor and disadvantaged from knowing where and how to direct their grievances.

Even if the formal justice system is physically accessible and people are aware of its existence, there may be other barriers to access. In the Lao People's Democratic Republic context, for example, a government case-free village policy may have a significant detrimental impact on access to alternatives to customary justice.[15] A case-free village is defined by having no cases reported to the formal justice system during a one-year period. While the policy does not explicitly discourage access and appeals to the courts, it provides incentives for village heads to ensure that no cases proceed beyond the village level, including those

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[10] S Callaghan, *The Relationship between Formal and Informal Justice Systems in Afghanistan*, Norwegian Refugee Council position paper (2007), 4.
[11] The Asia Foundation, *Law and Justice in East Timor: a survey of citizen awareness and attitudes regarding law and justice in East Timor* (2004).
[12] A Dias, 'Shared Challenges in Securing Access to Justice – the Indian and Sri Lankan Experiences' in The Asia Pacific Judicial Reform Forum (L Armytage and L Metzner (eds)) *Searching for Success in Judicial Reform,* 167.
[13] Amnesty International, "Cambodia: the People of Group 78" (2009) <http://www.amnesty.org/en/library/info/ASA23/012/2008/en> at 28 July 2009.
[14] The Asia Foundation's 2008 survey in Afghanistan found a direct correlation between the level of education and the individual's propensity to use the formal system. Poorer, less educated citizens were less inclined to seek justice in formal systems. The Asia Foundation,*Afghanistan in 2008: A Survey of the Afghan People* (2009).
[15] Minister of Justice Directive No. 01/MoJ 19 March 2007.

beyond the competence of the Village Mediation Unit (VMU).[16] This can have a severe impact on individuals' ability to obtain a just resolution for their grievances. They are either forced to use the customary mechanism or the VMU, and are pressured to accept the decision of these mechanisms with no alternative means of redress.

Women in one of the northern provinces of Lao PDR, for example, recently spoke to an author of this paper about high levels of drug-related crime and theft in their village.[17] They reported that they and other villagers know who the perpetrators are and have reported these crimes on numerous occasions to the village chief and the village-level security officer. The village chief spoke to the alleged thieves, who had subsequently denied any wrongdoing. And this is where the case ends. The village chief is not willing to take the case any further and the women have no other alternatives for seeking justice,[18] since, by law, the VMU is the first port of call, especially for these types of cases. Court and prosecutorial staff in the province report that, since the introduction of the case-free village policy, the number of cases filed had been reduced by around 25 percent.[19]

2.1.2 Pull factors

Many positive attributes of customary systems attract, or 'pull' populations towards using them. When examining the salient characteristics of customary justice,[20] many of these pull factors are immediately obvious, as are some of the characteristics that are particularly relevant to the goals of legal empowerment for the poor.

Customary justice systems are generally much more accessible and acceptable to the people they serve than are formal state systems. Actors within a customary justice system most often have their roots in the community. They will generally speak the local language or dialect, be more familiar with local customs, and consequently resolve disputes in a manner that is culturally acceptable to the disputing parties. Customary systems fill the service gaps in weak, dysfunctional or overburdened formal systems. Indeed, they are often the only avenue in the aftermath of conflict or natural disaster. With the significant exception of circumstances in which power imbalances are at play, the economic, geographic and intellectual accessibility of customary systems can empower the poor to seek and obtain just remedy for grievances in a familiar, unintimidating and culturally acceptable manner.

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[16] In Lao People's Democratic Republic, there are three broad categories of justice mechanisms – formal, semi-formal and customary. The formal system is informed by positive law and includes the courts, the prosecution service and the police. The semi-formal system includes the Village Mediation Units (VMUs), which are established by the state pursuant to a Decision of the Minister of Justice No. 304/MOJ, 7 August 1997, which provides guidelines on the operation of the units and a legal framework for resolving disputes at the village level. VMUs have been set up in most villages across the country. In theory, minor civil and criminal disputes first go before a VMU, while more serious cases should proceed directly to the court. Anecdotal evidence indicates, however, that, in practice, other, more serious cases are also heard by the VMUs. If a case is not settled through the VMU, mediation should then again be attempted by the District Justice Office, which would then refer disputes that are not successfully mediated to the appropriate court.

[17] Interviews conducted by Ewa Wojkowska, June 2009. Names of interviewees are withheld to maintain confidentiality.

[18] Ibid.

[19] Ibid.

[20] Salient characteristics that inform this section are taken from E Wojkowska, *Doing Justice: How Informal Systems Can Contribute* (2006); Penal Reform International, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems* (2001); B Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38(2) *Connecticut Law Review,* 239.

The process of obtaining remedy is usually voluntary, with a high degree of public participation. Customary justice systems are often perceived as fairer than formal systems. The few empirical studies conducted around the world show overwhelmingly that people's preferences hinge on their perceptions of which *procedures* are most fair.[21] Typically, fairness is viewed not in terms of outcome, but the procedural manner and degree to which the disputants can voice their own story. The emphasis on voice and expressing one's own story in one's own words in some customary justice systems can enhance empowerment, as the parties to the dispute feel confident and capable of presenting their story. Yet, opportunity to express one's voice is by no means a guarantee of equality and empowerment, particularly as certain voices may be more powerful than others.

Dispute resolution within customary justice systems is generally geared toward resolving disputes and/or addressing what one or both of the contending parties see as an injustice. This restorative characteristic is of great value to those who must get on with the daily business of living and working together in close communities. In some cases, however, it may in fact prevent a disputant from obtaining real justice, since the focus on social harmony is valued more greatly than an individual's rights or freedoms.

In the economic sphere, customary justice systems are often better placed to mediate disputes in the informal sector than the formal justice system. The informal sector is defined as "economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements governing both enterprise and employment relationships",[22] and is mostly occupied by the poor and disadvantaged. This gap between the law's protection and the "informal" assets and activities of the poor is a major barrier to poverty reduction. Customary justice systems and the actors within them often operate in the informal sector themselves, and are well placed to understand and protect the rights of informal businesses, informal laborers and property "owners" who lack formal title. While formalized title and contracts are preferable and can provide a higher level of security, these actors' localized knowledge of what the community considers a working agreement when a contract is lacking can support informal laborers, or indeed, informal business owners who enter into agreement with another party. They often make decisions on untitled property, having known the history of the disputing parties as it relates to the land.

2.2 Challenges to legal empowerment

Despite the variety of considerations that make customary systems preferable to the poor, some of the salient characteristics of these systems are clear barriers to legal empowerment.

1. Customary justice leaders are generally selected from within the community on the basis of status or lineage. While this indicates a level of authority and command necessary to mediate or decide on disputes concerning parties in voluntary attendance, it also suggests that this role is subject to elite capture by those who may have a vested interest in maintaining and institutionalizing discriminatory practices. In this regard informal justice systems, usually commanded by older men, may reinforce unequal power imbalances: women, children, minority groups

[21] D Shestowsky and J M Brett, *Disputants' Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study*, UC Davis Legal Studies Research Paper No. 130 (2008); L Klaming and I Giesen, *Access to Justice: the Quality of the Procedure*, TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 002 (2008).
[22] Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Vol. 2* (2008) 130.

and the disabled are often highly discriminated against in customary proceedings.

2. The potential lack of knowledge and varying degrees of capacity among customary justice leaders, combined with the authority they continue to hold, may mean there are missed opportunities for the poor to gain from the formal system. For example, a 2007 survey of the *Nari Adalat* women's dispute resolution systems in India notes that the inability of the system to comprehend and interpret revenue and legal documents means that the advice provided is often vulnerable to legal disputes.[23]

3. As rules of evidence and procedure are non-existent, and as similar cases may not be treated similarly, the customary justice operator(s) usually take into account the nature of the relationship between the disputing parties. The standing and position of the disputing parties or their families,[24] as well as outside interests are taken into account. A poorer member of the community may perform community service for a misdemeanor, while a wealthier member pays a fine. In practice, however, subjective decision-making can carry with it the prejudices of the community or the decision-maker himself, whereas for the same crime, a less popular community member may receive a harsher punishment.

4. On occasion, outcomes may be in contravention of human rights standards and may include corporal punishments or excessive retribution, which are considered cruel and inhumane forms of punishment.

5. The notion of "maintaining social harmony" can mask violations of many individual rights. Often, the problem is viewed as affecting the balance of the community or group as a whole. Adherence to the decision reached via a customary justice process then becomes subject to social pressure, even if the decision is unjust. Indeed, the Access to Justice Assessment by the United Nations Development Programme (UNDP) in Indonesia revealed that often the abrogation of a party's rights by a customary justice decision was "obscured behind the veil of an oft-stated desire to maintain harmonious community relations".[25]

6. Typically, there is no professional legal representation in customary justice systems, which has the benefit of reducing costs for the disputing parties. However, equally important rights of due process – the right to adequate representation, and critically the presumption of innocence until guilt is proven –are frequently traded in return. Customary justice systems, therefore, are ill-suited for dealing with serious cases that may require the imprisonment of the defendant, or in cases where mediation is extremely inappropriate under national and international law (although perhaps acceptable to some community residents), such as rape or murder. Arbitrary systems and rulings are unlikely to provide effective protection for victims. Additionally, they may issue severe punishments without the due process of the law.

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[23] S Iyengar, 'The Interface between formal and informal systems of justice: a study of *Nari Adalats* and caste *Panchayats* in Gujarat state, India' in UNDP, *Towards Inclusive Governance: Prompting the Participation of Disadvataged Groups in Asia-Pacific* (2007) 103.
[24] Penal Reform International, above n 20, 128.
[25] UNDP and BAPPENAS, *Justice for All? An Assessment of Access to Justice in Five Provinces of Indonesia* (2006) 72.

7. Cases relating to disputes or grievances with government agencies or service providers may be well beyond the capacity of a customary justice system to deal with effectively and fairly.

These barriers to legal empowerment are significant and they do pose serious risks of disabling even the most focused, well-funded efforts to enable the poor to improve their economic and social development. The barriers are largely linked to power relations at the local level and a resistance to change by those who benefit from the discriminatory or unequal status quo. The legal empowerment agenda, with its focus on challenging power imbalances, is well placed to inform engagement in these areas as will be discussed further in the 'way forward' below.

3. Aceh, Indonesia

This section discusses many of the aforementioned challenges to legal empowerment in the context of post-conflict and post-tsunami Aceh, a province in western Indonesia.

Even before a tsunami devastated Aceh in December 2004, the formal justice system in the province had virtually collapsed. This was partially due to the 30-year conflict that had afflicted the province and partially as a consequence of broad-scale institutional failure.[26] The human and physical losses resulting from the tsunami (and the offshore earthquake that triggered it) dealt a massive blow to the already weak system. The customary, village-level justice institutions known as *adat,* responsible for the resolution of the bulk of disputes in the province, did not escape the effects of the natural disaster in which many *adat* leaders lost their lives.

While the justice system was mostly decimated, demand for justice services in the wake of the tsunami was at an all time high. Approximately 130,000 people were killed, over 90,000 went missing and 500,000 were left homeless or were displaced. In addition, 300,000 land parcels were damaged,[27] creating thousands of potential disputes over land and inheritance.

3.1 The justice systems in Aceh

The legal framework in Aceh is pluralistic, with three simultaneously functioning and sometimes overlapping justice systems that include formal and customary mechanisms. Within the formal realm there are the general and the *Syariah* (*Sharia*) systems; the former is informed by positive state law, which has incorporated provisions of international human rights law, while the latter is informed by Islamic legal principles.

The formal justice system is complemented by customary mechanisms called *adat.*[28] *Adat* is the largely uncodified, culturally and ethnically specific form of

[26] An assessment conducted in 2003 by UNDP concluded: while many factors contribute to the demise of institutional integrity and functioning of the justice system - factors which are present throughout Indonesia – corruption, lack of accountability, transparency, independence and legal expertise among legal personnel, poor regulations governing recruitment and training of judges and weak supporting infrastructure – in Aceh, we find an acute expression of all of these factors. E Wojkowska, G Janssen and E Piza-Lopez, *A review of the justice system in Aceh, Indonesia,* (2003), 6.
[27] BAPPENAS, *Master Plan for Rehabilitation and Reconstruction for the Regions and People of the Province of NAD and Nias Islands of the Province of North Sumatra – Main Book of Rehabilitation and Reconstruction* (2005) 1.
[28] The word *adat* is of Arabic origin and means custom. Customary law is the oldest form of law: "rules of law that came into being because a particular community continuously and consciously observed

traditional law or custom that governs a community's rules of behaviour and is enforced by sanctions. It varies over time and place.[29] Many distinct *adat* systems co-exist in Indonesia and thus the content of *adat* can vary significantly across locations. Tim Lindsey observes that in Indonesia "within a few hundred miles the dominant *adat* may alter for example, from Islam to Hinduism, from matrilineal to patrilineal inheritance or from communal to individual land title."[30] In Aceh, however, *adat* is heavily influenced by Islam.

Acehnese typically belong to the three different 'legal communities' affected by these overlapping systems and are accordingly subject to the authority of three different areas of formal and customary law. First, they are a member of a village (*gampong*), meaning that they are subject to the *adat* of that village, as well as the association of villages (*mukim)* that corresponds to a higher level of *adat* authority. Second, most Acehnese are Muslim and in Aceh, *Syariah* has authority over Muslim citizens. Third, all Acehnese are Indonesian citizens and therefore enjoy the protections of, and are subject to, Indonesian state law.[31] This means, at least in theory, that for most disputes, Acehnese can access three different justice mechanisms.

Despite the existence of the three justice systems, *adat* is the mechanism upon which the majority of Acehnese rely for the resolution of their grievances.[32]

3.2 Source of authority

In addition to the powerful influence it exercises through traditional culture, across the Indonesian archipelago *adat* derives its principal formal authority from the transitional provisions annexed to the Indonesian Constitution (1945).[33] In Aceh, in recognition of Acehnese culture and its special status, specific local legislation has been passed that formally recognizes the role of *adat* to settle disputes between community members.[34] Although *adat* has formal authority in Indonesia under these legal provisions, it is nevertheless considered a customary justice system.

The legal provisions in the above-mentioned local legislation include setting out the duties, responsibilities and authority of the *keucik* (village head) and other *adat* leaders to resolve disputes between villagers. Recent legislation also lists the types of cases that can be handled by *adat.*[35] In addition, the *Majelis Adat Aceh*

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the same rules for the same sort of relationships or conduct of the people, without they ever having been laid down by a legislator" R Haveman, *The Legality of Adat Criminal Law in Modern Indonesia* (2002) 5.

[29] Ibid 31.

[30] As cited in E Harper, *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh* (2005) 14.

[31] S Lakhani, *Access to Justice Policy Paper Series* (forthcoming) (2009); A Brouwer and N Husin, *Options Paper on Adat* (unpublished paper) (2008).

[32] UNDP, BAPPENAS, BRR, UNSYIAH, IDLO, World Bank, *Access to Justice in Aceh* (2007); Wojkowska et al*,* above n 26; E Harper, *Promoting Legal Empowerment in the Aftermath of Disaster: An Evaluation of Post-Tsunami Legal Assistance Initiatives in Indonesia,* IDLO Legal Empowerment Working Paper No. 3 (2009).

[33] This states that all valid institutions and regulations at the date of independence would continue, pending the enactment of new legislation and institutions, and provided they are in conformity with the Constitution. The Constitutional recognition of *adat* arose due to the legal pluralism inherited from the Dutch. During the colonial period, *adat* was the default law for the indigenous population; post-independence, the transitional provisions in the Constitution ensured that it remained a valid source of law. Further, *adat* is now given additional, but still limited, recognition in the Indonesian Constitution (as amended) through articles 18B(2) and 28I(3). Wojkowska et al, above n 26, 18.

[34] This legislation includes Perda 7/2000 on the Establishment of Adat Life; Quanun 4/2003 on the Mukim Governance Structures; Quanun 5/2003 on the Gampong Governance Structure; Undang-Undang No.11/2006; Qanun 9/2008 on Nurturing Adat Life; Qanun 10/2008 concerning Adat Institutions.

[35] Qanun 9/2008.

(Aceh *Adat* Council) has been established, which is a provincial coordinating body mandated to strengthen and develop *adat* values and structures in the community.[36]

Despite the legislation, the legal framework in Aceh is still far from clear. In particular, the relevant legislation on the intersection of *adat* with the formal secular and *Syariah* justice systems is vague. For example, one provision requires that cases be dealt with first by *adat* justice providers before they are permitted to be addressed by the formal justice system.[37] This provision is inconsistent with the citizens' right to opt for the formal justice system under Indonesian Constitutional Law, as well as the national Human Rights Law.[38]

3.3 How does Acehnese *adat* work in practice?

Although *adat* processes vary between and even within districts in the province, the basic approach to dispute resolution tends to be consistent throughout Aceh. Generally, at the village level, if a dispute occurs, it is reported to the *keucik* (village chief), who will encourage the parties to discuss and reach compromise on the matter through a *musyawarah* (consultation process). If this is not possible, the *keucik* and other village leaders responsible for *adat*[39] at the local level will then attempt to mediate and assist parties to reach agreement.[40] Such meetings at the village level could take place on several occasions. If the dispute is settled, a letter of agreement may sometimes be signed by the disputing parties and kept by the *keucik.* If agreement cannot be reached, the problem is then submitted to the *imeum mukim* (village religious leader) to attempt resolution at a higher level.[41] A survey of *adat* leaders showed that most cases are resolved within one to seven days of its being reported. *Adat* leaders stated that it could take up to three weeks for more serious cases to be resolved.[42]

While there has been no standardized *adat* approach to handling village-level disputes, several processes for gathering evidence have been commonly identified. These include: seeking testimony from several witnesses that can be cross-checked, requiring witness oaths before giving testimony, imposing sanctions for false testimony, re-questioning witnesses whose truthfulness is in doubt to establish consistency, and inspecting physical evidence.[43]

Typical cases considered to be within the competence of *adat* include land disputes, family disputes, inheritance, appointment of guardians, livestock and irrigation concerns, youth misdemeanours and theft. A recent survey of *adat* leaders shows that in such cases the vast majority of *adat* providers felt that they could resolve these categories of cases effectively.[44] While *adat* should not be used for more serious criminal cases, in reality it is often used in cases such as

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[36] Harper, above n 30, 14.
[37] Article 10 of *Perda* 7 / 2000 on the Establishment of *Adat* Life.
[38] Article 28D(1) of the Indonesian Constitution provides for "just legal recognition, guarantees, protection and certainty, and to equal treatment before the law". Article 17 of the Human Rights Law 39/1999 states that every person has the right to "without discrimination, obtain justice by lodging an application, complaint, or claim in a criminal, civil or administrative case, and to have the case heard in a free and impartial judicial process. The process must comply with procedural law and involve an objective examination of the case by an honest and just judge in order to obtain a just and correct decision."
[39] At the village level, these village leaders include the *keuchik* (village chief), *imeum meunasah* (village religious leader), local *ulama* (religious scholar) and *tuha peut* (village elders).
[40] Harper, above n 30, 87.
[41] UNDP et al*,* above n 32; Wojkowska et al*,* above n 26.
[42] F Fuady, *Baseline Survey Report on Clarity of Adat Jurisdiction and Procedures* (internal report) (2008).
[43] UNDP et al*,* above n 32.
[44] Fuady, above n 42.

domestic violence, rape, drug-related crimes, and even on some occasions, murder.[45] Most *adat* leaders surveyed felt that they could not successfully deal with murder, rape and drug-related crimes, although many believed that they could effectively resolve domestic violence cases.[46]

Sanctions and costs related to *adat* dispute resolution vary and depend on the type of dispute. They also hinge on the results of negotiations between the parties involved and the *adat* leader. In one part of Aceh, the resolution of bodily harm cases involves: the guilty party or his/her family assuming the cost of medical treatment, a ritual feast at which a goat is slaughtered and shared by the community, and *peusijuk* (a ritual forgiveness ceremony).[47]

Legislation provides for the following types of sanctions: Warning, public apology followed by a *peusijuk* ceremony, fine, paying compensation, isolation by members of the village community, eviction from the village and revocation of *adat* titles.[48] Research conducted by UNDP concluded that, in practice, however, sanctions imposed through *adat* go beyond those stipulated in legislation. Some such sanctions are clearly in contravention of basic human rights principles - these include physical punishment, detention without due process, seizure of property, removal of property rights, and forced marriage in cases of pre-marital sex, for example.[49]

3.4 Why do people choose *adat*? And how real is this choice?

Many of the push and pull factors associated with customary justice systems in general resonate for *adat* in Aceh. Research conducted in 2003 and 2006 concluded that community members felt more comfortable and confident bringing their grievances to *adat* mechanisms because they are generally more familiar with its procedures and sanctions, and with the *adat* leaders themselves than they are with the analogous elements of the formal justice system. Reasons cited for not using the formal justice system included intimidating procedures and lack of responsiveness to people's needs, fear of ending up "in trouble", illiteracy, inability to speak Indonesian, and likely as a remnant of the 30-year conflict, an entrenched fear of state institutions.[50]

There are other reasons why people in Aceh do not use the formal justice system. These include low levels of awareness of alternatives to *adat* across Aceh and a belief that directly referring disputes to formal justice mechanisms is not permitted. The general perception is that *adat* justice providers, in particular, the *keucik*, constitute the only mechanism for dispute resolution, or at least a compulsory first port of call,[51] and that decisions based on *adat* cannot be appealed.[52] This misunderstanding is exacerbated by the fact that *adat* leaders, many of whom have only a minimal understanding of the law,[53] are the main source of information for the community regarding justice options. In cases where community members are aware of the option to access formal channels and would want to pursue this method, they are often further constrained from doing so because of opportunity costs, expensive legal representation costs and inadequate legal aid services.[54]

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[45] Lakhani, above n 31; Brouwer and Husin, above n 31; Harper, above n 30.
[46] Fuady, above n 42.
[47] Wojkowska et al, above n 26, 18; 33.
[48] *Perda* 7 / 2000; IDLO, *The Role of a Mediator in Dispute Resolution under Adat in Aceh,* n.d.
[49] UNDP et al, above n 32.
[50] Ibid.
[51] Ibid.
[52] Harper, above n 30, 17.
[53] Fuady, above n 42.
[54] UNDP et al, above n 32.

The research found that in several locations, *adat* leaders actively discourage citizens from approaching the formal justice system to resolve their grievances. These leaders explained that, traditionally, it is believed that they should be able to address the problems of their village. Consequently, if a villager takes his/her grievance to another forum, this reflects negatively on their capacity to resolve disputes, compromising their authority and credibility.[55]

3.5 Challenges to obtaining justice through *adat*

As with the above push/pull discussion, the *adat* experience echoes the more general challenges that customary justice in general presents to legal empowerment. First, the quality of the dispute resolution process and outcome strongly depends on the skills and knowledge of the individual(s) supervising the session. Despite the important role that *adat* leaders play in resolving most disputes across the province, there is no formal training or qualifications required to take on this role. An *adat* leader achieves his position either because trust is placed in him by the community or because he is appointed by government – not because he is necessarily skilled at dispute resolution. This is not to say that *adat* leaders are not skilled – in fact, many are highly competent. But there is no systematic means of ensuring that they are sufficiently equipped and informed to carry out this very important role.[56]

Second, research has revealed that *adat* leaders generally lack understanding of their role and the types of cases they can deal with. Most *adat* leaders in Aceh believe – for the most part correctly – that they can process civil and family law cases, land disputes and sometimes minor criminal cases.[57] In some areas of the province, however, they believe –– erroneously – that they can and should handle major criminal cases, including murder, incest and domestic violence. Local legislation now regulates the types of cases that they can deal with,[58] but there remains a significant gap between law on paper and its implementation on the ground.

Third, as is the case with many customary justice systems, *adat* is heavily dominated by men. One survey revealed that almost 90 percent of *adat* leaders stated that no women were involved in the decision-making or dispute resolution process; 57 percent said that it is "ethically not accepted" for women to be involved in such a process.[59] It is not particularly surprising, therefore, that research conducted by the International Development Law Organization (IDLO) revealed that inheritance decisions resolved at the village level often unjustly prioritized the rights of male heirs over female heirs, and the rights of a husband's family over his wife's family.[60]

This third challenge is a key one for equitable dispute resolution. *Adat* can result in discrimination against vulnerable members of the community. Since it emphasizes restorative justice aimed at maintaining social harmony, as opposed to prioritizing individuals' interests and rights, the final decision can often be unsatisfactory in terms of human rights, gender equity and other important human development goals. In particular, many domestic violence victims who fell under the purview of *adat* have felt that the outcomes were unjust, but simultaneously felt obliged to accept the decision to preserve social harmony.[61]

[55] Ibid.
[56] Lakhani, above n 31.
[57] UNDP et al, above n 32.
[58] Harper, above n 30, 17.
[59] Fuady, above n 42.
[60] Harper, above n 30.
[61] UNDP et al, above n 32.

UNDP research has found many victims of gender based violence reporting that the violence continued after the *adat* process had supposedly addressed the abuse.[62]

Fourth, the same research also found that Javanese trans-migrants in predominantly Acehnese areas perceived that they would be treated discriminatorily if they approached *adat* justice mechanisms. In villages populated by more than one ethnic group, the dominant one would often hold the view that minority communities must subscribe to their *adat* principles. [63]

Fifth, *adat* is highly susceptible to elite capture and third party interests. [64] Decisions and agreements are often not made on merit alone; they flow from outside pressure due to one party's powerful connections or threat of sanctions. As there are no formal oversight and monitoring mechanisms in place for *adat* institutions, the basic rights of disputants are not guaranteed in terms of justice processes and outcome. UNDP research in Aceh has found that those community members most unsatisfied with informal justice outcomes tend to belong to the weakest and most disadvantaged groups. It was typically the case that they lacked sufficient knowledge or resources to go beyond the village level to seek just remedies. [65]

4. A way forward: working with customary justice systems to legally empower the poor

The benefits and shortcomings of customary justice systems, such as those discussed above, are now generally acknowledged in law and development circles. Some development agencies are starting to show modest interest in legal empowerment initiatives and are beginning to look at using a rights-based approach to justice reform that focuses on experiences of the users. As a result, these development agencies also recognize the importance of customary systems.[66] They realize that ignoring these systems is likely to mean that discriminatory practices go unchallenged. Together with this recognition and modest shift in focus, there is an increased demand by practitioners for means of a constructive and tangible engagement with customary justice systems, as well as for evidence that such engagement positively impacts legal empowerment of the poor. This section accordingly provides some recommendations for how to move forward in this complicated field, as well as examples of ongoing initiatives.

4.1 Know your operating context

Understanding the operations of customary justice systems is a prerequisite to having any major impact in improving their operation. Therefore conducting context-specific research, learning about the norms, procedures and actors involved in customary mechanisms is necessary. Engaging in dialogue with the operators and identifying the strengths and weaknesses of these systems as well as their potential for transformation and adaptation to strengthen aspects of customary justice practice (such as human rights protection) should be a key component of any reform initiative.

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[62] Ibid.
[63] Ibid.
[64] Ibid; Lakhani, above n 31.
[65] UNDP et al, above n 32.
[66] Peacebuilding Initiative, *Traditional and Informal Justice Systems: Actors and Activities,* <http://www.peacebuildinginitiative.org/index.cfm?pageId=1877> at 19 August 2009.

Similarly, engagement in access to justice and legal empowerment work must be grounded in the experiences and priorities of the poor; programmes must be designed from this perspective. A bottom-up, participatory approach is therefore irreplaceable. Knowing the full spectrum of ways in which customary justice systems affect the lives of the poor and then finding the strengths to focus on and support makes programming sense. Direct communication with the poor is imperative in order to direct benefits towards them. Communication through village chiefs, the government or legal service providers alone leaves too great a gap for misrepresentation – intentional or otherwise. By failing to speak with marginalized groups, or allowing powerful elites to "represent" them, the status quo of disempowering the poor is maintained. This direct communication needs to be conducted by those known and trusted by the community – here is where the role of local civil society organizations (CSOs) and community-based organizations (CBOs) is imperative. This can also be a valuable entry point to begin discussions on rights and justice and their significance to people as individuals and members of the community.

When managing scarce human and financial resources, programmes benefit from the analytical capacity provided by empirical evidence. It is worth noting that the process of collecting empirical data is useful for mobilizing financial resources since, unsurprisingly, donors are more likely to support an initiative with a solid evidence base.

4.2 Align and develop the interface between the customary and formal justice systems

The central conundrum of engaging with customary justice systems is how to support and enhance their many important positive aspects without abandoning or violating the human rights of the most vulnerable members of society, especially women, vulnerable groups and children. The Peacebuilding Initiative[67] notes that adapting and reconciling the customary and formal justice systems so that they become mutually reinforcing "represents the new frontier" of engaging with these systems.[68]

Blanket approaches risk abolishing culture and tradition, or codifying and institutionalizing potentially bad practices. Most often, the abolition of customary law by the state does not necessarily mean those laws and customs will no longer be used and adhered to by the population.[69] Therefore, engaging with customary justice systems is necessary and requires a nuanced and reasoned approach grounded in the experiences of the poor. Any moves to align, harmonize or clarify jurisdictional issues will need to be informed by participatory dialogue and public debates in which positive and negative features of both systems are discussed in detail – including how an effective, complementary relationship between the two systems might be forged.

Developing the mutually reinforcing "new frontier" to increase access to justice and legal empowerment of the poor may in fact require a stricter enforcement of limitations on what exactly a customary court or decision-making body may effectively and fairly address. Seeing as this problem is largely one of

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[67] The Peacebuilding Initiative is a peace-building portal and represents a project of the International Association for Humanitarian Policy and Conflict Research (HPCR International), the United Nations Peacebuilding Support Office and the Program on Humanitarian Policy and Conflict Research at Harvard University.

[68] Peacebuilding Initiative, *Traditional and Informal Justice Systems: Key Debates and Implementation Challenges,* <http://www.peacebuildinginitiative.org/index.cfm?pageId=1878> at 29 July 2009.

[69] F von Benda Beckmann, 'The Multiple Edges of the Law: Dealing with Legal Pluralism in Development Practice' in C Sage and M Woolcock (eds) *The World Bank Legal Review Vol 2: Law, Equity, and Development* (2006) 63.

enforcement, rather than of introducing new formal restrictions, any such move would need to be complemented with extensive awareness-raising, capacity development efforts and community-based discussions to ensure that the law is being implemented correctly.

Clarifying the role and jurisdiction of customary legal systems, however, must not lead to codification of customary law. Such a step could prove to be a problematic and potentially harmful endeavor that freezes customary practices and deprives the mechanisms of fluidity and potential to change over time. Such fluidity and evolution is in fact a strong advantage of customary mechanisms.[70]

4.3 Work towards making customary mechanisms more inclusive

The marginalization of women within customary mechanisms needs to be addressed through greater representation of women in structures and processes.[71] The mediation mechanisms of *Nari Adalat* in Gujarat State, India, for example, were established by women and for women in response to the *Panchayat* systems established along more patriarchal lines. The *Nari Adalat* operate as "informal, conciliatory, non-adversarial courts with lay participation".[72] They have a narrow mandate, focusing only on mediation within marriage, and do not address other sources of discrimination, which may contribute to their initial successes and legitimacy.

Programmes should seek to engage the support of formal and informal women's organizations, child protection groups, and other collectives that represent vulnerable groups. Collective voices can be a powerful incentive for accountability, non-discrimination, and leveraging greater bargaining power. The ability and capacity to organize as a collective is fundamental to people's capacity to choose and voice their values. Such groups then have a critical role to play in real empowerment, "provid[ing] an arena for formulating shared values and preferences and instruments for pursuing them, even in the face of powerful opposition".[73]

4.4 Increase and improve legal awareness activities

The lack of awareness of alternatives to customary justice mechanisms and knowledge of rights in general is a serious impediment to legal empowerment. The degree of an individual's legal awareness can affect his or her perception of the law and its relevance to him or her, as well as influencing decisions on whether and how to deal with a grievance.

Activities aimed at building legal awareness therefore need to be continued and scaled up. In particular, efforts should be made to increase the availability of information on legal services and dispute resolution methods beyond the customary justice system, while access to alternatives must be a viable option - a legal awareness campaign that does not take into account the constraints of the formal justice system is likely to have limited effect.

When implementing awareness-raising initiatives, it is important to consider also how to raise awareness among both groups in the power struggle. Shalini Travedi of the Self- Employed Women's Association, a women's union of informal workers in India, has noted that "raising awareness of government officials in relation to

[70] Peacebuilding Initiative, above n 66.
[71] Lakhani, above n 31.
[72] Iyengar, above n 23, 103.
[73] P Evans 'Collective Capabilities, Culture and Amartya Sen's *Development as Freedom*' (2002) 37 (2) *Studies in Comparative International Development,* 54

legal empowerment is even more important than raising awareness among poor people".[74] Results from the Participatory Governance Assessment in Nepal by the Overseas Development Institute showed that poor people emphasized that it would be important to direct awareness-raising efforts not only towards those who face discrimination, but "especially to those who benefit from systems of dominance and injustice – men, the wealthy, 'upper caste' groups".[75]

4.5 Increase access to and strengthen the alternatives to customary mechanisms

Real choice only exists when both options are accessible, efficient, effective and viable. Efforts to improve justice outcomes through customary mechanisms also need to be pursued together with efforts to improve service delivery in the formal system. As Leah Kimanthy points out, "[h]igh usage of non-formal justice systems in rural areas does not automatically lead to the conclusion that those systems are the best; it could simply mean that they are the only ones available."[76] Reforms to the formal justice sector, to make it more responsive and accessible to the needs of the poor and disadvantaged must continue, to make this a real alternative for accessing justice.

Those using customary justice systems are generally bound by the decision through social pressure. It is imperative that disputants who consider that the outcome through the customary mechanism is unjust be aware, sufficiently confident and capable of taking their grievance to the formal system; paralegals (discussed below) can be a useful resource in this regard.

4.6 Prioritize paralegals

Training paralegals to straddle both formal and informal systems is an effective means of enabling greater user choice. Paralegal programmes are now increasingly common and recognized as an effective way of improving access to justice. One example can be found in the work of Sierra Leone's Timap for Justice, an NGO that initiated an experimental community-based paralegal programme and provided formal legal training to laypersons already familiar with the social context and customary legal norms. These paralegals could then speak with their clients on familiar terms about choosing the system that better suited their own needs. Where required, the paralegals could also assist them in navigating between systems.[77]

These paralegals in Sierra Leone have been able to challenge entrenched power imbalances by providing persistent advocacy through individual mediations with powerful figures such as police officers and chiefs. Combined with community education programmes and other activities, this has led to impressive results.[78] Vivek Maru, co-founder of Timap for Justice, has noted that often the threat of legal action by well-informed paralegals resulted in positive outcomes for marginalized groups. In one example he cites, the paralegals tracked down people who had been contracted to build wells in an internally displaced persons' camp but had not done so. When threatened with legal action, the contractors returned to the camp and built the wells. Maru notes that this credible threat of

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[74] Quoted in J Cunningham, E Wojkowska and R Sudarshan, *Making Everyone Work for the Law* (2009) 17.
[75] N Jones, *Governance and Citizenship from Below: Views of Poor and Excluded Groups and their Vision for a New Nepal*, Overseas Development Institute Working Paper 301 (2009) ix.
[76] L Kimanthy, 'Non-State Institutions as a Basis of State Reconstruction: The Case of Justice Systems in Africa' (paper presented at Codesria's 11th General Assembly, Maputo, 6 – 10 December 2005, 17).
[77] V Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' (2006) 31 *The Yale Journal of International Law* 427, 459, 464.
[78] Wojkowska, above n 20, 35.

formal action is often 'the teeth' behind paralegals on the ground.[79]

4.7 Make basic legal aid readily available

People may require professional help to access alternatives to customary justice systems. Legal counsel, however, is often beyond the reach of poor and disadvantaged communities; free, state-provided legal counsel is often simply not available and where it is offered, it is usually only for criminal cases. Efforts to improve access to legal aid need to be made. They can include supporting non-governmental organizations (NGOs) that provide free legal aid and university-based clinics that provide legal representation and advice. Legal aid programs are often linked to paralegal initiatives, such as those discussed above, which provide paralegals with access to legal expertise and back-up on more complex community grievances.

4.8 Develop minimum standards and guidelines and develop the capacity of customary actors

As discussed throughout the paper, the quality of the justice through customary mechanisms is heavily dependent on the skills and knowledge of the individual operator. In order to effectively resolve disputes, customary leaders must possess a range of skills and knowledge, yet the level of skills among leaders tends to be very inconsistent. Concerted efforts need to be made to develop the capacity of customary leaders. IDLO in post-tsunami Aceh, for example, focused on improving the quality of decision-making through these institutions. The organization developed a training program to improve *adat* leaders' mediation skills and knowledge of land, inheritance and guardianship law. An evaluation conducted after the project concluded that the legal knowledge of participants had indeed improved and there was evidence that the skills acquired were being put into practice. [80]

In the absence of minimum standards and the operators' knowledge of the content of these standards, there is wide scope for discriminatory practices to occur. An initiative currently underway in Aceh seeks to address this very challenge. The *Majelis Adat Aceh* (Aceh *Adat* Council), with support from UNDP, has developed guidelines for *adat* actors across the province, through a consultative process, to inform them of minimum standards, human rights safeguards and the content of recently passed legislation regarding *adat*. The guidelines focus on the *process* of *adat* rather than the *substance*. They also focus on the protection of the rights of disputants, including a special section on women and children. The objectives of this activity are to create greater clarity among *adat* actors on the types of cases that *adat* is allowed to handle, to fortify the relationship between *adat* and the formal justice system, and to improve the quality of the dispute resolution process and outcomes through *adat.* Training is being provided to *adat* actors on the content of the guidelines.

Since the guidelines have only recently been printed and disseminated, it is too soon to discuss the impact of this initiative, although early anecdotal evidence indicates an increased understanding of the types of cases that can be handled by *adat* and improved documentation of cases.[81] A baseline survey was conducted prior to the implementation of the initiative. Comparing its results with subsequent findings yet to emerge could yield useful data on project impact.

[79] Maru, above n 77, 464.
[80] Harper, above n 30.
[81] Email correspondence with Mohamad Kusadrianto, Programme Officer UNDP Indonesia, 14 July 2009.

4.9 Focus on monitoring and accountability

The monitoring of customary proceedings can challenge unfavorable power dynamics and assist in preventing abuse of power, corruption and elite capture. It can usefully be carried out by local communities or other institutions, for example: national human rights institutions, NGOs working on women's, children's and indigenous peoples' rights, and organizations providing legal aid, awareness-raising or paralegal initiatives. Monitoring may also help to ensure that customary mechanisms respect certain international human rights standards, particularly those concerning minorities and women. In this way, external scrutiny can promote more equitable dispute resolution and strengthen the overall accountability of customary mechanisms

The formal or state system can also act as a source of monitoring and accountability. For example, village headmen in Bhutan have jurisdiction to arbitrate disputes within their villages. Their decisions are then reviewed by a magistrate responsible for a block of villages. Magistrates' decisions can be further appealed to district judges.[82]

4.10 Emphasize better case management

Systematic written records of cases handled can serve a number of functions. Written records can allow the customary leader to review past cases and decisions made and lead to increased consistency. They can also support review by an oversight body and community-level/civil society monitoring mechanisms. A written record, while not a legal document, can nevertheless provide some security of decision.[83]

4.11 Empower the poor to challenge power imbalances

Any attempt to engage with the "bottom four billion" identified by the Commission on Legal Empowerment of the Poor as lacking the protection of the law will need to be aware of the power structures in place.[84] The lack of or limited state involvement in customary justice systems by no means suggests that they are not embedded within entrenched and politicized power structures. Even among the poor there are distinct social hierarchies, and power imbalances often dictate justice outcomes.

No single condition is likely to change deeply entrenched power imbalances (which powerful elites have a decided interest in maintaining). Success is more likely through a combination of empowerment tools, so that organized voice(s) and informed choice can meet with access to legal services and awareness of rights to seek just recourse. Strategic timing also plays a key part in challenging the status quo.[85] Initiatives need to be implemented at a time that does not run the risk of jeopardizing the end-goal of empowerment for all. For example, "law making" or the development of guidelines or codes of conduct should not be attempted where women are denied access to, and participation in, the

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[82] US Department of State, *2008 Human Rights Report: Bhutan* (2009) <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119133.htm> at 24 July, 2009. Further information on the circumstances under which – or indeed, if – the disputing villagers may themselves drive the process to the district court is needed. However, the example points to an interesting potential method for reviewing customary justice decisions and ensuring that they are not in contravention of national or international human rights standards.

[83] Lakhani, above n 31.

[84] A du Toit, *Hunger in the Valley of Fruitfulness: Chronic Poverty in Ceres, South Africa*, draft report (2003).

[85] Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Vol 2* (2008) 333.

consultation process.

Instead of attempting to somehow transplant empowerment, donors and international agencies need to find methods of effectively supporting organized groups without hijacking their agendas. In a village in West Sumatra, Indonesia, a women's group originally organized through small business interests began mediating disputes and lobbying effectively against corruption and for improved services. Their success was attributed to a combination of three elements. First, the group was a pre-existing, traditional women's group and did not appear to be as threatening as a new structure. Second, a degree of economic empowerment through their small business interests provided them with influence over village affairs. Third, the women were linked to an established NGO, which helped them to organize as a group and enhanced their legal awareness, thereby "equip[ping] them to move beyond problem solving to securing representation in the village seats of power".[86] This example demonstrates a combination of empowerment tools to effect change in local village affairs and gradually erode dominant power structures.

Collective organization is difficult to transplant. It is most effective where it is organic, but this does not mean that "fertile seeds" cannot or should not be planted. Micro-credit programmes, vocational skills training, schools and health clinics are all means of bringing people together around a common purpose. This purpose can lead to a sense of communal identity, which is valuable in lobbying against power imbalances at the local level. Thus, instead of individual A against individual B, the issue becomes mothers, small business owners or female-headed households against injustice.

4.12 Evaluate initiatives on their effectiveness – are they having the intended impact?

This paper supports the assertion that there is a need to move beyond anecdotal best practices of legal empowerment initiatives.[87] This includes those activities which engage with customary justice mechanisms. Research, comparative analysis of before and after interventions, and effective impact evaluations are necessary to determine the effectiveness of initiatives.

One initiative is the recurring perception assessments conducted by the Asia Foundation in Timor Leste in 2004 and again in 2008. These legal awareness perception surveys provide a means of monitoring where and how reforms have been successful and where initiatives are having little impact. The surveys provide insight on progress, or lack thereof, in a range of areas including: 'confidence in formal and local justice systems', 'attitudes on gender', 'legal knowledge and awareness', 'language', 'accessibility of the formal system', and 'impunity and rule of law'.[88] Combined with stakeholder discussions to analyse the data, the Asia Foundation will develop conclusive policy-relevant recommendations for the Timorese Government and other actors to strengthen the rule of law.[89]

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[86] S Clarke and M Stephens, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* (2008) 48.
[87] Cunningham et al, above n 74.
[88] S Everett, *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes regarding Law and Justice 2008* (2009).
[89] Ibid, 6.

Conclusion

Amartya Sen's argument that development is freedom and capacity to choose[90] changed international thinking about the value of capability-building institutions in reducing poverty. Justice reform through legal empowerment acknowledges and seeks to enhance this value.

The legally empowered individual should be the new face of justice reform. With the confidence and capacity to access the law and legal services, they make informed choices about the action they take. They join publicly with others who understand and represent their values. Most of all, the effective, efficient and just functioning of both formal and customary systems enable them and their neighbors to develop their full potential under the protection and opportunity of the law.

Sen also eloquently reminded us, "[t]o insist on the mechanical comfort of having just one homogenous 'good thing' would be to deny our humanity as reasoning creatures".[91] Customary justice systems – as complex and constrained as they may be – host many opportunities to advance the legal empowerment of individuals and communities. Engagement with these systems will benefit from a broad and deep understanding of what works and what does not. On this basis, the critical role of the international community is to strengthen what works and empower the community to change what doesn't.

As Sally Engle-Merry wrote more than 20 years ago, this is "no small project".[92] But it is time to start it in earnest.

[90] A Sen, *Development as Freedom* (1999).
[91] Ibid, 77.
[92] S Engle-Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869, 892.